BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, Respondent.	Docket No. UE-151871 Docket No. UG-151872 (Consolidated)

REPLY BRIEF OF PUGET SOUND ENERGY

SEPTEMBER 19, 2016

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I. INTRODUCTION

1 PSE has already established, and the Commission and the Washington Supreme Court have already determined, that leasing is an appropriate function by a regulated utility. To avoid this precedent, Staff and the other parties' initial briefs contain legal arguments that:

- have already been rejected by the Commission;
- provide inaccurate and irrelevant accounts of legislative history;
- propose new legal standards for evaluating "connection" to gas and electric service;
- advocate a "behind the meter" theory, repeatedly rejected by the Commission (including only weeks ago); and
- ask the Commission to change the law to accommodate their viewpoints.

2 Ironically, while Staff and the other parties suggest that PSE's service is beyond the bounds of utility service, it is they who attempt to impermissibly alter the bounds of utility service and limit the sphere of the Commission's regulation. The statutory framework confirmed by the Commission and the Washington Supreme Court provides straightforward authority for PSE's proposal, and PSE has not proposed any changes or alternations to the law to accommodate its proposal. Conversely, to accommodate Staff and the other parties' position, they necessarily ask the Commission to modify the law, overturn precedent, adopt new legal standards, and cede a component of its jurisdiction that has been upheld by the Washington Supreme Court and which the Commission is authorized by statute to regulate.

3 The parties also ignore the facts presented through multiple witnesses and surveys demonstrating that PSE's customers are interested in leasing water heaters, furnaces, and heat pumps. It is troubling that Public Counsel, who is tasked with advocating for customers, and Staff, who is charged with objectively balancing the interests of customers and regulated

utilities, both completely disregard the evidence from customers that a leasing service is desirable, that for some customers there are significant barriers preventing them from acquiring new equipment, and that leasing would allow some customers to accelerate the replacement of older inefficient water heaters and furnaces. Staff's questionable positions in this case do not represent the interests of either customers or PSE. By opposing PSE's proposal, Staff denies customers a beneficial service they desire, constrains PSE from developing a platform for new technologies that would benefit the system at large, and prevents PSE from diversifying its revenue base—steps Staff concedes PSE must do to survive. Staff recognizes the need for change in the industry but is hamstrung by what it views as immutable ratemaking principles. However, as PSE has shown, PSE's leasing service is consistent with statutes, or Commission rules, and past Commission practice.

4 It is undisputed that gas and electric service is currently in a state of transition, defined by evolving energy sources, new technologies, and the acute need to increase energy efficiency and decrease carbon emissions. To transform the market to fully utilize new technologies and resources such as Demand Response, electric car charging, and increased energy efficiency, changes will likely need to be made throughout the entire energy grid, including the equipment used in customers' homes, and how such equipment are integrated into the evolving energy system. Without comprehensive change, little progress will be made. PSE's provides a platform to address these issues. Additionally, consistent with Washington State energy policy, it provides another avenue to promote energy efficiency and decrease greenhouse gas emissions, outside of the traditional customer funded conservation platform.

5 The proper framework by which PSE's proposed service should be evaluated, and what the law requires, is for the Commission to evaluate whether PSE's leasing service is in the

public interest and the rates proposed are fair, just, reasonable, and sufficient. Following this standard, in support of its proposal, PSE has demonstrated that:

a. There are thousands of customers in PSE's service area that continue to use outdated water heater and heating, ventilation, and air conditioning equipment ("HVAC"), despite the presence of PSE's robust conservation rebates and programs, leading to system inefficiencies, and higher energy bills;
b. There are several significant reasons why customers do not acquire better equipment, including credit constraints, information barriers, externalities, myopic behavior, and distrust and dissatisfaction with current market providers;
c. Leasing would provide customers with an effective, alternative option to acquire new, more efficient water heater and HVAC equipment;
d. Leasing could be used as a framework by which PSE could continue to offer customers new technologies that would be necessary to increase system efficiency;
e. Customers demand leasing as a market option, as evidenced by significant participation in PSE's current service, and years of market research;
f. Because the utility industry is evolving, utilities will need to diversify their revenue sources and leasing is a statutory-approved mechanism to develop utility business; and
g. The rates PSE has proposed are based on a detailed pricing model which includes actual prices provided by licensed Washington contractors.

6 The evidence demonstrates that PSE's service is in the public interest and the rates are fair, just, reasonable, and sufficient. The Commission should approve PSE's tariff schedules.

II. PSE'S LEASING PROPOSAL IS A PROPER REGULATED UTILITY SERVICE

A. PSE's Leasing Service Is A Regulated Utility Service As A Matter of Law

7 Staff and the other parties' legal arguments as to why PSE's proposed service is not a utility service fail as a matter of law. Washington law, Commission decisions, Washington Supreme Court precedent, and PSE's filed natural gas tariff, provide the framework for PSE's leasing service. To avoid this precedent, the parties' arguments impermissibly require the Commission to modify the law, overturn precedent, disregard legislative history, manufacture new legal standards, and cede a component of its jurisdiction that has been upheld by the Washington Supreme Court and which the Commission is authorized by statute to regulate.

1. PSE's leased equipment under RCW 80.04.010 qualifies as "plant.

8 The parties incorrectly argue that PSE's proposed leasing service does not qualify as a "utility service" because the leased equipment allegedly is not gas or electric plant under RCW 80.04.010(11) and RCW 80.04.010(15).[1] RCW 80.04.010(11) defines electric plant as:

> [A]ll real estate, fixtures and personal 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 for light, heat, or power for hire; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.[2]

Without citing any authority, the parties narrowly interpret these statutes to argue that only equipment that transmits, distributes, sells, or furnishes energy to consumers qualify as utility plant, and that equipment that converts energy to light and heat does not qualify under this definition.[3] This interpretation is both inconsistent with the law and actual utility practice.

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[1] Initial Brief On Behalf of Commission Staff ("Staff Initial Brief"), ¶ 30; Brief of Public Counsel ("Public Counsel Initial Brief"), ¶¶ 5-7; Initial Post-Hearing Brief of SMACNA-WW ("SMACNA Initial Brief"), ¶¶ 10-12.
[2] RCW 80.04.010(15) contains a nearly identical provision for gas.
[3] *See* Public Counsel Initial Brief, ¶¶ 5-7.

9 First, a plain reading of the statute provides that utility plant includes "fixtures and personal property . . . used . . . to facilitate the . . . furnishing of electricity for light, heat, or power."[4] Statutes should be interpreted so that "no clause, sentence or word shall be superfluous, void, or insignificant."[5] Equipment like a furnace or a water heater indisputably are "personal property," used in "furnishing" energy for heat. Without a furnace or a water heater that converts the electricity or gas into heat, heat is impossible. Indeed, this is one reason why PSE and other public utilities in Washington offer a variety of in-home, end-use equipment inspection and repair services, which include "minor repairs to heating and water heating equipment."[6] Given that PSE has a public duty to facilitate the furnishing of electricity for heat and light, that necessarily includes personal property that converts electricity to heat or light.

10 Second, the Commission and the Washington Supreme Court confirmed in *Cole* that water heaters and HVAC equipment—precisely the equipment at issue in this case—qualify as utility plant, that the Commission had jurisdiction over such types of equipment, and that PSE's predecessor could appropriately rent the equipment to customers as a regulated service.[7]

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[4] RCW 80.04.010(11).
[5] *Cole v. WUTC*, 79 Wn.2d 302, 307-10, 485 P.2d 71 (1971).
[6] Initial Brief of Puget Sound Energy ("PSE Initial Brief"), ¶ 10. In Rule No. 2 Definitions (Sheet No. 12-A), PSE is specifically allowed to conduct safety and inspection services for customers that occur on the customer side of the meter. *See* Rule No. 24, http://pse.com/aboutpse/Rates/Documents/gas_rule_24.pdf. Notably, other utilities such as Avista and Northwest Natural Gas conduct similar natural gas appliance inspections on the customer side of the meter. *See* https://www.nwnatural.com/uploadedFiles/AboutNWNatural/RatesAndRegulations/WashingtonTariffBook/GeneralRulesAndRegulations/6Sheet9.1(1).pdf and https://avistautilities.intelliresponse.com/index.jsp?interfaceID=1&requestType=NormalRequest&id=1245&source=9&question=appliance.
[7] *Cole v. Wash. Natural Gas Co.*, No. U-9621, at 14-15, 20, 45 (1968) ("Commission Proposed Order"); *Cole v. WUTC*, 79 Wn.2d 302, 307-10, 485 P.2d 71 (1971).

Accordingly, since 1961, PSE and its predecessors have properly included such equipment under its existing service as utility plant.[8]

2. The argument that load building is the only permissible justification for leasing is unsupported in the law.

11 Staff speaks out of both sides of its mouth when it concedes that leasing is a legitimate utility function,[9] that "[t]he scope of regulated utility service is broad and ambiguous,"[10] and then proceeds to articulate the narrowest interpretation possible of a utility's ability to lease and the Commission's authority to regulate leasing.[11] Staff's view is not grounded in the law or past Commission practice and should be rejected.

12 First, while it is true that the public service laws empowering the Commission to regulate utility "rentals" never expressly reference water heating or HVAC equipment (or any equipment for that matter), in *Cole*, the Commission and the Washington Supreme Court confirmed that water heating and HVAC equipment constituted appropriate rental equipment that falls under the Commission's jurisdiction.[12] Indeed, given that PSE and two predecessor companies have leased water heaters and other HVAC equipment for over fifty years,[13] the Commission has already determined that water heating and HVAC equipment are appropriately "rentals" under the public service laws. Perhaps the most telling evidence of this is the fact that PSE's own natural gas tariff on file with the Commission expressly allows PSE to offer equipment rentals. In Rule No. 2 Definitions (Sheet No. 12-A), Gas Service is defined broadly to include "Rental of natural gas equipment."[14] A tariff approved and on-file

[8] PSE Initial Brief, ¶ 9
[9] Staff Initial Brief, ¶ 15
[10] *Id.* ¶ 17.
[11] *Id.* ¶ 18.
[12] Commission Proposed Order at 14-15, 20, 45; *Cole*, 79 Wn.2d at 307-10, 485 P.2d 71.
[13] PSE Initial Brief, ¶ 9.
[14] *See* http://pse.com/aboutpse/Rates/Documents/gas_rule_02.pdf.

with the Commission has the force and effect of law.[15] Rule No. 2 makes rental of natural gas equipment intrinsically part of Gas Service as a matter of law.

13 Second, Staff and the other parties mischaracterize the Commission's order in *Cole* by suggesting that the Commission held that equipment leasing was somehow a narrow exception to the Commission's jurisdictional authority.[16] To be clear, in *Cole*, the Commission never ruled that leasing or renting equipment is only permitted if the leasing or renting *increases* the sale of gas or electricity; there is no statutory provision containing such a restriction, nor did the Commission ever state that the circumstances by which leasing are allowed are "narrow" or limited as Staff incorrectly suggests.[17] In *Cole*, the Commission approved of the equipment rental program because, after reviewing RCW 80.04.130, RCW 80.04.150, RCW 80.28.020 and RCW 80.28.100, it determined renting equipment was within the statutory purview of a regulated utility. The Commission explained:

> It is clear that the Commission has, ***by statute***, been given jurisdiction and power to regulate rates, charges, rentals for the sale of gas, or any service connected therewith. Certainly, the furnishing of rented conversion burners or other appliances using gas is a service directly connected with the sale of gas. . . .[18]
>
> ***The Commission has statutory jurisdiction and general powers and the duty to regulate utility practices including and specifically rental charges and any service rendered in connection with gas sales***.[19]

The Washington Supreme Court affirmed the Commission's statutory interpretation:

> The respondent commission also supports its conclusion that the leasing of appliances is a jurisdictional activity by references to RCW 80.04.130 and .150 which refer to a "rental" charge or to RCW 80.28.010 and .100 which refer to charge for "any other service rendered" or "in connection therewith." ***Because no clause or individual words of a statute should be deemed superfluous . . . we***

[15] *General Tel. Co. of N.W., Inc. v. City of Bothell*, 105 Wn.2d 579, 585 (1986).
[16] Staff Initial Brief, ¶¶ 18-19; Public Counsel Initial Brief, ¶¶ 13-16; SMACNA Initial Brief, ¶¶ 21-23.
[17] Staff Initial Brief, ¶ 18.
[18] Commission Proposed Order at 15.
[19] *Id.* at 20 (emphasis added).

> ***assume that the legislature contemplated that public service corporations would engage in rental and leasing programs***.[20]

14 SMACNA's suggestion that the Supreme Court was simply deferring to the Commission's allegedly incorrect interpretation of the statute is wrong[21] since "[c]onstruction of a statute is a question of law which [the Supreme Court] review[s] de novo under the error of law standard. The courts retain the ultimate authority to interpret a statute."[22]

15 While load-building was a motivating purpose and justifying effect of that rental program, the program was also implemented to "give prospective gas customers who could not afford to purchase the necessary equipment the opportunity to have gas service within their means without the necessity of purchasing the appliances," a purpose never acknowledged by Staff.[23] The program also had numerous other benefits that directly and indirectly benefited customers, and strengthened the financial stability of the company.[24] But none of these factors were the underlying jurisdictional basis for leasing. Rather, as explained in its Conclusions of Law, the Commission confirmed that utilities have the statutory authority to lease and did not predicate this authority on increasing sales or on load building:

> The Commission is given jurisdiction to regulate rates and charges for supplying gas or for any service in connection therewith, including the service of renting gas appliances and rates and charges therefor. Therefore, the terms of the rental contract would fall within the Commission jurisdiction and responsibilities.[25]

16 Leasing is a statutorily-approved tool that can be used by utilities to achieve initiatives that benefit customers beyond merely load building. PSE's existing service operated for

[20] *Cole*, 79 Wn.2d at 308 (emphasis added); *Groves v. Meyers*, 35 Wn.2d 403, 407, 213 P.2d 483 (1950) (statutes should be interpreted so no clause, sentence or word shall be superfluous, void, or insignificant).
[21] SMACNA Initial Brief, ¶¶ 24-25.
[22] *Waste Mgmt. of Seattle, Inc. v. WUTC*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994) (internal citations omitted).
[23] Commission Proposed Order at 17.
[24] *See id.* at 31.
[25] *Id.* at 45.

decades after load-building was no longer a justifying motivation.[26] PSE currently offers other lease services that are not for load building.[27] The Commission's determination in *Cole* that load-building was an acceptable justification for leasing in that case did not place that same requirement on leasing for all future cases. Today, instead of load building, customer needs center on improving system-wide efficiency and reliability, incorporating new technologies, and diversifying energy sources.[28] Given that energy efficient equipment and the potential for Demand Response is a critical part of these important objectives, using its statutory authority to lease such equipment to customers is entirely justifiable and worthwhile.

3. SMACNA's diversion into legislative history is inaccurate and irrelevant.

17 SMACNA's theory that Washington statutes which provide that the Commission has jurisdiction over equipment "rentals," apply only to leases or rentals of telecommunications equipment is simply wrong.[29] While *early* versions of those laws may have applied to only telecommunications utilities, the law changed, and in the recodified versions of those laws, rentals were no longer exclusive to telecommunications. RCW 80.04.130(1) provides:

> [W]henever ***any public service company*** shall file with the commission any schedule, classification, rule, or regulation, the effect of which is to change any rate, charge, ***rental***, or toll therefore charged . . . .[30]

18 "Public service company" is defined as "***every gas company, electrical company***, telecommunications company, wastewater company, and water company."[31] Notably, RCW 80.04.130(2)(a) specifically references only telecommunications companies, demonstrating that had the Legislature wanted to restrict rentals to telecommunications companies, it could

[26] PSE Initial Brief, ¶ 61.
[27] *Id.*, ¶ 10.
[28] *Id.*, ¶¶ 3, 15-16, 73.
[29] SMACNA Initial Brief, ¶ 6.
[30] RCW 80.04.130(1) (emphasis added).
[31] RCW 80.04.010(23) (emphasis added).

have done so in RCW 80.04.130(1). But it didn't. This is also confirmed by RCW 80.04.150, which discusses rentals as applicable to any "public service company," not just telecommunications companies.

19 The inaccuracy of SMACNA's recitation of the law is underscored by the fact that in *Cole*, the Commission cited these very statutes as the statutory basis by which it approved of PSE's existing rental service, which has been in operation since 1961.[32] SMACNA has misstated the law by arguing that "in that recodification evolution, the jurisdictional line remained clear: telecommunications companies could rent equipment; other public serviced [sic] companies could not."[33] In reality, the exact opposite actually occurred.

20 SMACNA never addresses the plain language of the statutes providing that "rentals" expressly apply to "any public service company" and instead, argues that the only reason why the Commission approved of leasing was because the Commission and the Washington Supreme Court were wrong and do not understand the legislative history like SMACNA does.[34] Accordingly, SMACNA's apparent solution is that the Commission should reverse *Cole* using SMACNA's inaccurate recitation of the law,[35] despite the fact that the Commission does not have the authority to overturn the Washington Supreme Court, which did not blindly affirm *Cole* as SMACNA indicates.[36] Rather, the Court carefully reviewed the statutes and using standard cannons of statutory interpretation,[37] determined that "because no clause or

[32] Commission Proposed Order at 15, 45.
[33] SMACNA Initial Brief, ¶ 18.
[34] *Id.*, ¶¶ 24-25.
[35] *Id.*, ¶¶ 26-27.
[36] *Cole*, 79 Wn.2d at 308, 485 P.2d 71.
[37] *Groves*, 35 Wn.2d at 407, 213 P.2d 483.

individual words of a statute should be deemed superfluous . . . we assume that the legislature contemplated that public service corporations would engage in rental and leasing programs."[38]

21 SMACNA's legislative history theory is further flawed because the Legislature has amended these statutes multiple times since the Washington Supreme Court's decision in *Cole*. "If the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative approval."[39] RCW 80.04.130, which references "rentals" charged by public service companies, has been amended a dozen times since the Washington Supreme Court decided *Cole.*[40] In the course of these amendments, the Legislature has amended certain sections to add language specific to telecommunications companies and electric companies.[41] The fact that the Legislature did not amend the statute to "correct" the Supreme Court's interpretation of RCW 80.04.130 in *Cole* demonstrates the Legislature's approval of the Court's interpretation of the statute.[42] Apparently, the Commission agrees since PSE's natural gas tariff expressly authorizes PSE to rent equipment to customers.[43] The Commission should reject SMACNA's misrepresentation of the law.

4. PSE's proposed service is "connected" to gas and electric sales.

22 Staff and the other parties now concede that leasing is permissible if the service is "rendered in connection with gas [or electricity] sales."[44] However, on brief, Staff proposes a novel test for how "connection" should be defined by suggesting that in order for the

[38] *Cole*, 79 Wn.2d at 308, 485 P.2d 71.
[39] *Cedar River Water & Sewer Dist. v. King County*, 178 Wn.2d 763, 786, 315 P.3d 1065 (2013).
[40] *See* RCWA 80.04.130 (West) (citing amendments in 1984, 1985, 1987, 1989, 1990, 1992, 1993, 1997, 1998, 2001, 2003, and 2008).
[41] *Id.*
[42] Moreover, there is nothing in the language in RCW 80.28.020 and RCW 80.28.100 that prohibits leases or rentals by gas or electric companies. RCW 80.28.020 broadly addresses rates or charges for gas, electricity or in connection therewith. RCW 80.28.100 broadly addresses any special rate, rebate, drawback or other device or method, charged, demanded, collected or received for gas, electricity or "for any service rendered or to be rendered or in connection therewith."
[43] PSE Initial Brief, ¶ 44.
[44] Staff Initial Brief, ¶ 18; SMACNA Initial Brief, ¶ 9.

connection to gas or electric sales to be sufficient, the connection must have a "legitimate public purpose connection."[45] Not surprisingly, Staff cites no authority for this new test and Staff does not explain how it defines "legitimate" or "public purpose." Neither the Commission nor the Washington Supreme Court ever imposed this requirement. Staff's attempt to interpose additional requirements not grounded in the law should be rejected.

23 Under its contrived standard, Staff's suggestion that PSE's service is not sufficiently connected to gas and electric sales is illogical. First, it is ironic that Staff uses PSE's existing rental program as the standard by which the "connectedness" of PSE's current service should be judged,[46] considering Staff argued, unsuccessfully, in *Cole* that the existing program was not a utility service. In addition, for decades, Staff has opposed the existing service because the costs for the service were borne by all ratepayers resulting, in some instances, of cross-subsidization.[47] Yet now, when PSE proposes to eliminate the possibility of cross-subsidization by providing that only participating customers bear the cost for the service, Staff again is not satisfied and argues that only intermingling lease sales with gas or electric sales would sufficiently demonstrate connectedness.[48] Calculating together the revenues and expenses of rentals with gas or electric sales made sense when the purpose of the program was load building. But PSE's service is not for the purpose of promoting load building; it serves other public purposes connected with the sale of gas and electricity. By providing that only those who participate in the service to pay for it, PSE is not "severing the financial connection between the sale of energy and services."[49] Rather, for those customers that participate, the

[45] Staff Initial Brief, ¶ 20.
[46] *Id.* ¶ 21.
[47] Cebulko, Exh. No. BTC-1HCT, at 13:9-14:5.
[48] Staff Initial Brief, ¶ 19.
[49] *Id.*, ¶ 21.

leasing cost is seamlessly incorporated into the customer's purchase of gas or electricity, which Staff concedes connects it to gas and electric sales.[50] And, while PSE's service ensures that non-participating customers are not subsidizing those who choose to participate, there is still a direct connection to gas and electric sales since the diversification of revenue streams assists in mitigating general upward pressure on rates caused by industry transition.[51] PSE would also own the assets and the assets for the service would be included in PSE's rate base, just like any other investment made to support utility service.[52]

24 Second, PSE's leasing service is clearly connected to the sale of gas and electricity. Given that the primary purpose of providing gas and electricity is for heat and light, the leasing services indisputably fall within the scope of PSE's jurisdictional responsibility.[53] Staff's view of gas and electric service is outdated and inconsistent; it ignores that in this age of a changing energy delivery system (with increased energy efficiency, decreased load, distributed generation, and Demand Response capability) PSE needs to improve the interconnectedness of the entire energy grid.[54] Indeed, Mr. Cebulko testified that the utility industry is "undergoing a massive transformation."[55] PSE has worked diligently to evolve within the statutory framework and to provide services that will be beneficial to its customers now and in the future.[56] Providing creative solutions for customers to access better technologies that will improve gas and electric service is undoubtedly within the prerogative

[50] *Id.*, ¶ 41
[51] Cebulko, Exh. No. BTC-1HC, at 39:8-16.
[52] *See, e.g.*, *WUTC v. PSE*, Dkt. Nos. UE-111048 & UG-111049, Order 08, Rejecting Tariff Sheets; Authorizing and Requiring Compliance Filing (May 7, 2012) (including water heater depreciation in rate base); Marcelia, Exh. No. MRM-1T, at 10:17-11:4.
[53] RCW 80.04.010(11); RCW 80.04.010(15).
[54] PSE Initial Brief, ¶¶ 3, 15-16.
[55] Cebulko, Exh. No. BTC-1HC, at 39:21.
[56] PSE Initial Brief, ¶¶ 11-24.

and indeed, in PSE's view, a central mission of a 21st-century utility.[57] If PSE cannot provide services that interconnect a customer's equipment to energy delivery systems, then PSE may never be able to effectively implement services such as Demand Response and other technologies which will undoubtedly require customers to use and acquire new technologies,[58] not to mention technologies such as solar and storage which Staff concedes are appropriate endeavors.[59] Utilizing leasing to help facilitate this is entirely legitimate and makes perfect sense. Indeed, in *Cole*, one of the fundamental purposes of leasing was to help customers that could not purchase new equipment outright still obtain access to beneficial equipment.[60]

25 Third, Staff's skepticism of the significant aging and inefficient equipment in the market is surprising. While Staff and the other parties criticize PSE's methodology for calculating market gap,[61] they cannot credibly deny that there are thousands of households in PSE's service territory that are using outdated equipment and that accelerating replacement of this equipment would be beneficial. Staff's proposed solution is that PSE should ignore the problem and instead, address "one of the many real challenges it faces in effectively delivering its principle [sic] regulated service."[62] But that is precisely what PSE is doing. Helping customers acquire better heating equipment and other beneficial energy-saving technologies is one of the important ways PSE will more efficiently and effectively provide gas and electric

[57] *Id.*, ¶¶ 1-8.
[58] *Id.*, ¶¶ 73, 130.
[59] Cebulko, Exh. No. BTC-1HCT, at 40:9-18; 41:15-17.
[60] Commission Proposed Order at 17.
[61] Staff Initial Brief, ¶¶ 24, 54-57; Public Counsel Initial Brief, ¶¶ 49-52; SMACNA Initial Brief, ¶¶ 40-46; Post-Hearing Brief of Washington State Heating, Ventilation and Air Conditioning Contractors Association, ¶¶ 8-13 ("WSHVACCA Initial Brief").
[62] Staff Initial Brief, ¶ 24.

service, now and in the future.[63] Staff's shortsighted view is thwarting PSE's ability to meet its statutory obligations.

26 Fourth, Staff also mocks the "specter" that PSE is offering leasing, in part, to increase its financial stability and long-term survival.[64] Staff argues that PSE has not provided sufficient evidence of financial need.[65] Staff's position is surprising since it was Mr. Cebulko who testified that PSE "will have to evolve if it is to survive [market] transformation":[66]

> For PSE, load growth is anemic, and energy use-per-customer is declining. Since 2013, the Company has had revenue decoupling, which means it has a pre-determined revenue stream from its core regulated business. Although decoupling provides revenue certainty, losing the throughput incentive deprives the Company of one of its few paths for increasing revenue. The Company is also seeing an increase in distributed generation, supported by state and federal policy, which competes with its own generating resources. In sum, PSE has entered an era of low load growth, declining use-per-customer, pre-determined revenue, and customer generation."[67]

27 PSE is proposing leasing not because its financial health is terminal, but because it recognizes that in order to survive in a changing industry, as Staff itself concedes, PSE will need to diversify revenue sources, prepare for new energy distribution models, and adapt to new technologies.[68] PSE's leasing service is designed to achieve all of these objectives.[69]

28 Fifth, Staff's suggestion that PSE's service is not sufficiently connected to the sale of gas or electric service because it believes the service will offer only private benefits[70] selectively ignores evidence in the record. If customers choose to lease equipment that is more efficient than their prior equipment, it will provide benefits to all customers, participating and non-

[63] PSE Initial Brief, ¶¶ 7-8, 15-16.
[64] Staff Initial Brief, ¶ 22.
[65] *Id.*
[66] Cebulko, Exh. No. BTC-1HCT, at 40:4-8.
[67] *Id.* at 39:14-16.
[68] TR. 112:17-113:1, 8-11.
[69] PSE Initial Brief, ¶¶ 19-24.
[70] Staff Initial Brief, ¶ 23.

participating.[71] Participating customers will enjoy the benefits of leasing, and non-participating customers (who bear no cost for the service), will enjoy system benefits.[72] Staff's argument is also flawed because PSE has numerous programs and services that offer "private benefits" for customers who choose to participate, including PSE's existing rental program, lighting leasing service, net metering, green power program, credit card payment service, and compressed natural gas ("CNG") tariff.

29 Finally, Staff and the other parties' criticism that PSE would offer electric equipment for lease in areas where PSE only has gas customers[73] is entirely inconsistent with the parties' arguments that PSE's service is not publicly available.[74] Indeed, PSE's offering of leasing to all of its customers demonstrates PSE's commitment to ensuring the service is publicly available in the areas PSE serves. Further, given that thousands of households using outdated technologies, offering the electric equipment lease option to a gas customer, if it could assist the customer in upgrading their equipment, is entirely appropriate.

5. PSE's leasing service is not a retail installment contract.

30 Staff's argument that PSE's leasing service constitutes a retail installment contract is unsupported by both the facts and the law. First, Staff's suggestion that PSE's proposed tariff is "in excess of the value of the good sold" simply because PSE uses its weighted average cost of capital in the calculation of rates is incorrect.[75] The value of the goods sold would certainly include a reasonable profit and Staff has not presented any authority to the contrary. Otherwise, no party would ever offer a lease service. Further, Staff ignores the fact that PSE's tariff is not simply an equipment lease. Rather, PSE's tariff includes full-service maintenance,

[71] PSE Initial Brief, ¶¶ 75-90.
[72] *Id.*, ¶¶ 75-85.
[73] Staff Initial Brief, ¶ 17; SMACNA Initial Brief, ¶ 23.
[74] Staff Initial Brief, ¶¶ 32-33; Public Counsel Initial Brief, ¶ 9.
[75] Staff Initial Brief, ¶¶ 29.

24-hour repair, and guaranteed equipment replacement throughout the life of the lease.[76] There is no comparable service currently offered in the marketplace.[77] Staff's conclusory statement that merely having the opportunity to earn a return on capital equipment means that a customer is paying in excess of the value of the goods sold, is baseless.

31 Second, the second clause in the retail installment contract law is also inapplicable because it applies only if the lessee can exercise a purchase option "upon full compliance with the provisions of the . . . lease."[78] But under PSE's tariff, at the end of the lease term, contrary to Staff's suggestion, there is no purchase option. The customer may only enter into a new lease or must return the lease equipment.[79] Further, PSE offers a purchase option because the Commission required WNG to include this option for the water heater rental service that continues today.[80] The Commission could certainly order PSE to stop offering a purchase option, or order PSE not include one with this program, and PSE would comply.

32 Third, there are numerous indices demonstrating that PSE's proposed service is a lease, not a sale. Titled "Equipment Lease Service," the lease agreement provides equipment and services to the customers, in exchange for a monthly lease rate.[81] The tariff contains "Lease Terms and Conditions."[82] "Pursuant to the Agreement, Customer hereby leases from PSE, and PSE hereby leases to Customer, the equipment identified on the front of the Equipment Lease Agreement."[83] The lease contains a specific lease term.[84] The lease contains a separate

[76] PSE Initial Brief, ¶¶ 18-22, 104.
[77] *Id.*, ¶ 104; TR. 214:8-11.
[78] RCW 63.14.010.
[79] Tariff Sheet No. 75-U.
[80] Letter from Ken Johnson to Steven J. King (Nov. 6, 2015); PSE Initial Brief, ¶ 70.
[81] Tariff Sheet No. 75.
[82] Tariff Sheet No. 75-D.
[83] Tariff Sheet No. 75-E.
[84] Tariff Sheet No. 75-E – F.

purchase option.[85] PSE remains the owner of the equipment throughout the lease.[86] Following the lease, the customer may either end the lease, or enter into a new lease.[87] All of these indices clearly demonstrate that the service is a lease, not a sale.[88]

33 Finally, PSE is not proposing to use an "inappropriate accounting method to track the expenses and revenues of its proposed service, as Staff claims."[89] Mr. Marcelia clarified Staff witness O'Connell's confusion regarding the appropriate accounting for the leasing service. Ms. O'Connell relies on the new GAAP guidance, ASC 842, which will not go into effect until 2019, to determine her view of the proper accounting treatment.[90] But there are two different forms of accounting—regulatory accounting and GAAP accounting.[91] The Commission is not bound by GAAP rules and, in fact, there are many situations where PSE reports differently for GAAP than for the WUTC reporting.[92] As Mr. Marcelia testified, FERC and the Commission may promulgate rules that maintain the historic treatment of lessor/lessee accounting and diverge from the new ASC 842 standard.[93] Mr. Marcelia asserts that PSE should apply the FERC guidance to its leasing activities, not the GAAP guidance.[94] PSE believes that FERC GI 19, GI 20, and Account 104 provide the guidance necessary to

[85] Tariff Sheet No. 75-R.
[86] Tariff Sheet No. 75-G.
[87] Tariff Sheet No. 75-U.
[88] *See Alpiser v. Eagle Pontiac-GMC-Isuzu, Inc.*, 97 N.C. App. 610, 612-14, 389 S.E.2d 293 (1990) (fixed term and clear language it was a lease and that lessor retained ownership was evidence of a lease); *Tolaram Fibers, Inc. v. Tandy Corp.*, 92 N.C. App. 713, 717-18, 375 S.E.2d 673 (1989) (agreement was a lease where the agreement was clear that the lessee did not receive right, title, or interest in the equipment and at the end of the leasing program the property was to return to the lessor); *Nat'l Can Servs. Corp. v. Gateway Aluminum Co.*, 683 F. Supp. 719, 728 (E.D. Mo. 1988) ("Upon consideration, the Court finds that the parties' agreement here is a true lease. While the lessee . . . paid the taxes, paid maintenance and repair costs, and assumed the risk of loss of or damage to the equipment, the equipment was to be returned to NC Services at termination or expiration of the lease subject to an option to purchase.").
[89] Staff Initial Brief, ¶ 30.
[90] Marcelia, Exh. No. MRM-1T, at 9:1-4.
[91] TR. 470:4-7.
[92] TR. 469:23-470-6.
[93] TR. 470:8-24.
[94] TR. 469:13-470:3.

properly account for PSE's leasing activities as a lessor.[95] Moreover, the accounting is not the driver when determining whether or not a program is merchandising.[96]

6. PSE's leasing service is a public service.

34 In PSE's Initial Brief, PSE questioned the applicability of the 2014 Interpretive Statement to PSE's leasing proposal, not only because the 2014 Interpretive Statement provided the Commission's "current opinion regarding the Commission's jurisdiction over third-party owners of net-metered systems" and not the leasing of water heating and HVAC equipment,[97] but because interpretive statements are advisory only and do not have the force of law.[98] The fact that an order cites to an interpretive statement does not make it law. PSE maintains this position here. Regardless, even if the factors apply, PSE's service is a public service.

a. PSE service is publicly available.

35 PSE is surprised that Staff and other parties continue to argue that PSE's service is not "unequivocally" offered to the public.[99] As discussed in paragraphs 62-65 of PSE's Initial Brief, PSE leasing service is publicly available consistent with the Commission's rules and PSE's other authorized services.[100] PSE also objects to Staff's incorrect suggestion that PSE is avoiding "long-standing regulatory tenets"[101] when it is Staff who is seeking to impose on

[95] Marcelia, Exh. No. MRM-1T, at 10:1-5
[96] *Id.* at 14:10-11.
[97] PSE Initial Brief, ¶¶ 71-73.
[98] RCW 34.05.230(1) ("Current interpretive and policy statements are advisory only."). As the Commission recently noted, "[s]uch statements generally set forth the Commission's preferences or clear guidelines in certain policy-related matters after extensive deliberation in a workshop setting." *In re Petition of PSE and NWEC For an Order Authorizing PSE To Implement Electric and Natural Gas Decoupling Mechanisms and To Record Accounting Entries Associated With the Mechanisms*, Dockets UE-121697 & UG-121705, Order 07, ¶ 95 (June 25, 2013). They do not set forth immutable doctrine. *Id.*
[99] Staff Initial Brief, ¶ 32; Public Counsel, ¶¶ 8-9.
[100] *See also* PSE's Reply to Public Counsel's Brief in Support of Staff's Motion for Summary Determination (July 29, 2016).
[101] Staff Initial Brief, ¶ 33.

PSE manufactured legal standards,[102] incorrect accounting methodologies,[103] inapplicable regulatory rules,[104] and a "behind the meter" theory that Staff concedes is not law.[105]

36 Staff grossly mischaracterizes PSE's position when it states that PSE "does not want to be accountable for comporting with long-standing regulatory principles."[106] PSE has filed a tariff that sets forth the terms and conditions of the service it seeks to offer, and seeks Commission approval of the tariff. PSE has provided a detailed pricing model supporting the rates it proposes.[107] PSE has proposed rates based on actual prices provided by licensed Washington contractors.[108] PSE uses its weighted average cost of capital previously approved by the Commission in setting its rates.[109] PSE proposes to follow the same principles of regulatory accounting it follows for other rate base.[110] PSE has demonstrated that its proposed leasing service will benefit all customers and thus is in the public interest.[111] In sum, it is absurd for Staff to argue that PSE is trying to avoid "long-standing regulatory principles."

b. PSE is uniquely positioned to offer this service.

37 The parties' argument that PSE does not meet the second prong of the 2014 Interpretive Statement is also incorrect.[112] At the outset, as explained in paragraph 73 of PSE's Initial Brief, PSE has already demonstrated how it satisfies this prong. In sum, there is no comparable market option currently available today and it is beyond dispute that PSE is the only entity who has the ability to comprehensively address energy efficiencies across the

[102] *Id.*, ¶ 20.
[103] *Id.*, ¶ 30.
[104] PSE Initial Brief, ¶¶ 97-100.
[105] Staff Initial Brief, ¶¶ 49-52.
[106] *Id.*, ¶ 33.
[107] PSE Initial Brief, ¶¶ 94-96.
[108] *Id.*, ¶¶ 92-93.
[109] *Id.*, ¶ 105.
[110] Marcelia, Exh. No. MRM-1T, at 10:17-11:14.
[111] PSE Initial Brief, ¶¶ 74-115.
[112] Staff Initial Brief, ¶¶ 34-44; Public Counsel Initial Brief, ¶ 10.

energy grid.[113] No party has refuted this point. Thus, not only would there be significant benefits from PSE providing these services, but PSE's providing these services will support and help expedite the Commission's desires that technologies such as Demand Response and other interconnected systems are deployed on a broader scale to all customers.[114] Further, to effectively develop a system that will meet the energy demands of the future, PSE will need a process by which it can offer customers beneficial equipment.[115]

38 Thus, PSE strongly disagrees with Staff's outdated view that PSE's proposed service is not consistent with a monopoly service and that the system "would not gain efficiencies and produce greater public benefit through one company's exclusive provision of products and services."[116] In this current era, providing solutions that will benefit the entire energy system—including offering energy-efficient technologies—is precisely PSE's role as a regulated utility. And given that there are no other market actors who are willing to acknowledge that there is a market need for new technologies, PSE is uniquely situated to provide these solutions.[117] PSE proposes to offer a service that is not offered anywhere in the market, would improve system efficiencies, respond to customer demand, and address the market gap that exists.

39 PSE has already responded to the unfounded attacks on the Cocker Fennessy survey. As discussed below, the Cocker Fennessy survey demonstrates customer interest in leasing water heaters and HVAC equipment, and the results are consistent with PSE's prior market research.

[113] PSE Initial Brief, ¶¶ 106-09.
[114] *Id.* ¶¶ 13, 15, 23-24, 73.
[115] *Id.* ¶¶ 15, 19, 23.
[116] Staff Initial Brief, ¶ 35.
[117] PSE Initial Brief, ¶ 73.

40 Staff's suggestion that the competitive market will be able to address market gap, or that the market can implement a comprehensive and cohesive solution to improve system efficiencies, including incorporating Demand Response, is not credible.[118] The intervenors have not provided any evidence whatsoever that they have a plan for improving or making it easier for all customers to obtain energy-efficient equipment. Indeed, given that they deny that there is any market need for new technologies, why would they? So far, their position has been one of total and complete denial of a market need,[119] and that customers are better off if they use outdated technologies as long as possible until they break down.[120] This should not engender any confidence from the Commission that the unregulated market has the motivation or the ability to effectively drive market transformation and accelerate customer adoption of more efficient technologies.[121] To effectively implement any such plan, the Commission will need PSE to lead this effort as it is the only entity that has the public duty to make comprehensive beneficial changes.

41 Further, Staff and Public Counsel incorrectly state that there are equivalent market options to PSE's proposed service.[122] No party has provided a comparable market option.[123] Instead, Staff and Public Counsel have steadfastly defended market options such as bank loans, credit cards, and other complicated financing procedures,[124] when it is undisputed that some customers do not qualify for those options,[125] and the "options" have significant

[118] Staff Initial Brief, ¶¶ 24, 37.
[119] Fluetsch, Exh. No. BF-1T, at 14:13-14;
[120] *Id.* at 14:19-23.
[121] PSE Initial Brief, ¶ 73.
[122] Staff Initial Brief, ¶ 37; Public Counsel Initial Brief, ¶ 10.
[123] PSE Initial Brief, ¶¶ 104-07; TR. 214:8-11.
[124] Staff Initial Brief, ¶ 37; Public Counsel Initial Brief, ¶ 10; Faruqui, Exh. No. AF-4T, at 2:9-15:20 (testifying how market options proposed by Staff and Public Counsel do not overcome market barriers for all customers).
[125] Faruqui, Exh. No. AF-4T, at 2:9-15:20; Wigen, Exh. No. AJW-1T, at 8:3-10.

drawbacks.[126] The parties dismiss or choose to ignore Dr. Faruqui's testimony that there are significant market barriers to adoption of new technologies and that current market options do not meet the needs of all customers.[127]

42 PSE also objects to the suggestion by parties that it will somehow abuse its position as a trusted advisor.[128] There is no basis for this argument. Customers trust PSE because it provides reliable services. If customers who are frustrated with existing market options decide to upgrade to more efficient equipment because they trust PSE, all benefit. As explained by Mr. Wigen, who currently sells water heating and HVAC equipment in the marketplace:

> Many customers do not trust the contractor market.[129] . . . As with any technical product, people need to trust the party from whom they are buying or leasing.[130] . . . PSE provides reliable energy services for [customers] and this relationship builds trust. It cannot be overstated how impactful the message is when PSE says, "your equipment is inefficient, past its useful age, and you should consider replacement' and, 'here are some options you might want to consider." . . . [I]n my experience, when a large and trusted entity like PSE is spreading the word about the importance of replacing older, inefficient equipment, and when it is providing additional options for customers to engage in the market, the entire market can benefit.[131]

43 PSE objects further to the suggestion that it will somehow misuse customer information.[132] As PSE has stated repeatedly, there are Commission rules governing how utilities may notify and educate their customers regarding Commission-approved tariffed services and PSE is fully committed to complying with those rules.[133]

44 Finally Staff blatantly misrepresents the facts by arguing that PSE inappropriately used its "monopoly position over retail energy service to solicit critical market information from

[126] Faruqui, Exh. No. AF-4T, at 2:9-15:20.
[127] *Id.*
[128] Staff Initial Brief, ¶ 40; Public Counsel ¶ 69.
[129] Wigen, Exh. No. AJW-1T, at 5:4.
[130] *Id.* 5:13-14.
[131] *Id.* at 13:11-14.
[132] Staff Initial Brief, ¶ 44; Public Counsel ¶¶ 70-72.
[133] Englert, Exh. No. EEE-1T, at 5:1-8.

would-be competitors."[134] What Staff is disingenuously referring to is PSE's Request for Qualification ("RFQ"), which PSE submitted to prospective installation partners.[135] PSE's position in the marketplace had nothing to do with this RFQ and indeed, numerous licensed contractors voluntarily responded and will be candidates to partner with PSE if and when its service is approved.[136] PSE regularly issues RFQs, RFPs, and other market solicitations for a variety of projects.[137] Staff's distortion of the facts is troubling.

c. PSE's service should have commission oversight.

45 PSE disagrees with Staff and Public Counsel's suggestion that PSE's proposed leasing service would not be an essential service and thus not warrant Commission oversight.[138] Washington statutes and *Cole* recognize that leasing water heaters and furnaces that provide heat and hot water as a central part of the service of a regulated utility. As PSE has stated repeatedly, no entity is currently offering a comprehensive leasing service specifically tailored to meet significant market needs, while also providing a critical platform for the future.[139] PSE's role in this regard is critical to how gas and electric services will operate now and in the future and thus is properly regulated by the Commission.[140] In addition to water heaters and HVAC equipment, PSE hopes to offer other equipment, including solar and energy storage through its leasing platform.[141] To suggest that the Commission should not regulate these activities is inconsistent with the Commission's stated interest in advancing the utility of the future and incorporating new technologies. Accordingly, if there are consumer protection

[134] Public Counsel Initial Brief, ¶ 43.
[135] PSE Initial Brief, ¶¶ 92-93.
[136] *Id.*; TR. 212:15-19.
[137] *See, e.g., In the Matter of Puget Sound Energy's Proposed Request for Proposals*, Dkt. No. UE-160808, Order 01, Order Approving Request for Proposals (Sept. 8, 2016).
[138] Staff Initial Brief, ¶ 45; Public Counsel Initial Brief, ¶ 11.
[139] PSE Initial Brief, ¶ 73.
[140] *Id.*
[141] Letter from Ken Johnson to Steven V. King (Sept. 18, 2015), at 2; PSE Initial Brief, ¶¶ 3, 15, 23 n.64.

issues, PSE believes the Commission should be involved in the same manner it is involved with PSE's existing services.

46 PSE takes offense to Staff's accusations that PSE will take advantage of its customers, promise unrealistic bill savings, "run-up" the cost of non-standard installations, or install equipment inappropriate for a customer's home.[142] PSE takes its role as a public service company seriously and PSE genuinely strives to meet its customer's needs and does not engage in or tolerate such behavior by its contractors. For decades, utilities in Washington have been leasing equipment nearly identical to what PSE is offering. Neither Staff nor any party has provided evidence of even one example where PSE has engaged in such behavior with its existing service. The implication that consumer protection complaints will overrun the Commission is inconsistent with actual history and Staff's position is baseless.

47 Finally, Staff's suggestion that PSE's customers would be subject to antitrust liability is nothing more than a scare tactic.[143] Regulated utilities have engaged in leasing for decades in Washington, and Staff's concerns regarding federal antitrust laws and the state action doctrine are simply unwarranted.

7. The Commission has already rejected Staff's behind the meter argument.

48 Staff's plea that the Commission adopt its "common sense" "behind the meter" rule only highlights the instability of Staff's position.[144] Staff's notion that the "principle is fully consistent with legal precedent"[145] misrepresents the law. Staff made this same argument in its motion for summary determination without any citation to legal authority,[146] and the Commission rejected Staff's theory stating that it "has not found to this point anything in the

[142] Staff Initial Brief, ¶ 47.
[143] *Id.*, ¶ 46.
[144] *Id.*, ¶ 49.
[145] *Id.*, ¶ 50.
[146] Commission Staff Motion for Summary Determination (July 13, 2016), ¶ 6.

statutes that would require drawing a bright line at the meter."[147] Undaunted, yet still unable to find authority supporting its "behind the meter" rule, Staff now cites the Commission's order in *Cole*. However, in *Cole*, the Commission rejected Staff's "behind the meter" theory stating that the Commission has jurisdiction over "[a]ll charges . . . by any gas company, electrical company . . . for gas, electricity. . . or for any service rendered or to be rendered in connection therewith. Certainly, the furnishing of rented conversion burners or other appliances using gas is a service directly connected with the sale of gas."[148] "[T]he terms of the rental contract would fall within the Commission jurisdiction and responsibilities."[149] In 1992, the Commission rejected Staff's second attempt to introduce this theory.[150]

49 If there has been any "moving target" in this case, it is Staff's "behind the meter" theory. Having gone back to the drawing board again, Staff now presents to the Commission a Swiss-cheese version of its proposed rule.[151] Staff latest version contains so many loopholes and exceptions that it is hard to know what equipment would be allowed and what would be banned under Staff's theory. Staff then caps the offer with the suggestion that the Commission should simply "amend" the standard any time it wishes.[152] Staff's approach would provide little assurance to PSE and other utilities that would have to restructure their services around Staff's "common sense," yet potentially ever-changing principle. The Commission should again reject Staff's proposed rule.

[147] TR. 106:1-3.
[148] Commission Proposed Order at 15; RCW 80.28.010(1).
[149] Proposed Order at 45.
[150] PSE Initial Brief, ¶ 56.
[151] *Id.*, ¶¶ 49-52.
[152] *Id.*, ¶ 52.

III. PSE HAS MET THE REQUIREMENTS FOR ESTABLISHING A NEW REGULATED UTILITY SERVICE

A. PSE's Leasing Service Is In The Public Interest

50 In its initial brief, PSE addressed the evidence demonstrating that PSE's leasing service is consistent with the public interest. Here, PSE responds to additional arguments, raised in other parties' initial briefs, regarding the public interest.

1. The scope of PSE's proposed lease service is reasonable.

51 Parties mischaracterize the scope of PSE's proposed equipment leasing service. For example, SMACNA argues that "from PSE's point of view [the leasing service] could evolve into a dramatic share of the appliance market."[153] That is not the case. At the hearing, Ms. Norton clarified misconceptions about the scope of the service. The market share numbers shown in PSE's preliminary planning documents do not reflect PSE's projected share of the *overall* equipment market in Western Washington. Rather, they reflect low, medium and high scenarios of actual participation in the PSE lease service for the share of the 25 percent of PSE's customers *who expressed interest in the leasing program*. Ms. Norton testified that

> 25 percent of our customers have expressed interest in leasing, and the low, medium, and high scenarios are to articulate if a low percentage of those customers were to participate, this is what the numbers would look like, a medium case and a high case.
>
> This is not to suggest all water heaters in the market; this is only the share of customers that had expressed interest in the service.[154]

52 In sum, the parties' misconception that PSE plans to take over the market for water heaters and HVAC equipment through its lease service is not supported by the record.

[153] SMACNA Initial Brief ¶95 (citing BTC-2HC).
[154] TR. 186:15-23.

2. PSE has demonstrated that there is a market need/market gap.

53 Other parties' concerns about the exact percentage of the age of HVAC and water heater equipment in the market as shown in the NEEA data are overstated for three reasons: First, the NEEA data, along with other evidence, shows a significant market gap in terms of customers timely replacing older equipment. A large number of homeowners are waiting until their equipment is old and breaks down before replacing it, and much of this equipment is beyond its useful life. Second, the NEEA data was not used for the pricing model. Third, although Dr. Faruqui used some data from the NEEA survey for a very limited purpose in the benefits model, he did not use the assumptions that other parties have criticized.

a. Evidence in addition to the NEEA data shows a market gap

54 Arguments over the *size* of the market gap shown in the NEEA data lose sight of the fact that there *exists* a market gap that is documented by the NEEA data and other surveys. For example, the survey undertaken by PSE in 2014 documents a gap in customers replacing their water heaters and HVAC equipment. In PSE's 2014 survey, 19 percent of responding customers reported that they waited for their equipment to fail before replacing it and another 27 percent responded that they replaced their equipment because it was old.[155] In that same survey, 31 percent of respondents reported that they replaced their water heater when the old water heater failed and another 13 percent replaced their water heater because it was "old."[156]

55 The Cocker Fennessy survey also shows that there is a gap in customers replacing older equipment. The Cocker Fennessy survey indicates that of the respondents with electric furnaces, 61 percent of the furnaces were 16 or more years old; for respondents with gas furnaces, 28 percent of the furnaces were 16 or more years old; for respondents with heat

[155] McCulloch, Exh. No. MBM-18, at 32.
[156] *Id.* at 40.

pumps, 14 percent of the heat pumps were 16 or more years old; and for respondents with water heaters, 16 percent of the water heaters were 16 or more years old.[157] Additionally, 36 percent of respondents reported that they waited until their heating equipment broke or failed before replacing it,[158] and 58 percent of respondents reported that they waited until their water heater broke or failed before replacing it.[159]

56 PSE's witness Andy Wigen also testified to the market gap and the fact that there are thousands of older, inefficient water heaters and furnaces that are not being replaced, though they are at the end of their useful life and can be dangerous.[160]

57 Whether the market gap is 40 percent, 25 percent, or 20 percent is not a determinative factor in this case. As Ms. Norton testified, even with a market gap of 25 percent, there are still approximately 100,000 furnaces in PSE's customers' homes that are beyond their useful life.[161] The bottom line is that for each type of equipment detailed in the NEEA data, there remains a significant gap, thus an opportunity to help those customers accelerate the replacement of their old equipment with more efficient equipment before it fails.

b. The NEEA data was not used for the pricing model

58 The parties have also overstated the role of the NEEA data in this case. As explained by Mr. McCulloch, the NEEA data "was one instrument we used to assess the existence of an unmet need in the market. That was simply all it was used for. It doesn't inform our pricing model, our market buildup. It was just an opportunity for us to understand the landscape of

[157] McCulloch, Exh. No. MBM-4, at 2.
[158] *Id.* at 3.
[159] *Id.* at 5.
[160] Wigen, Exh. No. AJW-1T, at 2:18-3:2, 3:8-11, 4:19-5:2
[161] TR. 145:8-12.

the market."[162] Thus, whether the market gap is 23 percent or 40 percent for gas forced air furnaces, it has no bearing on the PSE pricing model, since the NEEA data was not an input.

c. Dr. Faruqui used the NEEA data for a limited purpose

59 Although Dr. Faruqui's benefit model uses the NEEA data for a very limited purpose, he did not use the assumption that 40 percent of furnaces are beyond their useful life. Instead, Dr. Faruqui assumes that 22 percent of furnaces are older than 17 years, based on the results of the Cocker Fennessy survey.[163] Dr. Faruqui used the NEEA data for a very limited purpose—for determining the median age of equipment beyond its useful life for purposes of determining benefits for accelerated replacement.[164] Notably, the benefit from accelerated replacement are very minimal and account for less than one percent of the total avoided energy savings over the first 20 years.[165]

3. PSE has demonstrated customer interest.

60 PSE has established customer interest in the leasing service through several different channels. Multiple customer surveys over a two-year time period document customer interest.[166] PSE witnesses have testified to the requests they receive from customers who want to lease equipment from PSE.[167] And, 33,000 customers continue to lease from PSE today.[168] Despite this evidence of customer interest, the parties maintain an unsupportable position that PSE has failed to establish customer interest in the proposed service.

[162] TR. 359:25-360:4.
[163] Faruqui, Exh. No. AF-1T, at 18:3-15, 23:4-7(citing Cocker Fennessy survey to determine equipment beyond its useful life).
[164] *Id.* 23:8-10.
[165] Faruqui, Exh. No. AF-4T 22:4-9
[166] PSE Initial Brief, ¶¶ 17, 26-33.
[167] *Id.*, ¶ 12.
[168] *Id.*

61 The parties' argument that the Cocker Fennessy study should be given no evidentiary weight is not supported by the law or Commission rules.[169] WAC 480-07-495(1) states that "[a]ll relevant evidence is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability and trustworthiness." Moreover, the Administrative Procedure Act provides that "[f]indings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial."[170] The Cocker Fennessy survey results are relevant to the case. They measure customer interest in the leasing service. It is the most current and reasonably obtainable evidence of customer interest. PSE's involvement in the survey process was limited; PSE provided input to Cocker Fennessy about the features of its leasing service so that Cocker Fennessy could accurately describe the lease service in the survey.[171] The survey was not simply obtained for purposes of litigation, as Staff argues. It was obtained by PSE to establish rates in its pricing model.[172] PSE commonly relies on surveys such as the Cocker Fennessy survey as part of its standard business operations. Indeed, PSE relied on an earlier survey from 2014 to plan its lease service, and the Cocker Fennessy survey confirmed PSE's earlier survey findings that customers are interested in a leasing service.[173]

62 Contrary to Staff's claims, surveys of the type PSE used are admissible in court. Staff cites to one federal district court case, *U.S. v. Southern Indiana Gas & Elec. Co.*,[174] in support of its argument that the Cocker Fennessy survey should not be given evidentiary weight. But

[169] Staff Initial Brief, ¶¶ 58-60; Public Counsel Initial Brief, ¶¶ 18-33.
[170] RCW 34.05.461(4).
[171] PSE Initial Brief; ¶ 29.
[172] *Id.*, ¶¶ 25-26.
[173] *Id.*, ¶¶ 30-33.
[174] 258 F.Supp.2d 884 (S.D. Ind. 2003).

the facts of that case, and the survey at issue in that case, are much different from the Cocker Fennessy survey. In *Southern Indiana Gas & Elec.*, the survey was undertaken by a utility that was facing an EPA enforcement action under the Clean Air Act ("CAA"). All of the recipients of the survey were utility companies subject to the CAA that owned or operated coal-fired, electric generating units and all were potential defendants in future suits.[175] In fact, the government had either filed suit or issued an administrative order on consent against the majority of the survey respondents.[176] Along with the survey, a cover letter was sent to the CEO of each surveyed company, explaining that the survey sought data relevant to the EPA's enforcement action and citing the regulatory defense to which the survey would relate.[177] The respondents were promised a copy of the final report of the study.[178] The survey sought information about activities that may have taken place up to sixty years earlier.[179] The Southern Indiana Gas & Electric attorneys who were defending the enforcement action spoke with some questionnaire recipients about the survey.[180] Based on the facts of that survey, the court found it to not be reliable because the respondents were biased.[181] As the court noted: "The respondents are sophisticated entities with millions of dollars at stake if they are found to be in violation of the CAA. The risk of insincerity in the responses is very high."[182]

63 Further, although the court in *Southern Indiana Gas & Elec.* found that particular survey to be unreliable and inadmissible, it noted that public opinion/consumer survey polls are frequently deemed admissible by courts, for example in trademark cases, where there is

[175] *Id.* at 891-92.
[176] *Id.* at 892.
[177] *Id.* at 891.
[178] *Id.* at 892.
[179] *Id.* at 891.
[180] *Id.* at 894.
[181] *Id.* at 892.
[182] *Id.*

random sampling of respondents, and respondents have no reason to falsify their feelings.[183] In such cases, strong justification exists for admitting the surveys: the efficiency of taking a poll of a random sampling of respondents rather than parading in numerous out-of-court declarants to testify in court; respondents given an immediate answer to questions; respondents do not have an interest in the litigation; and respondents are unaware that the survey is connected to litigation.[184] The court in *Southern Indiana Gas & Electric* also stated that the fact that an attorney or party has some level of involvement in the design of the survey does not make the survey defective. "The goal is a legally and factually relevant survey, and attorney involvement in that regard may be necessary."[185]

64 Thus, the only legal authority cited by Staff *supports* the admissibility of the Cocker Fennessy survey. Unlike *Southern Indiana Gas & Elec.*, in the Cocker Fennessy survey, the respondents have no reason to falsify their feelings, and no PSE employee or attorney spoke with the respondents. It is a survey of public opinion of respondents who have no interest in this litigation and who would not know if the survey had any relationship to litigation. It is a reliable survey that is admissible and should be given full weight by the Commission.

4. Staff and Public Counsel's cost-effectiveness arguments are misplaced.

a. The participation level PSE used in the pricing model is appropriate.

65 The argument by Staff and Public Counsel that PSE's rates are fundamentally flawed because they rely on the Cocker Fennessy survey is wrong. As noted in PSE's Initial Brief, the customer interest in the product categories as measured through the Cocker Fennessy survey is consistent, and in fact slightly lower, than customer interest as measured by PSE in a

[183] *Id.* at 893.
[184] *Id.*
[185] *Id.* at 894.

2014 survey.[186] So the Cocker Fennessy survey results are supported by another survey conducted nearly two years before litigation in this matter.

66 Moreover, PSE was conservative in using the customer participation numbers in its pricing model. In its pricing model, PSE assumed only 50 percent of the survey respondents who said they were likely or extremely likely to lease would actually lease,[187] and PSE assumed that *none* of the customers who were neutral to the lease would actually lease.[188] It is reasonable to assume that at least a small percentage of these neutral customers will choose to participate in the leasing service, but for purposes of its pricing model and Dr. Faruqui's benefits model, PSE assumed that none of these "neutral" customers would participate.[189] In sum, the Cocker Fennessy survey results were consistent with past surveys and PSE used these results in its pricing model in a conservative manner to develop reasonable rates.

67 Staff and Public Counsel argue that the Cocker Fennessy survey was overly optimistic in its projections of customers who would lease equipment.[190] But even if the customer participation numbers in the pricing model turn out to be higher than actual participation, which PSE does not expect to occur, customers would not be harmed.[191] It is PSE's shareholders who would be at risk for under-recovery, since the rates are set for leasing customers and they will not change for those customers if fewer than projected customers participate in the leasing service.[192] Similarly, non-participating customers will not be harmed, as they are not paying for the service.

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[186] PSE Initial Brief, ¶¶ 30-33.
[187] McCulloch, Exh. No. MBM-7HCT, at 34:6-16.
[188] *Id.*, Exh. No. MBM-40HC.
[189] Faruqui, Exh. No. AF-1T, at 20:10-25:4.
[190] Staff Initial Brief, ¶¶ 58-60; Public Counsel Initial Brief, ¶¶ 22-24.
[191] McCulloch, Exh. No. MBM-7HCT, at 32:6-11; 35:3-36:4.
[192] *Id.*

68 Mr. McCulloch calculated the impact on PSE's recovery if only one-half of the projected customers participated in the leasing service (i.e., 25% of customers who expressed interest rather than 50% of customers).[193] This sensitivity analysis can be found in Exhibit No. MBM-20. Even if only one-half of the projected participants actually choose to lease, over the lease term this would result in a relatively small under-recovered amount: between ($250) to ($352) per unit over the lease term.[194] In such a case, PSE would be recovering between two and nine percent less than what it projects would be necessary for the Company to fully recover its authorized rate of return.[195] Customers would not be harmed by this under-recovery.

b. PSE is not required to conduct Staff's cost-benefit analysis.

69 Staff argues that the PSE's rates are not cost effective because PSE did not conduct a cost-benefit analysis to demonstrate that efficiency gains exceed production costs.[196] Staff relies on a model of cost-effectiveness that is not applicable for this new, optional lease service.[197] Staff inappropriately relies on the cost-effectiveness test that applies when general ratepayer dollars are used to fund a conservation measure under Schedule 120.[198] That is an entirely different situation from the lease tariff currently before the Commission. Under PSE's proposed lease service, customers choose to lease water heaters or heat pumps because of the turn-key nature of the lease and the peace of mind that comes with maintenance, repair, and replacement for the term of the lease.[199] There is no general ratepayer funding of this lease service; it is funded by the customers who choose the service.[200] However, the benefits that

[193] *Id.* at 35:10-36:4.
[194] *Id.*; Exh. No. MBM-20.
[195] *Id.* at 35:10-36:4; Exh. No. MBM-20.
[196] Staff Initial Brief, ¶¶ 61-62.
[197] PSE Initial Brief, ¶¶ 86-87.
[198] *Id.*
[199] *Id.*, ¶¶ 17, 27-33.
[200] *Id.*, ¶ 86.

result from the increased efficiency of the leased equipment—such as energy savings and reduced carbon emissions—will benefit all customers, even though the non-participating customers do not pay for the benefits.[201] These benefits do not transform this optional, leasing service into a customer-funded conservation program that must meet a complex cost-benefit analysis before it is eligible for funding through customer rates. The Commission should reject Staff's rudimentary attempt to tack-on a cost-effectiveness test to the new leasing service, simply because one of the benefits of the service is increased energy efficiency.

B. PSE Has Demonstrated That Its Rates Are Fair, Just, Reasonable, and Sufficient

70 PSE's proposed rates are neither speculative nor "divorced from the actual costs of the products and services," as Staff argues.[202] PSE's rates are based on a detailed pricing model that incorporates the PSE internal costs as well as the actual costs that were submitted by interested contractors who are looking to partner with PSE in offering the lease service.[203] For each product offered, PSE has based its lease rate on detailed factors such as the equipment cost, maintenance costs, the cost of disposal, the post-warranty service costs, taxes, depreciation, labor costs, and overhead, as shown in detail in PSE's pricing model.[204] It is difficult to imagine how PSE could provide a more detailed basis for its rates, particularly when it is proposing a new service, and there are limited historical costs on which to base the rates.[205] Limited historical data and costs are an inescapable characteristic of offering a new service.[206] The Commission has approved new services or offerings in the past, before the

[201] *Id.*
[202] Staff Initial Brief, ¶ 64.
[203] PSE Initial Brief, ¶¶ 94-96.
[204] *Id.*, ¶¶ 92-96.
[205] *See id.*, ¶¶ 97-100.
[206] *Id.*

actual costs of the service are known and measurable, such as CNG[207] and in the 1992 WNG rate case, a new energy efficient water heater rental.[208] Although, there were not known and measurable historical costs on which to fully base the rate, the Commission authorized the new service or product.[209] In fact, for PSE's CNG service, the Commission authorized the tariff revision for the new service, despite the fact that the tariff, as filed, did not include rates. The Commission placed conditions on its Order, requiring PSE to file its cost model that it will used to develop its service rates.[210] For the leasing service, where there are such historical costs or data, through PSE's existing water heater rental program, PSE has used this information where applicable.[211]

71 The Commission should also reject SMACNA's convoluted and baseless argument that PSE's rate of return is excessive,[212] when PSE has used its weighted average cost of capital as it does for every other type of capital expenditure, regulatory asset and regulatory liability. SMACNA apparently makes the odd and unsupported argument that because the capital equipment to be leased is not "generation or distribution plant," the weighted average cost of capital should not apply.[213] This ignores the fact that all types of capital expenditures such as transmission lines, computers, office equipment, vehicles, and office buildings are capital expenditures to which the weighted average cost of capital applies. PSE is making a long-term investment in the equipment to be leased. Whether or not PSE is at risk for a stranded

[207] *In re Tariff Revisions of PSE Designating a New Schedule No. 54, Optional Gas Compression Service*, Docket UG-140721, Order 01 (July 24, 2014).
[208] *WUTC v. WNG*, Dkt. UG-920840, Fourth Supp. Order Rejecting Tariff Filing; Authorizing Refiling, at 16-17 (Sept. 27, 1993) (requiring WNG to file a new revised tariff with a cost-recovering rate for the new efficient water heaters it proposes to lease).
[209] *Id.*; *In re Tariff Revisions of PSE Designating a New Schedule No. 54, Optional Gas Compression Service*, Dkt. UG-140721, Order 01, ¶ 9 (July 24, 2014).
[210] *In re Tariff Revisions of PSE Designating a New Schedule No. 54, Optional Gas Compression Service*, Dkt. No. UG-140721, Order 01, ¶ 9 (July 24, 2014).
[211] McCulloch, Exh. No. MBM-7HCT, at 10:15-11:2.
[212] SMACNA Initial Brief, ¶¶ 61-64.
[213] *Id.*, ¶ 63.

asset is not determinative,[214] and SMACNA cites no authority for the novel proposition that the authorized rate of return is only applicable if there is a potential for stranded assets. Under general principles of ratemaking, the Commission must allow PSE a fair opportunity to earn a return on, and a return of, its investment,[215] and PSE's investment in the capital needed to operate its leasing service is no different. Indeed, PSE currently earns a return on the water heaters it has rented for the past several decades.[216] There is no reason to treat the water heater and HVAC equipment proposed in this docket in a different manner.

72 SMACNA's argument also ignores the fact that the Commission's practice is to apply carrying costs at the weighted average cost of capital for all regulatory assets and liabilities.[217] Even in those situations where PSE holds a regulatory asset where the cash received only offsets short-term debt, and thus the applicable rate would be the cost of short-term debt, which is less than one percent, PSE is required to include carrying costs at the company's authorized rate of return.[218] Thus, SMACNA's citation to an internal preliminary discussion by PSE in 2014 suggesting that the equipment *could* be funded through PSE's existing credit facilities[219] does not change the analysis. The actual source of funding is not parsed for each capital expenditure, asset or liability. To do so would create an unworkable morass for the Commission.

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[214] *See, e.g., In re Tariff Revisions of Puget Sound Energy Designating a New Schedule No. 54, Optional Gas Compression Service*, Dkt. No. UG-140721, Order 01, ¶ 10 (July 24, 2014) (approving CNG tariffs and electing not to address stranded investment costs at that time if CNG customers terminate service prematurely).
[215] *See, e.g., WUTC v. PSE,* Dkt. Nos. UE-111048 & UG-111049, Order 08, ¶ 22 (May 7, 2012); *see also Federal Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591 (1944); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923).
[216] *WUTC v. PSE,* Dkts. No. UE-111048 & UG-111049, Order 08 at App. B (May 7, 2012) (listing water heater depreciation as an uncontested adjustment with $2.2 million in rate base).
[217] *See, e.g., In re Petition of Puget Sound Energy For an Accounting Order Approving the Allocation of Proceeds of the Sale of Certain Assets to Public Utility District #1 of Jefferson County,* Docket UE-132027, Order 05, at ¶¶ 3-6 (Oct. 1, 2014) (authorizing one-time credit to customers of approximately $52.7 million two months after order issued and requiring interest to accrue at the Company's after-tax rate of return, grossed up for taxes).
[218] *Id.*
[219] SMACNA Initial Brief, ¶ 63.

73 SMACNA makes the inapt argument that PSE has not met its burden of proof to demonstrate that its weighted average cost of capital is appropriate for this lease service, but the authority SMACNA cites has no relevance to the case currently before the Commission.[220] PSE is not required to re-litigate its return on equity or weighted average cost of capital in every tariff filing or accounting petition in which the weighted average cost of capital is applied. That would result in an unmanageable situation. Rather, the weighted average cost of capital is set in a general rate case (or, as in the case SMACNA cited, a multi-year rate plan case),[221] neither of which is the case here. Once set, the weighted average cost of capital is used to determine the carrying costs for all regulatory assets, liabilities, and investment undertaken by the Company, until the capital costs are reset in the subsequent rate case.[222] SMACNA seems to suggest that every time the weighted average cost of capital is applied, it should be re-litigated. That has never been the policy of the Commission and there is no Commission rule, law, or legal authority that supports SMACNA's curious approach to rate making. SMACNA strays far afield from traditional rate making principles by suggesting that the current weighted average cost of capital set in PSE's last rate proceeding is not valid here.

74 Finally, Staff and other parties imply that there is some improper regulatory accounting of rate base with the lease program because PSE "would record in its books 'the actual original costs of the assets,' rather than the cost estimates embedded in the rates."[223] There is nothing improper with this approach. The parties fail to recognize that PSE's actual rate base never matches the rate base used for setting rates. The actual costs of assets are always

[220] *Id.*, ¶ 61.
[221] *Id.*, ¶ 61, n. 102.
[222] *See, e.g., In re Petition of Puget Sound Energy For an Accounting Order Approving the Allocation of Proceeds of the Sale of Certain Assets to Public Utility District #1 of Jefferson County*, Docket UE-132027, Order 05, at ¶ 3 (Oct. 1, 2014).
[223] Staff Initial Brief, ¶ 64 (citing Marcelia, Exh. No. MRM-1T, at 15:7-8).

recorded in rate base; however, the rate base on the books is never the rate base when the rates are actually collected. The historical test year used by the Commission applies a historical, outdated number to determine revenue requirement today, and that method is no different, and potentially less accurate, than using the cost estimates to determine the leasing rate. In both situations, the rate base at the time of collection is different than the rate base at the time rates are set. If this process creates rates that are "inherently uncertain" as Staff claims,[224] than the same must be said for the Commission's historical ratemaking process in which the actual rate base on the books never matches the rate base on which rates are collected.

1. PSE's use of the Cocker Fennessy data was appropriate.

75 Public Counsel seeks to differentiate "interest in leasing" in the survey from "likelihood to participate"[225] but this is a distinction without a difference. The full text of the Cocker Fennessy survey[226] and a detailed breakdown of all the responses[227] provide the detail of the survey. The survey measures customer interest in leasing water heater and HVAC equipment, *likelihood* to replace equipment sooner with a lease, and *likelihood* to enroll in demand response programs.[228]

76 Moreover, Public Counsel underestimates the capabilities of customers who participated in the online survey by suggesting either that they are unaware that there are twelve months in each of the 15 years of the lease term, or that they are unable to perform simple math such as recognizing that $18 per month for 15 years equals $3,240 ($18 per month * 12 months * 15 years).[229] It is difficult to believe that customers who are capable of participating in an on-line

[224] *Id.*, ¶ 64.
[225] Public Counsel Initial Brief, ¶¶ 22-24.
[226] McCulloch, Exh. No. MBM-4.
[227] Faruqui, Exh. No. AF-3.
[228] McCulloch, Exh. No. MBM-4, at 6-9.
[229] Public Counsel Initial Brief, ¶¶ 25-26.

survey do not have this general knowledge, are not able to undertake basic multiplication, and do not have access to a calculator—which is likely available on the laptop or phone on which the survey is viewed.

77 While there is much hand waving on the part of Public Counsel and other parties about the Cocker Fennessy survey, it is important to recognize, again, that this is not the only evidence that shows an interest on the part of customers for an equipment leasing service. The 2014 survey, the continued participation in PSE's water heater rental program by 33,000 customers (15 years after the program was closed to new customers), and the continued customer inquiries about an equipment leasing service all attest to customer interest in this service. The Cocker Fennessy survey, like any other survey, is not perfect, and cannot predict with 100% accuracy the number of customers who will lease equipment; however, it is a reasonable tool for PSE to use to measure the likely participation, particularly when the results from the survey are corroborated by prior survey results.

2. PSE did not overstate market potential.

78 Although Public Counsel uses its brief to calculate what it perceives to be an overstatement of the market by PSE in its pricing model, in the final analysis this is much ado about nothing. As discussed above, if PSE has over-projected the number of water heaters or furnaces that it will lease, as Public Counsel theorizes, it is PSE's shareholders, and not customers, who bear that risk. This is because the rates for the participating customers assume the higher level of participation. If PSE does not achieve this higher level of participation, its financial performance for the leasing service will not be as strong as PSE has projected. But participating customers will pay no more for the service, because their rates are set based on the pricing model. Similarly, non-participating customers are not paying for the service, so the hypothetical overstatement of market potential that Public Counsel argues, has absolutely

no effect on participating or non-participating customers.[230] Moreover, as the highly confidential pricing model demonstrates, the equipment (and the installation, repair, maintenance associated with the equipment) make up the vast majority of the unit costs for each type of equipment.[231] Therefore, a reduction in the number of customers participating also reduces the costs associated with the service. As previously discussed, PSE has calculated a scenario where the participation in the leasing service is reduced by 50 percent (which is more than the 28 percent reduction Public Counsel argues for[232]),and though PSE's earnings on the leasing service would be less than projected, it would still be a sustainable service.[233] Additionally, as previously discussed, PSE has been conservative in projecting participation because it assumed zero participation by customers who were "neutral" to a leasing service.[234] The bottom line is Public Counsel's assertions that the market share is 28 percent less than what PSE projected is of little significance because customers are held harmless from any divergence in PSE's projections of customer participation.

3. PSE's equipment costs are not speculative.

79 In its initial brief, PSE addressed in detail that its equipment costs are not speculative but are based on actual costs for specified equipment, submitted by installers and suppliers in the industry who are interested in partnering with PSE in this leasing service.[235] The leasing tariff sheets include the specifications for the equipment to be leased, in the same manner as PSE's existing water heater rental tariff specifies the equipment that customers currently rent. Thus,

[230] McCulloch, Exh. No. MBM-7HCT, at 35:3-9.
[231] Highly Confidential Pricing Model, O'Connell, Exh. No. ECO-5HC.
[232] Public Counsel Initial Brief, ¶¶ 38-41.
[233] McCulloch, Exh. No. MBM-7HCT, at 35:10-36:4.
[234] *See* McCulloch, Exh. No. MBM-40HC.
[235] PSE Initial Brief, ¶¶ 92-93.

PSE's rates are not speculative, contrary to arguments made by Public Counsel and other parties and the Commission should approve the rates as filed.

80 If the Commission thinks it would be helpful to have more specificity in terms of the cost of the equipment to be leased, it may follow the approach it has done in the past and allow a compliance filing. For example, when the Commission ordered WNG to add a more energy efficient water heater option to its existing water heater rental program and instructed WNG to file a compliance filing with rates for the new equipment.[236] The Commission authorized PSE's CNG service before rates were filed, and authorized a later compliance filing with PSE's cost model that would be used to set rates.[237] While PSE does not expect any material changes to the prices in its tariff,[238] it is reasonable to undertake such an update if the Commission chooses to authorize it, and the update should assuage concerns raised by other parties that the rates are speculative because the contracts are not yet finalized.

4. PSE's failure rate is reasonable.

81 Public Counsel's argument that PSE's rates are improper based on failure rates used in the pricing model should be rejected by the Commission.[239] PSE has demonstrated that it used its historical failure rate from its water heater rental program to set the failure rates.[240] No party has offered any evidence that different failure rates should be used.[241] If the failure rate proves to be higher than PSE's historical failure rate, customers will bear no adverse consequences; as discussed above, it is PSE shareholders that will bear the risk for higher

[236] PSE Initial Brief, ¶ 131.
[237] *In re Tariff Revisions of PSE Designating a New Schedule No. 54, Optional Gas Compression Service*, Dkt. No. UG-140721, Order 01, ¶ 9 (July 24, 2014).
[238] McCulloch, Exh. No. MBM-7HCT, at 10:10-14; Exh. No. MBM-12.
[239] Public Counsel Initial Brief, ¶¶ 45-47.
[240] McCulloch, Exh. No. 7HCT, at 10:15-1:16:2.
[241] *Id.*

costs associated with the leasing service.[242] Moreover, once the service has operated, PSE will have additional data on which to base its failure rate when it updates rates in the future.[243]

5. The proposed rates are not excessive as compared to market alternatives.

82 Parties continue to ignore the fact that PSE's lease service offers customers a different model than the sale of equipment. Parties err by comparing PSE's proposed all-inclusive lease—with its turn-key option, seamless eligibility screening, repair and maintenance for the full lease terms, and replacement of failed equipment during the full lease term—to the sales option offered in the market. Because they do not undertake an accurate comparison, they reach the incorrect and subjective conclusion that the rates for the lease service are excessive.

83 As addressed in detail in PSE's Initial Brief, both Staff and Public Counsel ascribe no value to components of PSE's lease service that are very important to customers such as the maintenance, repair, and replacement of failed equipment during the lease term.[244] PSE's 2014 survey showed that 68 percent of survey respondents stated that the inclusion of maintenance (including repair and replacement) was "important" or "very important" in terms of inclusion in the HVAC lease offering, and 77 percent of respondents stated that the inclusion of maintenance (including repair and replacement) was "important or "very important" in terms of inclusion in the water heater lease offering.[245]

84 In its Initial Brief, SMACNA misrepresents the evidence when it says "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."[246] In fact, the very language SMACNA quotes refutes SMACNA's inaccurate statement. The language from PSE's survey

[242] PSE Initial Brief, ¶ 24.
[243] McCulloch, Exh. No. MBM-1T, at 20:6-21:2.
[244] PSE Initial Brief, ¶¶ 105-06.
[245] McCulloch, Exh. No. MBM-18, at 42.
[246] SMACNA Initial Brief, ¶ 49.

made clear that the PSE's lease option is much more than a sales option: "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*."[247] The survey further clarified that "maintenance" includes repairs and replacement.[248] Additionally, the survey expressly compared the lease term, attributes and rates with the cost to purchase the equipment. With respect to the space heat option, the survey specifically advised survey respondents that "[t]he contract duration would be 17 years, and the estimated monthly charge is $60. This is compared to the cost of purchasing the product outright (at around $1500, with a $650 installation cost) and paying for maintenance out of pocket."[249] Based on this information provided to respondents in the 2014 survey, approximately 20 percent of respondents were very likely or likely to lease space heating equipment, and approximately 25 percent of respondents were neutral.[250] Similar information was provided to customers in the 2014 water heater lease survey.[251] Based on the information, approximately 32 percent of respondents were very interested or interested in leasing water heater equipment and another 27 percent were neutral.[252] In summary, the evidence demonstrates that PSE's lease option differs considerably from the sale of this equipment currently offered in the market.

6. PSE's proposed rates are not discriminatory.

85 In its Initial Brief, PSE responded to Staff's argument that because the tariffed lease rate does not reflect the precise cost of serving each customers, the lease rates are unduly and

[247] McCulloch, Exh. No. MBM-18, at 9 (emphasis added).
[248] *Id.*
[249] *Id.* at 28.
[250] *Id.*
[251] *Id.* at 37.
[252] *Id.*

unreasonably discriminatory.[253] As PSE noted, when looking at PSE's electric and gas rates in general, nearly all costs of service are based on averages, including the basic charge, the average of monthly average rate base, and the overall cost of delivering electricity and gas to each PSE customer.[254] Similarly, PSE's lease service uses some averages in setting rates, but this does not make PSE's approach unduly discriminatory. All customers leasing standard vent natural gas tank style water heaters, up to 55 gallons and with an efficiency of .62 Energy Factor will pay a monthly lease rate of $19.13 per month. Some customers will require more repair or maintenance service than others, but their rates will be the same for the same type of equipment. Some customers may need more attention from PSE or installers in the standard installation phase, but their rates will be the same for the same type of equipment. This is consistent with other aspects of PSE's tariffed rates for electric and natural gas service.

86 It is puzzling that Staff points to averages for repair costs, maintenance costs and costs of bad debt as unduly discriminatory,[255] when PSE similarly uses averages of these costs in its general rate filings.[256] PSE does not calculate the repair costs that will be incurred by each customer and factor that into each individual's rate. Similarly, in general rate cases, PSE averages the bad debt over a multi-year period to reach an average amount to be factored into rates.[257] The use of averages in setting rates does not make the rates discriminatory.

87 Staff's concerns can largely be alleviated with a compliance filing, that PSE has testified can occur within 60 days of the Commission's final order in this case, after contracts have

[253] Staff Initial Brief, ¶¶ 65-69.
[254] PSE Initial Brief, ¶¶ 101-02.
[255] Staff Initial Brief, ¶65.
[256] PSE Initial Brief, ¶ 102.
[257] *WUTC v. PSE*, Dkt. Nos. UE-090704 & UG-090705, Order 11, ¶ 98 (April 2, 2010) (noting PSE's use of multi-year averages for bad debt expense).

been executed with PSE's service partners.[258] Staff is flat wrong when it claims that if the Commission ordered a compliance filing, PSE would lease to customers at the currently filed rate between the time the final order is issued and the time that the compliance filing is made.[259] This issue was clarified on the stand, when Mr. McCulloch agreed that if the Commission ordered a compliance filing, PSE would not begin leasing to customers until the contracts were executed and the rates updated in a compliance filing.[260] Thus, there is no possibility that customers would sign a lease *before* the compliance filing is completed and the rates are refreshed based on executed contracts with service partners.

88 Similarly, the fact that PSE will update rates in future years, based on updated costs, does not create an undue preference or intergenerational inequity. The future updates will reflect more up to date information about costs of equipment, overhead, and repair costs. Cost will change over time, and the new leases should reflect the updated costs. Such an update does not make the cost of service for existing lease customers unreasonable or prejudicial.

89 Finally, the Commission should decline to adopt SMACNA's narrow interpretation of a compliance filing. WAC 480-07-880(1) allows the Commission to enter an 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. Thus, the Commission can order PSE to update its rates for the equipment currently specified in the tariff, once PSE enters into contracts for the leased equipment. This is within the parameters of WAC 480-07-880 and the Commission has in the past allowed similar compliance filings. For example, in the 1992 WNG rate case, the Commission

[258] TR. 336:16-337:3.
[259] Staff Initial Brief, ¶ 67.
[260] TR. 355:19-22.

accepted an offer by the company, made on rebuttal, to revise its water heater tariff to: (i) include a purchase option; (ii) increase the rate for existing water heaters; and (iii) offer new, efficient water heaters.[261] These were accomplished in the compliance filing. When authorizing the CNG tariff, the Commission conditioned its order on PSE filing its CNG Cost Model that was to be used to develop its service rates.[262] Similarly, on its own accord, the Commission ordered PSE to adjust its earnings sharing mechanism in PSE's decoupling dockets to reflect equal sharing by customers and the Company above PSE's authorized rate of return.[263] In PSE's 2013 Expedited Rate Filing case, which was heard by the Commission concurrently with PSE's decoupling case, the Commission also authorized PSE to implement a property tax tracker and file the mechanism in a compliance filing.[264] In those cases the Commission also ordered PSE to undertake detailed reporting of "information concerning the operation of the three mechanisms and the results that are being achieved."[265] The Commission stated its intent to "monitor closely the degree of success that these mechanisms achieve relative to the promise they hold."[266] This is also consistent with WAC 480-07-880(3) which allows the Commission, in a final order, to require "a party to report periodically to the commission with respect to designated subject matter." These cases demonstrate the Commission's ability to use the compliance filing to refresh rates and implement revisions to

[261] *WUTC v. WNG*, Dkt. UG-920840, Fourth Supp. Order Rejecting Tariff Filing; Authorizing Refiling, at 16-17 (Sept. 27, 1993).
[262] *In re Tariff Revisions of PSE Designating a New Schedule No. 54, Optional Gas Compression Service*, Dkt. No. UG-140721, Order 01, ¶ 9 (July 24, 2014).
[263] *In re Petition of PSE and NWEC For an Order Authorizing PSE To Implement Electric and Natural Gas Decoupling Mechanisms and To Record Accounting Entries Associated With the Mechanisms*, Dkt. Nos. UE-121697 & UG-121705 (consolidated), Order 07, ¶¶ 237, 245(June 25, 2013) (requiring PSE to make appropriate compliance filings to implement the electric and natural gas decoupling mechanisms and the rate plan, subject to the condition that the earnings test is modified to provide for equal sharing between PSE and its customers of any earnings that exceed the Company's adjusted overall rate of return of 7.77 percent.).
[264] *Id.* ¶¶ 241, 245 (in the ERF, ordering PSE to "make an appropriate compliance filing to implement the tracker").
[265] *Id.* at iii, ¶¶ 211-15.
[266] *Id.* at iii.

tariffs that were proposed by the utility in direct or rebuttal testimony, and to also impose changes to the tariffs—of the Commission's own accord—that were different from what the company proposed in either its direct or rebuttal case.

C. PSE Properly Used Conservation Savings

90 PSE's leasing service will provide benefits to all customers in terms of avoided energy use, greenhouse gas emissions, and generation and distribution capacity costs, as Dr. Faruqui testified.[267] It is entirely proper for PSE to quantify these benefits that inure to all customers, including the customers who do not participate in the program.

91 The Commission should reject Public Counsel's attempts to compartmentalize any service that reduces greenhouse gas emissions and avoids energy and capacity costs into the requirements of PSE's conservation portfolio, which is a ratepayer-funded conservation program.[268] It is consistent with State energy policy to pursue greenhouse gas emissions reductions and energy savings by every means available.[269] Yet Staff and Public Counsel discount the important system-wide benefits that will result from the lease service because they do not fit neatly into Schedule 120 and its TRC cost-benefit test, which is appropriate for customer-funded conservation programs, but not for the benefits that result from the lease service.[270] As PSE explained in its testimony and Initial Brief, a Commission imposed cost-benefit analysis is not appropriate and cannot be done for the leasing service.[271] Individual customers will weigh the costs and benefits of whether to lease equipment.[272] For a significant percentage of customers, the attributes of the lease service—such as ease of credit screening,

[267] PSE Initial Brief, ¶¶ 2, 77, 82.
[268] Public Counsel Initial Brief, ¶¶ 53-57.
[269] PSE Initial Brief, ¶¶ 37-39.
[270] *Id.*, ¶¶ 86-87.
[271] *Id.*, ¶¶ 79-85.
[272] *Id.*

limited to no upfront costs, and the peace of mind that comes with maintenance, repair and replacement throughout the lease term—are benefits that outweigh the costs of the lease service.[273] That is the relevant cost-benefit analysis. The remainder of the benefits that accrue to participating customer and to all non-participating customers are surplus. Customers are benefited by system-wide savings that may delay the need for generation and distribution capacity, result in less greenhouse gas emissions, and avoid energy usage.[274] These system-wide benefits further establish that the lease service is consistent with the public interest.

92 Public Counsel's reliance on WAC 480-109-100(8) is misplaced. This rule implements the Energy Independence Act and requires a utility's *conservation portfolio* to pass a cost effectiveness test. Both the Energy Independence Act and WAC 480-109 address PSE's *conservation portfolio*, which is funded by all ratepayers through Schedule 120. In contrast, the lease service is a separate tariff, outside the scope of the conservation portfolio, funded only by the customers who choose to lease water heaters and HVAC equipment.[275] In addition to providing benefits to the participating customers, this service has the benefit of reducing greenhouse gas emissions and avoiding energy and capacity costs for all customers.[276]

93 While one cannot know for certain the magnitude of the avoided greenhouse gas emissions and energy savings that will result from the acceleration of energy efficient equipment usage through the leasing service, we know that significant benefits will result. Dr. Faruqui has attempted to quantify these benefits based on customer interest in the service—as measured and affirmed by both the Cocker Fennessy survey and the earlier surveys PSE

[273] *Id.*, ¶ 83.
[274] *Id.*, ¶ 82.
[275] *Id.*, ¶¶ 86-87.
[276] *Id.*, ¶ 82.

conducted.[277] While parties dispute various inputs used by Dr. Faruqui, it cannot be disputed that with each energy efficient water heater, furnace, or heat pump leased, benefits will result. Even if these benefits are reduced by half, they are still significant. It is surprising that advocates of energy efficiency such as Staff and Public Counsel are willing to take a pass on this innovative avenue to reductions in greenhouse gas emissions and energy usage.

94 Finally, as Mr. McCulloch testified,[278] and as MBM-21 demonstrates, the 50 gallon water heater with an installed Energy Factor ("EF") of .62 water heater exceeds the NAECA federal standard. PSE properly assumed nine therms of energy savings for the 50 gallon .62 EF water heater, consistent with the DOE calculator.[279] Thus, when Public Counsel argues that PSE claims energy savings for lease equipment that "largely just meets minimum federal standards"[280] it fails to recognize the benefits DOE calculates for the 50 gallon water heaters.

D. The Parties' Consumer Protection Concerns Are Disingenuous

95 PSE addressed the consumer protection concerns in its Initial Brief. The Commission has strict consumer protection standards with which PSE must comply.[281] The fact that all of these are not affirmatively set forth in the tariff does not mean that PSE will not follow them. To the contrary, PSE intends to follow all laws, rules and regulations set forth by the Commission.[282] It is not necessary to restate the law or rule in each tariff schedule.

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[277] *Id.*, ¶¶ 75-90.
[278] McCulloch, Exh. No. MBM-7HCT, at 36:9-10; TR. 330:3-8.
[279] Faruqui, Exh. No. AF-5HC, at 148.
[280] Public Counsel Initial Brief, ¶ 60.
[281] PSE Initial Brief, ¶¶ 120-29.
[282] *Id.*, ¶ 128.

1. The tariff does not contain unfair terms.

96 PSE disagrees with Staff's conclusion that the tariff contains unfair terms. PSE has addressed this in its Initial Brief.[283] The terms Staff cites to are common terms in a lease agreement. However, if the Commission believes that specific terms of the tariff are inconsistent with its rules or unfair, it can order PSE to amend or remove those terms.

2. There are not significant extra-tariff charges.

97 Staff's argument that the tariffs are unfair because they include the possibility that some customers may pay non-standard installation costs is inconsistent with current Commission practice and several tariffs on file with the Commission.[284] PSE addressed non-standard installation costs in detail in its Initial Brief.[285] Separate payment for non-standard costs occurs with other tariffed services,[286] licensed Washington contractors[287] and Mr. Wigen testified that it is entirely reasonable for PSE to structure its service model this way, and this is consistent with the practice in the industry.[288] He also testified that non-standard installation costs should be rare and that "HVAC/water heating contractors know they can easily come up with a standard installation cost that fits the overwhelming majority of installations."[289] For PSE's lease service, customers will be given notice of the possibility of additional charges for non-standard installation costs, customers will be given the opportunity to pay for these costs on their bill over a three-month period, and if customers do not want to pay the non-standard installation costs they may cancel the lease without penalty.[290]

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[283] *Id.*, ¶¶ 126-29.
[284] *Id.*, ¶¶ 110-14.
[285] *Id.*
[286] *Id.*, ¶ 113.
[287] *Id.*, ¶ 111.
[288] Wigen, Exh. No. AJW-1T, at 11:1-2.
[289] *Id.* at 11:6-15.
[290] Tariff Sheet No. 75-L.

3. The tariff addresses foreseeable issues like any other tariff.

98 Staff argues that the lease tariffs are unfair because they fail to address what Staff terms as "foreseeable" issues likely to require Commission action.[291] But the issues Staff suggests should be raised in the tariff are not the type of terms that are found in other tariffs. Under Staff's view, the leasing tariff schedules should address upselling or pressure selling.[292] While PSE has stated repeatedly that it does not intend to engage in these practices,[293] these are not provisions found in PSE's tariff book. For example, there is no language in the conservation tariffs precluding PSE from using pressure selling tactic for its energy efficiency products, even though PSE is subject to penalties if it fails to meet its conservation targets. There is no language in PSE's CNG tariff prohibiting pressure sales techniques for this service.

99 On one hand, parties complain that the tariff is too lengthy,[294] while on the other hand the parties claim that there are insufficient terms in the tariff to address every possible scenario that could potentially arise.[295] The parties cannot have it both ways. The tariff is reasonable, as filed. The Commission has broad authority under its consumer protection provisions to address the unlikely scenarios Staff raises. And Public Counsel's "inference" that customers will already have committed to the service before obtaining full access to the terms and conditions of service[296] is completely false.[297]

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[291] Staff Initial Brief, ¶ 78.
[292] *Id.*
[293] Englert, Exh. No. EEE-3T, at 5:9-21.
[294] *See, e.g.*, TR. 199:5-200:6 ("Is it PSE's expectation that customers will read the Company's tariff to educate themselves on the terms of the proposed transaction?").
[295] *See, e.g.*, Staff Initial Brief, ¶¶ 77-78; Public Counsel Initial Brief, ¶ 66. In fact, Public Counsel questions whether customers will read the 19-page tariff, it also wished PSE would "provide additional documents to explain the terms and conditions of the service to customers." Public Counsel Initial Brief, ¶ 67.
[296] Public Counsel Initial Brief, ¶ 66.
[297] TR. 199:5-200:6.

100 Staff acknowledges that PSE plans to disclose to customers the total lease payment over the lease term as well as non-standard installation costs.[298] Customers will also be provided a lease agreement in the form approved by the Commission, and the terms of the tariff will be provided to customers.[299] PSE's weighted average cost of capital is publicly available to customers. However, Staff cries foul because PSE does not include a detailed breakdown of how the rates are calculated,[300] yet Staff fails to provide any authority as to why this would be required or helpful to customers. Moreover, some of the information is commercially sensitive, proprietary information from PSE's highly confidential pricing model. Such proprietary information is not available to customers who purchase a water heater or HVAC equipment from an outside contractor. Nor do PSE's gas and electric residential tariffs include a detailed breakdown of all the costs that go into the tariffed rates. PSE's disclosures are reasonable and consistent with other tariffed services.

4. Concerns of insufficient regulatory fees are a red herring.

101 PSE has rented water heaters for decades, and there is no evidence that the rental program caused a disproportionate number of complaints or occupied a disproportionate amount of the Consumer Protection Staff's time. Parties create a straw man, using hypothetical upon hypothetical, to assume that customers will be dissatisfied, bring an inordinate number of complaints, and PSE's regulatory fees will be insufficient to cover all the costs of the service. This argument is baseless. Moreover, the Commission has the authority to impose costs for specific proceedings if appropriate.[301]

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[298] Staff Initial Brief, ¶ 77.
[299] TR. 199:5-200:6.
[300] Staff Initial Brief, ¶ 77.
[301] *See* RCW 80.20.020 (allowing Commission to assess the cost of an investigation against a public service company).

5. PSE developed a reasonable transition plan for its existing water heater rental customers.

102 PSE has developed a plan to transition existing gas water heater rental customers to the new leasing service. The plan is set forth in Exhibit MBM-22. While this is not a fundamental component of PSE's leasing service, PSE is prepared to undertake this transition once the leasing service is approved by the Commission. PSE is also willing to further review and define an expedited transition plan provided that it can be done in a manner that does not harm participating customers or result in the premature termination of assets which remain within their forecasted service lives.

6. SMACNA's argument that PSE would be immune from consumer protection complaints is based upon a misrepresentation of the law.

103 SMACNA's argument that PSE would be operating in a jurisdictional "vacuum" totally immune from consumer protection violations under the Commission's rules is simply a misrepresentation of the law. While SMACNA cites RCW 80.04.110(1)(c) as the alleged basis for its "jurisdictional anomaly,"[302] it completely ignores and skips over the first clause of RCW 80.04.110 which provides that:

> Complaint may be made by the commission of its own motion or ***by any person or corporation***, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, or by the public counsel section of the office of the attorney general, or its successor, by petition or complaint in writing, ***setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of this title, Title 81 RCW, or of any order or rule of the commission***.[303]

104 Thus, the public service laws provide that any person, company, or even association (like SMACNA) could bring a complaint against PSE for a violation of the public service laws "or

[302] SMACNA Initial Brief, ¶¶ 31-32.
[303] RCW 80.04.110(1)(a) (emphasis added).

of any order or rule of the commission." If a competitor has a legitimate issue with PSE's rates, its installation processes, any other aspect of its service, or any Commission rule for that matter, it could bring a complaint against PSE. Thus, SMACNA's suggestion that PSE would somehow be immune from consumer protection complaints by competitors, and would be playing "offense, but never have to play defense,"[304] is baseless. SMACNA acts as though equipment leasing has never been offered by a public utility before by using scare tactics to suggest the laws of the state are inadequate. But Washington has a robust history of utilities offering equipment leasing programs for decades.

105 What SMACNA claims is a jurisdictional anomaly is not an anomaly at all. There are other situations in Washington law where the Consumer Protection Act ("CPA") applies to one party but not to another. SMACNA identifies one of these situations involving municipal utilities. A municipal utility can bring a claim against a company under the CPA, but the municipal utility is immune from claims under the CPA. As the Washington Supreme Court stated "although defendant PUD is not subject to the Consumer Protection Act, it may nonetheless claim its benefits and protection."[305] Thus, the fact that PSE "could play offense, but never have to play defense" under the CPA does not violate the structure set up in the CPA. It is consistent with the structure of the CPA. The statutory structure SMACNA complains about has been in effect with PSE's water heater rental tariff for decades, including when the Supreme Court considered *Cole*. There is no jurisdictional vacuum that violates the structure set up in the CPA and the public service laws, as SMACNA incorrectly argues.[306]

[304] SMACNA Initial Brief, ¶ 33.
[305] *WNG v. Public Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 98-99, 459 P.2d 633 (1969); *see also Keenan v. Allen*, 889 F. Supp. 1320, 1383 (E.D. Wash. 1995).
[306] SMACNA Initial Brief, ¶ 33.

106 Finally, SMACNA's suggestion that two utilities could divide the market between themselves is irrelevant because such a division would not have any impact on any unregulated company's market territory.[307] Whether one utility offers leasing in a particular service territory, or ten do, unregulated competitors could still offer leasing or whatever other service they wanted without any restriction. Frankly, the intervenors' concerns about PSE's proposed leasing service are surprising since they are not aware of any similar leasing service currently offered in the marketplace,[308] and believe there is no customer demand for one.[309]

107 SMACNA's discussion of the Regulatory Flexibility Act for telecommunications companies is irrelevant.[310] The telecommunications industry has been deregulated by federal law, while electric and natural gas services are not deregulated in Washington. The key point here is that the Legislature has seen fit *not* to enact a law similar to the Regulatory Flexibility Act for electrical and natural gas companies. More than four decades after the Washington Supreme Court ruled that regulated natural gas companies could lease water heaters and furnaces as a regulated service, the Legislature has not removed CPA exemptions that apply to electrical companies and gas companies. The Legislature's actions with respect to the deregulated telecommunications industry has no bearing on PSE's proposed leasing service.

7. Leasing will not create a burdensome regulatory process.

108 In arguing that PSE lease service will burden the Commission, SMACNA ignores the fact that PSE has offered rental services for decades without unduly burdening the Commission. Thus, there is no need for the Commission to adopt rules on an emergency basis to address

[307] *Id.*, ¶ 34.
[308] Fluetsch, Exh. No. BF-1T, at 5:14-16;
[309] *Id.*
[310] SMACNA Initial Brief, ¶ 35.

leasing, as SMACNA suggests.[311] Moreover, SMACNA exaggerates the process that will be involved for updating the lease tariffs periodically to reflect more up to date rates. Once the Commission approves the leasing service, it is unlikely that future updates to the cost components will be contentious. When future updates to rate schedules are necessary, PSE will file revised tariffs with supporting work papers, as it typically does, and the tariff revisions likely can be addressed through the open meeting process.

E. PSE's Proposal Has Been Consistent Throughout.

109 PSE's proposal has not been a moving target, as Staff argues. PSE has been transparent from the start about the challenges of setting rates for a new service, before that service is offered. Because this is a new service, there are limited historical costs and no actual participation percentages on which to base the rates. There necessarily will be some projections, as is the case when any new service is offered. That is why PSE originally filed a tariff that included a formula for setting rates, but without the specific rates.[312] After filing its tariffs, PSE received formal and informal input from Staff and other parties.[313] At the prehearing conference, PSE agreed to establish rates for the tariff in response to input from Staff, and the parties agreed to a date by which PSE would update its tariffs. It is disingenuous for Staff to argue that the updated tariff filed in February prejudiced Staff when the parties agreed that PSE would file the updated tariffs. Parties had several months to review the tariff schedules and supporting testimony and file their response testimony.

110 In order to establish rates for a service that is not yet being offered, PSE used cost information related to equipment, installation, and repair that was submitted by contractors

[311] *Id.*, ¶ 86.
[312] PSE Initial Brief, ¶ 18.
[313] *Id.*, ¶ 25.

through the RFQ process.[314] PSE also worked with contractors to determine standard versus non-standard installation costs.[315] PSE developed a detailed pricing model.[316] PSE arranged for an outside survey to further gauge the number of customers who would participate in the service;[317] the findings were largely consistent with its earlier survey.[318] PSE measured the benefits that are projected to result from the leasing service.[319] After doing all of this, and as agreed at the prehearing conference, PSE updated its tariff with rates and to address concerns expressed by other parties.[320] PSE's direct testimony fully set forth PSE's case in chief.

111 There is nothing fundamentally changed in rebuttal from what PSE proposed in its initial tariff filings. PSE still proposes to offer a leasing service. On rebuttal PSE made additional commitments of reporting and other steps it would take if ordered by the Commission, but these do not change the essence of the lease service offered.[321] This is basic reporting on the effectiveness of the service, which the Commission is authorized to order, of its own accord, at the end of a case.[322] Moreover, as pointed out in PSE's Initial Brief, the Commission has in the past accepted similar commitments from parties on rebuttal.[323]

112 PSE's offer on rebuttal to refresh rates within 60 days, when the actual contracts with its partners are executed, is reasonable and not a shift from its original proposal. Given that this is a new service and it is not feasible to execute contracts before the Commission approves the service, it is reasonable for PSE to offer to refresh the rates. Additionally, if the Commission

[314] *Id.*, ¶¶ 34, 92.
[315] *Id.*, ¶ 111.
[316] *Id.*, ¶¶ 94-96.
[317] *Id.*, ¶ 17.
[318] *Id.*, ¶¶ 25-33.
[319] *Id.*, ¶¶ 75-78.
[320] *Id.*, ¶ 34.
[321] *Id.*, ¶¶ 35, 130-32.
[322] WAC 480-07-880(3) ("The commission may enter a final order that requires a party to report periodically to the commission with respect to designated subject matter.").
[323] *Id.*, ¶¶ 130-32.

wants PSE to expand its options of water heaters and HVAC equipment, for example to offer a higher input capacity natural gas furnace, PSE has offered to add such equipment in its compliance filing, though it is not necessary from PSE's perspective to do so. The Commission has ordered such expanded offerings in the past.[324]

IV. CONCLUSION

113 In summary, PSE proposed to offer a leasing service because it has been requested by customers, it is an opportunity to address a gap in the market, it is a service that will advance the state energy policy and move to a more integrated and energy efficient future, it builds and improves on PSE's past experience offering water heater rentals, and it will benefit all customers. This was all true in PSE's original filing, and it remains true today.

Respectfully submitted this 19th day of September, 2016.

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[324] *WUTC v. WNG*, Dkt. No. UG-920840, Fourth Supp. Order Rejecting Tariff Filing; Authorizing Refiling, at 17 (Sept. 27, 1993).