BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, Respondent.	DOCKETS UE-151871 and UG-151872 (*consolidated*)

REPLY BRIEF ON BEHALF OF COMMISSION STAFF

September 19, 2016

ROBERT W. FERGUSON
Attorney General

CHRISTOPHER M. CASEY
JEFF ROBERSON
Assistant Attorneys General
Office of the Attorney General
Utilities & Transportation Division

1400 S Evergreen Park Drive S.W.
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-11

REDACTED VERSION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Table of Administrative Cases

Statutes

Other Authorities

I. INTRODUCTION

1 Puget Sound Energy seeks to categorically expand the scope of its regulated utility service to include the business of merchandising and financing equipment. In that pursuit, the Company presents a deficient and ever-changing filing unfit for Commission review. To gain preapproval of its entire leasing platform, the Company advocates for a hollow standard of review and encourages the Commission to abdicate its responsibility to meaningfully evaluate the proposed leasing service. The Company's litigation strategy reflects the fact that its radical proposal contravenes both state law and the public interest.

2 Staff, Public Counsel, and the two intervening parties anticipated and rebutted the arguments made by PSE in its initial brief. Therefore, this reply brief is necessarily limited in scope to addressing inaccurate, misleading, or contradictory claims from the Company that could be cause for confusion. The Commission should emphatically reject PSE's woefully inadequate and unlawful proposal.

II. DISCUSSION

A. PSE Seeks to Evade Meaningful Review of Its Proposed Service

3 PSE advocates for a hollow standard of review and encourages the Commission to abdicate its responsibility to meaningfully evaluate the Company's proposed leasing service. According to the Company, there is "no specific test" for reviewing its proposal, so the Commission must look to the "laws, public policies, and values of the state" to determine whether the proposed service is in the public interest.[1] The Company then selectively cites disparate statutes concerning energy efficiency and the decisions upholding the legacy rental program to contend that leasing equipment is "in the public interest as a matter of law".[2] The

[1] Initial Br. of Puget Sound Energy (PSE Br.) at ¶ 36.
[2] *Id.* at ¶¶ 37-40.

Company's leasing of equipment, however, is not preordained as in the public interest. PSE bears the burden to prove that its proposed service is both lawfully a regulated utility service, and that expanding its lines of business in the manner proposed is in the public interest. Both determinations involve questions of law and fact based on the filing that PSE presents.[3] Here, PSE's alarming filing demonstrates the proposed service contradicts both law and the public interest. The Commission should reject the filing.

4 PSE paints an incomplete picture for the Commission. The Company avoids addressing the laws, public policies, and values of the state that promote and protect free-market competition;[4] that justify regulation by the Commission on the basis that the regulated utility is a natural monopoly providing a service affected with the public interest;[5] and the express legislative directive that equipment merchandising is not subject to economic regulation by the Commission.[6] PSE provides an incomplete account of the laws, public policies, and values of the state in an attempt to categorically expand the scope of regulated utility service without meaningful review of its proposed service.

5 Importantly, PSE articulates no principle that limits the scope of regulated utility service or the future creep of its leasing platform. The Company only offers a laundry list of

---

[3] *See Inland Empire Rural Elec., Inc. v. Dept. of Pub. Serv.*, 199 Wash. 527, 538, 92 P.2d 258, 263 (1939).
[4] RCW 19.86.920 ("The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition."); *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wash. 2d 656, 684, 911 P.2d 1301, 1315 (1996) ("Washington's Consumer Protection Act was enacted to promote free competition in the marketplace for the ultimate benefit of the consumer").
[5] *In re Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies- Interconnection With Electric Generators*, Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third-Party Owners of Net Metering Facilities, Docket UE-112133, ¶ 63 (July 30, 2014) (*See Munn v. Illinois*, 94 U.S. 113, 151-52 (1876); *State ex rel. Stimson v. Kuykendall*, 137 Wash. at 609, 243 P. at 836.); *see also Tanner Elec. v. Puget Sound*, 128 Wn.2d 656, 666, 911 P.2d 1301, 1306 (1996) ("In return for their monopoly status, public utilities are regulated by the State through the WUTC." Referring to *Jewell v. Wash. Utils. & Transp. Comm'n*, 90 Wn.2d 775, 776, 585 P.2d 1167 (1978)); *see also* RCW 54.48.020.
[6] RCW 80.04.270.

statutes, Commission precedent, and regulatory principles that it believes have no applicability to its proposed service.[7] Of note, PSE acknowledges that any regulated service must be "connected" to its gas and electric service, but the Company attempts to conceal that the defining feature of its gas and electric service is the sale of energy because its proposal lacks any credible connection therewith.[8] PSE misrepresents that the equipment it would offer meets the statutory definition of "electric [or gas] plant" because it would be "used to facilitate the furnishing of heat", as opposed to the "furnishing *of electricity [or natural gas] for* light, heat, or power"[9] However, the definition's express reference to the "sale or furnishing of electricity [or natural gas]" is vital to the statute's proper interpretation because, as the Company argues, "no clause or individual words of a statute should be deemed superfluous."[10]

6 Pursuant to applicable court and Commission precedent, the proposed service is not a regulated utility service as a matter of law if it lacks a legitimate public purpose connection to its sale of energy.[11] Staff found that PSE seeks to inappropriately expand the definition of "electric [and gas] plant" to create a new class of rate base consisting of consumer goods.[12] Staff further found that these behind-the-meter consumer products do not qualify as electric or gas plant because they do not "'facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat, or power.'"[13] The Company should not earn any

---

[7] *E.g.*, PSE Br. at ¶¶ 71-73 (contending that the Commission should not apply the factors set out in its interpretive statement concerning third-party ownership of net metering facilities), ¶¶ 80-81 (contending that no costs-benefits test applies), ¶¶ 86-87 (urging the Commission not to apply the Total Resource Cost test), ¶¶ 97-100 (arguing traditional ratemaking principles such as the known and measurable standard do not apply).
[8] PSE Br. at ¶ 55
[9] PSE Br. at ¶ 55 (citing RCW 80.04.010(11), (15)).
[10] PSE Br. at ¶ 47 (citing *Cole v. Wash. Natural Gas Co.*, 79 Wn.2d. 302, 308 (1971)).
[11] *See* Initial Br. on Behalf of Comm'n Staff (Staff Br.) at ¶¶ 18-20.
[12] O'Connell, Exh. No. ECO-1HCT at 14:16-15:17.
[13] O'Connell, Exh. No. ECO-1HCT at 19:5-11 (*citing* RCW 80.04.010(11), (15)).

return on equipment that does not qualify as plant.[14] PSE, however, seeks to eliminate all reasonable restraint on the scope of its regulated utility service so that it can leverage its monopoly position to sell consumer goods, and thus earn a rate of return on an ever-expanding portfolio of rate base eligible items.[15]Approving PSE's radical proposal would establish an ill-advised precedent given the Company's express plans to rapidly expand its leasing platform to offer additional products and services.[16]

B. PSE Distorts Staff's Recommended Principle in Order to Attack a Ridged Bright-line Test

PSE conflates Staff's position that the Company's proposed leasing service is not a lawful regulated utility service with the sham position that regulated equipment leasing is never lawful. Staff does not recommend that the Commission adopt a "bright-line rule" that regulated utility service ends at the meter under all circumstance, as PSE claims.[17] Nor does Staff testify that PSE may never lease end-use equipment.[18] Rather, Staff recommends that the Commission affirm that regulated utility service ends at the customer meter *unless* the overreaching service is (1) narrowly tailored to provide compelling net-benefits to all customers, or (2) otherwise fulfills some statutory purpose articulated in the public service laws.[19] Staff thus articulates two broad, flexible conditions that can serve as a sufficient public purpose connection to the Company's sale of energy to bring a hypothetical equipment leasing service within the scope of Commission-regulated utility service. PSE's propose service, however, meets neither of these conditions.

---

[14] *See* O'Connell, Exh. No. ECO-1HCT at 12:10-15:17, 19:5-11 (Staff, therefore, has challenged PSE's use of its weighted cost of capital in calculating its rate of return. *See* PSE Br. at ¶ 105, n. 263.).
[15] Staff Br. at ¶¶ 39-40.
[16] *See id.* at ¶ 5.
[17] PSE Br. at ¶ 53; *see* Staff Br. at ¶¶ 49-52.
[18] Cebulko, Exh. No. BTC-1HCT at 10:1-13, 41-1:10.
[19] *Id.* at 10:1-13.

8 The Commission has established, and the Court has affirmed, that regulated utility service may include equipment leasing if the service has a legitimate public purpose connection to the utility's sale of energy. In the 1960's, promoting gas sales and improving system load factor served as the public purpose connection that justified the Company's legacy rental program.[20] However, neither the Commission nor state courts have ever addressed whether the customer meter serves as an appropriate boundary, subject to exceptions, for rate-based eligible system equipment used to provide regulated utility service.[21] Staff's above-mentioned principle is fully consistent with legal precedent, and provides an intuitive and practical distinction for the appropriate bounds of regulated utility service that can help inform the Company's future filings. PSE, however, ignores the broad and flexible conditions articulated by Staff in order to attack a non-existent, rigid bright-line test.

9 PSE's straw man argument serves only to distract from the Company's deficient and ever-changing filing.[22] It also reflects the Company's broader strategy: to gain preapproval of the leasing platform by evading substantive review. The Commission has established three factors for determining whether a particular service is a public service subject to Commission regulation; these factors arise from state court decisions on the public service requirement embedded in the public service laws.[23] Analysis of the factors demonstrates that

---

[20] *Cole v. Wash. Natural Gas Co.*, U-9621, at 17-31 (1968); Staff considers PSE's legacy water heater rental program as no longer meeting the stated goals of 50 years ago and, therefore, worthy of reconsideration as a regulated function.

[21] *See Cole v. Wash. Natural Gas Co.*, U-9621 (1968); *Cole v. Wash. Util. & Transp. Comm'n*, 79 Wn.2d 302 (1971); *Wash. Utils. & Transp. Comm'n v. Wash. Nat'l Gas Co.*, Docket No. UG-920840, Fourth Supplemental Order, (Sep. 27, 1993).

[22] *See* Staff Br. at ¶ 80.

[23] *In re Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies- Interconnection With Electric Generators*, Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third-Party Owners of Net Metering Facilities, Docket UE-112133, ¶ 59 (July 30, 2014) (citing *Inland Empire Rural*

PSE's proposed leasing service is devoid of any features of a Commission-regulated utility service.[24]

C. The Proposed Leasing Service is an Unlawful Merchandising Program

10 Public service companies cannot merchandise equipment subject to economic regulation by the Commission.[25] Here, PSE attempts to do exactly that.[26] Applying the proper accounting principles,[27] or state consumer lease law,[28] PSE's leasing program is a merchandising program. PSE, nevertheless, contends that the proposed contracts are leases "as a matter of law" under the UCC.[29] Not so.

11 Washington has adopted UCC § 1-203,[30] which sets out a two-pronged test that "looks to the underlying substance" of what the parties call a lease "to determine if it is really a sale."[31] Where (1) the lessee cannot terminate his or her obligation to pay for the right to possession and use of a good and (2) the presence of any one of four independent factors "indicate[s] that the lessor does not retain any 'residual interest in the leased property," the transaction is a sale.[32] These factors include a lease term that equals or

---

Elec., Inc. v. Dept. of Pub. Serv., 199 Wash. 527, 537, 92 P.2d 258, 262 (1939) ("A corporation becomes a public service corporation, subject to regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to a public use."); *United and Informed Citizen Advocates Network v. Util. and Trans. Comm'n*, 106 Wash. App. 605, 24 P.3d 471, (2001); *Clark v. Olson*, 177 Wash. 237, 31 P.2d 534 (1934); *State ex rel. Stimson v. Kuykendall*, 137 Wash. 602, 243 P. 834 (1926)).

[24] *See* Staff Br. at ¶¶ 31-38.

[25] RCW 80.04.270.

[26] PSE creates a straw man by contending in its initial brief that Staff argued that RCW 80.04.270 applies to leasing programs. Staff simply contended that this program *is* a merchandising program.

[27] O'Connell, Exh. No. ECO-8HCT at 30:0-42:3.

[28] *See* RCW 63.10.010, .020(4); 63.14.010(11).

[29] PSE Br. at 27-28.

[30] RCW 62A.1-203.

[31] *PSINet, Inc. v. Cisco Sys. Cap. Corp.*, 271 B.R. 1, 43-44 (Bankr. S.D.N.Y. Dec 18, 2001). Because the UCC is a uniform code, interpretations of its provisions by foreign jurisdictions are more than "mere persuasive authority." *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 846, 259, 234 A.2d 737 (1967); *see* RCW 62A.1-103(a)(3).

[32] *PSINet*, 271 B.R. 1 at 45 (quoting E. Carolyn Hochstadter Dicker and John P. Campo, *FF & E and the True Lease Question, Article 2A and Accompanying Amendments to UCC Section 1-201(37)*, 7 Am. Bankr. Inst L. Rev. 517, 537 (1999)); *accord* RCW 62A.1-203.

exceeds the economic life of the good and the lessor's option to purchase the good upon compliance with the lease terms for no additional, or nominal, consideration.[33]

12 The proposed lease agreements in this case are "disguised sales" under the UCC.[34] Under the proposed tariff, customers cannot terminate the agreement without purchasing the equipment,[35] meaning customers cannot terminate their obligation to pay for the right to possession and use of the equipment.[36] The agreement's term spans the useful economic life of the equipment,[37] and PSE emphasizes that it retains no residual value in any leased equipment by disposing of all equipment returned from its customers.[38] The tariff also allows customers to purchase the equipment after the final rent payment but before the end of the lease term for no additional consideration.[39]

13 Other facets of the tariff confirm that the proposed leases are actually sales. Customers would pay a total that exceeds the cost of the equipment due to PSE's weighted cost of capital, taxes, insurance, and maintenance.[40] PSE would retain the right to accelerate all payments under the tariff in the event of a default.[41] Customers bear all risk of loss in the event of damage to the leased equipment.[42] Finally, PSE essentially acts as a financier rather than as a supplier for its customers.[43] All of these "signposts" establish that PSE is selling

---

[33] RCW 62A.1-203.
[34] *In re Jll Liquidating, Inc.*, 341 B.R. 256, 272 (Bankr. N.D. Ill. April 27, 2006); *In re Bailey*, 326 B.R. 156 (W.D. Ark. May 10, 2005)
[35] Proposed Sched. 75, Subst. Sheet 75-U, § 5.12.
[36] *PSINet*, 271 B.R. at 44; *Fox v. Snap-On Credit Corp.*, 229 B.R. 160, 165 (Bankr. N.D. Ohio Nov. 24, 1998).
[37] *In re Marhoefer Packing Co.*, 674 F.2d 1139, 1145 (7th Cir. 1982); Cebulko, Exh. No. BTC-1HCT at 6:1-4.
[38] McCulloch, TR. 246:18-22; 348:21-349:6.
[39] *Id.* at 194:6-195:22, *see id.* 349:7-350:18.
[40] *In re Marhoefer*, 674 F.2d at 1145; O'Connell, Exh. No. ECO-1HCT at 11:11-14, 25:14-17.
[41] *In re Metrobility Optical Sys., Inc.*, 279 B.R. 35, 37 (D. N.H. May 30, 2002); McCulloch, TR. 347:13-348:9; Subst. Proposed Sched. 75, Sheet No. 75T at § 5.11.a.iii.
[42] *In re Taylor*, 209 B.R. 482, 488 (Bankr. S.D. Ill. June 12, 1997); O'Connell, Exh. No. ECO-1HCT at 28:4-5.
[43] *L.C. Williams Oil Co. v. NAFCO Cap. Corp.*, 130 N.C. App. 286, 291, 502 S.E.2d 415 (1998); *Litton Indus. Credit Corp. v. Lunceford*, 175 Ga.App. 445, 333 S.E.2d 373, 375 (1985); O'Connell, Exh. No. ECO-1HCT at 4:6-12.

the equipment to customers under the UCC.[44] For this reason alone, the Commission should reject PSE's proposed service as contrary to law.

D. PSE Failed to Demonstrate that the Proposed Service is in the Public Interest

14 PSE attempts to dodge scrutiny of the costs and benefits of its proposed service. The Company justifies its proposed service as a regulated public service based on "quantifiable benefits to participating and all non-participating customers."[45] Those quantified benefits, however, are illusory and based on deeply flawed assumptions.

15 PSE incorrectly contends that the proposed service is not subject to any cost-benefit analysis.[46] Expressly contradicting its aforementioned statement about quantifiable benefits, the Company argues that participating customers—not the Commission—must conduct the cost-benefit analysis because "benefits are customer specific and not quantifiable."[47] The Company suggests that Commission review of the so-called benefits would place "paternalistic value judgments on the benefits of the program."[48] According to PSE, "it is not necessary or possible to quantify the benefits"; only after the service is up and running can the Commission "infer from the customer's decision to participate" that the program is cost-effective.[49] For non-participating customers, PSE claims conservation benefits are a "costless bonus"[50] that will exist so long as at least one customer participates in the

---

[44] *In re Jll Liquidating, Inc.*, 341 B.R. at 272 (discussing the use of other factors to determine whether a lease that is not a sale under the bright line test discussed above is nevertheless a sale).
[45] PSE Br. at ¶ 74-75.
[46] *Id.* at ¶ 80.
[47] *Id.* at ¶¶ 80-83.
[48] *Id.* at ¶ 84.
[49] *Id.* at ¶ 81 (This wrongly assumes that customer participation is a measure of benefit. *See* Staff Br. at ¶ 40; Br. of Public Counsel at ¶¶ 69-72.).
[50] PSE Br. at ¶ 86.

program.[51] PSE argues here that the Commission should not substantively review the costs and benefits of its proposal.

16 PSE seeks to evade meaningful review because the costs and benefits of its proposal are deeply flawed and bear no relation to what the proposed service would actually deliver. The quantified conservation benefits that the Company presents do not reflect an achievable potential. PSE expressly acknowledges its benefit model merely illustrates the "'total possible benefits from the addressable market (i.e., market or economic potential).' In contrast, the pricing model [seeks] to conservatively predict the achievable potential of the service".[52] According to the Company's forecasted install rates, [redacted][53] [redacted][54] [redacted][55] [redacted][56] PSE's prediction of the achievable potential represents both squandered conservation opportunity and a possible violation of the state's Energy Independence Act.[57] Importantly, even PSE's prediction of the achievable conservation potential is illusory[58] because the Company has not committed to—nor would it be accountable for—delivering any quantifiable benefit.[59]

---

[51] *Id.* at ¶ 89.
[52] *Id.* at ¶ 90 (*citing* Faruqui, Exh. No. AF-4T at 20:8-12).
[53] O'Connell, Exh. No. ECO-5HC, (Highly Confidential – PSE Pricing Worksheet, tab 'Price Summary' Product number 32).
[54] O'Connell, Exh. No. ECO-5HC, (Highly Confidential – PSE Pricing Worksheet, tab 'Price Summary' Product number 39).
[55] O'Connell, Exh. No. ECO-5HC, (Highly Confidential – PSE Pricing Worksheet, tab 'Price Summary' Product numbers 44 and 45).
[56] Cebulko, Exh. No. BTC-8 (PSE Response to Public Counsel Data Request 6, Attachment A) (These are Company estimates of customer uptake; they do not represent what will actually happen if proposed program goes into effect.).
[57] Cebulko, Exh. No. BTC-1HCT at 38:5-21.
[58] An "illusory promise" is "An apparent promise which, according to its terms, makes performance optional with the promisor no matter what may happen, or no matter what course of conduct in other respects he may pursue, is in fact no promise. Samuel Williston, *A Treatise on the Law of Contracts* § 1A, at 5 (Walter H.E. Jaeger ed., 3d ed. 1957).
[59] Englert, TR. at 385:8-15.

PSE disingenuously oversells the "benefits" of its program to the Commission, and thereby signals it would do the same to customers if the program were approved.

17 Critically, PSE's rate and benefit models are entirely speculative because they rely on deeply flawed assumptions. While done inconsistently, the Company bases the two models on an "addressable market size" predicated on the annual deployment and cumulative installation of leased equipment units.[60] The assumptions the Company uses, however, are suspect because they are based on a wholly invalid customer survey[61] and a new customer credit eligibility standard that the Company dramatically changed after the close of the record.[62] PSE did not update its rates or benefit model to reflect its new, dramatically different assumptions.[63] Ultimately, the Company's flawed, ever-changing assumptions render both its proposed rates and benefit forecast inaccurate and invalid.

18 Of note, PSE changed its credit eligibility standard after the close of the record because it understands that the legality of its proposal is highly questionable. In particular, PSE dramatically altered its credit eligibility standard in response to criticisms that the proposed service is not a regulated utility service because the service is not sufficiently public.[64] PSE's entire case is one post hoc "pivot" after another.[65]

---

[60] PSE Br. at ¶ 76; McCulloch, Exh. No. MBM-7HCT at 33:4-12; O'Connell, Exh. No. ECO-5HC ("Market Share Assumptions" tab and "Program Assumptions" Tab, Lines 58-63); Cebulko, Exh. No. BTC-1HCT at 32:20-33:6; Faruqui, Exh. No. AF-1T at 16:6-18:2.

[61] *Compare* Initial Br. of Staff at ¶¶ 58-60; PSE Response to Bench Request No. 001; Teller, Exh. No. JET-1T at 10:17-21; Faruqui, Exh. No. AF-1T at 17:8-10.

[62] PSE Br. at ¶ 64.

[63] PSE did not revise its assumptions for the cost of bad debt or the addressable market share, which fundamentally affects the scale of the proposed service and therefore numerous other estimated costs embedded in the proposed rates.

[64] *See id.* at ¶¶ 62-64.

[65] McCulloch, Exh. No. MBM-65 at 1 ("While a recommendation to suspend [the proposed tariff] is not what PSE hoped for, the [leasing] team is pivoting its strategy. We will work on demonstrating how leasing is a key element of a customer focused 'Energy Company of the Future' and why regulation to support the utility evolution is vital."); *see also* Dockets UE-151871 & UG-151872, Staff Motion for Summary Determination, at ¶¶ 3-7 (July, 13, 2016).

E. Traditional Ratemaking Principles Apply to PSE's Proposed Service

19 PSE maintains that traditional ratemaking principles should not apply to the proposed leasing program, for two reasons. The Commission should reject both.

20 First, PSE contends that applying the traditional principles used to review regulated services here creates a "chicken and egg" problem.[66] That argument might have some merit if PSE had offered the Commission an "egg," instead of the mere shell of one. PSE has not presented the Commission a finalized program: it has not even selected any of the products (including makes or models) or service partners involved in the leasing program.[67] As the Commission has recognized, failure to select vendors or products indicates that the Company seeks preapproval of the leasing platform.[68] The Commission, of course, refuses to preapprove rate recovery.[69]

21 Regardless, PSE's argument that new programs cannot survive review under traditional ratemaking principles is spurious. Utilities may rate-base new programs if they present the Commission with best known data and later true up expenses and revenues for all participating customers.[70] That is not possible here, however, because the structure of the proposed service prevents any rate true up: participating customers are locked into the terms agreed to at signing for the entire term of the agreement.[71]

---

[66] PSE Br. at 43 (PSE, not Staff, creates the "chicken and egg" dilemma by claiming that a cost benefit analysis of the proposed program is not possible, and that only after the service is up and running can the Commission infer from customer participation that costs outweigh benefits.).
[67] McCulloch, Exh. No. MBM-7T at 7:8-12.
[68] *See Utils & Transp. Comm'n v. Avista Corp.*, Docket Nos. UE-150204 and UG-150205, Order 05 at 147-48 (Jan. 6, 2016).
[69] *Id.*
[70] *See e.g., Utils. & Transp. Comm'n v. Pacificorp d/b/a Pac. Power & Light Co.*, Docket No. UE-032065, Order 06 at 50-52, 236 P.U.R.4th 485 (Oct. 27, 2004).
[71] McCulloch, Exh. No. MBM-1T at 11:1-10.

22 Second, PSE asks the Commission to disregard traditional ratemaking principles and approve the proposed rates as a "'reasonable starting point.'"[72] The Commission has approved rates as a "fair, just, and reasonable starting point" where the utility provided concrete costs and justified the tariff on a cost-benefit basis.[73] Again, PSE did not provide the Commission with concrete costs here because it has not even selected the equipment it will offer or the vendors with whom it will do business. Putting those failures aside, PSE cannot justify the program on a cost-benefit basis because it has refused to perform any sort of cost-benefit analysis of the proposed service.[74]

23 Further, PSE's tariff is not a reasonable "starting point" given its flouting of cost causation principles:[75] participating customers would pay a tariffed-rate based on averages rather than the incremental costs of the products and services that the customer would actually receive.[76] Because those incremental costs are readily knowable and PSE could easily charge for them, PSE's use of averages creates undue or unreasonable preference for some of its customers while others suffer undue or unreasonable prejudice, [77] which means that PSE's tariff rate violates State law.[78] A violation of State law cannot serve as a reasonable starting point for rate-setting under any rational analysis.

---

[72] PSE Br. at 39 (citing *In re Petition of Puget Sound Energy*, Docket No. UE-140626, Order 01 at 6-7 (April 30, 2014)).
[73] *In re Petition of Puget Sound Energy*, Docket No. UE-140626, Order 01 at 6-7 (April 30, 2014); *id.* at 11-12 (Goltz, Comm'nr concurring).
[74] Cebulko, Exh. No. BTC-1HCT at 20:10-15,22:7-18, 27:6-16, 27:20-28:7, 29:6-9, 31:6-17, 34:12-20.
[75] O'Connell, Exh. No. ECO-1HCT at 5:6-7.
[76] McCulloch, Exh. No. MBM-1T at 19:19-23, TR. 223:20-225:2.
[77] O'Connell, Exh. No. ECO-1HCT at 5:2-7, 20:1-18, 21:13-21. PSE creates another straw man by contending in its brief that Staff argues that the Commission may never use averages. Staff simply argued that PSE's use of averages *here* created undue or unreasonable preference or prejudice in violation of RCW 80.04.090.
[78] RCW 80.04.090.

24 In any event, PSE's tariff is not a "starting point." The Company's proposal represents a significant long-term commitment. The agreements that customers would sign lock in customers to terms for 10- to 18-years.[79] Allowing PSE to sign customers to those agreements could create a decades-long boondoggle that, like the PSE's legacy rental program, may be difficult to unwind.[80]

F. The Proposed Tariff Creates Significant Consumer Protection Difficulties

25 PSE contends that the extensiveness of the Commission's regulation, as well as the voluminous nature of its tariff, work to prevent consumer protection problems. In this context, PSE grossly understates the consumer protection issues raised by its filing.

26 PSE's proposed tariff allows it to change the tariff's terms on a case-by-case basis. Specifically, the "Equipment Lease Agreement" consists of Attachment A to Schedule 75, along with the terms and conditions section of the tariff.[81] Using Attachment A, PSE's service partners may establish the Monthly Lease Payment, include non-standard charges, and set the term of the lease.[82] Further, PSE may, with the consent of its customer, change or add additional terms to the lease agreement without Commission review.[83] PSE's ability to freely alter the terms of the tariff provides it loopholes to avoid Commission regulation and oversight. In addition to creating significant consumer protection issues, these loopholes further demonstrate that the proposed service is dedicated to private, not public, use.[84]

---

[79] Cebulko, Exh. No. BTC-1HCT at 6:1-4.
[80] *See id.* at 13:11-18:7 (discussing problems with the legacy leasing program).
[81] Subst. Proposed Sched. 75, Sheet 75-D, § 4.3 (Of note, the Equipment Lease Agreement does not include the proposed rates listed on Subst. Proposed Sched. 75, Sheet 75-A and 75-B, only the Monthly Lease Payment in Attachment A).
[82] Subst. Proposed Sched. 75, Attachment A.
[83] Proposed Sched. 75, Sheet 75-W, § 5.18, Subst. Proposed Sched. 75, Attachment A.
[84] *See* Staff Br. at ¶¶ 32-33.

27 Moreover, approval of the tariff would give PSE something its market competitors would lack—a Commission determination that its rates are fair, just, and reasonable as well as a promise of active consumer protection oversight. Commission approval would thus enhance the Company's credibility with its customers and would promote sales. That would be especially problematic given the grossly unfair nature of the tariff terms, including the fact that the tariff assigns all risk of loss to the customer,[85] imposes harsh default penalties,[86] limits customer remedies and PSE's damages,[87] allows PSE to opt-out without giving customers a comparable option,[88] and imposes exorbitant rates.[89]

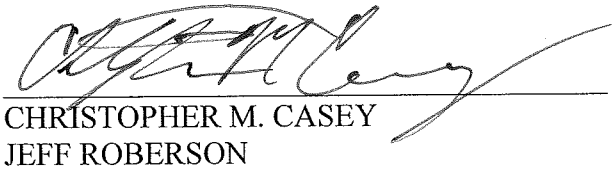
III. CONCLUSION

28 For the above reasons and those detailed in Staff's Initial Brief, the Commission should reject PSE's proposed service as unlawful and summarily dismiss PSE's case.

DATED this 19th day of September 2016.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General



CHRISTOPHER M. CASEY
JEFF ROBERSON
Assistant Attorneys General
Counsel for Washington Utilities and
Transportation Commission Staff

[85] O'Connell, Exh. No. ECO-1HCT at 28:4-5.
[86] McCulloch, TR. 347:13-348:9; Subst. Proposed Sched. 75, Sheet No. 75T at § 5.11.a.iii.
[87] Roberts, Exh. No. AR-1T at 8:3-8; Subst. Proposed Sched. 75, Sheet No. 75P at § 5.7.f.
[88] McCulloch, TR. 350:19-351:10; Subst. Proposed Sched. 75, Sheet No. 75U at § 5.12.b.
[89] *See* Kimball, Exh. No. MMK-1HCT at 26:5-7, 29:1-16, 48:11-49:17.