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December 23, 2009

Commission Secretary
Washington Utilities and Transportation Commission,
P.O. Box 47250
1300 S. Evergreen Park Drive, S.W.
Olympia, Washington 98504-7250

Re: Docket No. UE-090704 & UG-090705

Dear Commission Secretary:

Please find enclosed the original and twenty one (21) copies of the KROGER CO.'S MEMORANDUM IN OPPOSITION TO THE MOTION TO STRIKE OF PUGET SOUND ENERGY, INC., COMMISSION STAFF, NW ENERGY COALITION AND THE ENERGY PROJECT. filed in the above-referenced matter. Please note that we also filed the above via electronic mail.

By copy of this letter, all parties listed on the Certificate of Service have been electronically served. Please place this document of file.

Very Truly Yours,

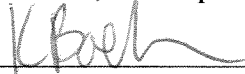


Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
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MLKkew
Enclosures
cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing on all parties by regular U.S. mail and electronic mail (when available) this 23rd day of December, 2009 upon the parties listed on the attached Certificate of Service.



Kurt J. Boehm, Esq.

MASTER SERVICE LIST

As of: 11/16/09 Docket: UE-090704 Page: 1
 Name: Puget Sound Energy (E012)
 Comments: General rate increase to recover increased electric cost. Annual
 revenue impact is approximately \$148,148,000 Million (7.4 percent).
 Original MSL Date:

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As of: 11/16/09 Docket: UE-090704 Page: 5
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**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,
Docket No. UG-090705**

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

Docket No. UE-090704

**KROGER CO.'S MEMORANDUM
IN OPPOSITION TO THE MOTION
TO STRIKE OF PUGET SOUND ENERGY,
INC., COMMISSION STAFF, NW ENERGY
COALITION AND THE ENERGY
PROJECT**

I. INTRODUCTION

On December 16, 2009 Puget Sound Energy, Inc., ("PSE" or the "Company") the Staff of the Washington Utilities and Transportation Commission ("Staff"), the NW Energy Coalition, and The Energy Project (herein referred to collectively as the "Joint Parties") filed a Motion to Strike those portions of the response testimony and exhibits of Public Counsel and the Kroger Co. ("Kroger") that relate to the sale of renewable energy credits ("RECs") by PSE. The Joint Parties argue that such testimony and exhibits should be stricken because they are outside the scope of issues presented in this case. Kroger submits the below Memorandum in Opposition to the Motion to Strike of the Joint Parties:

II. ARGUMENT

1. The Motion To Strike Fails To State The Grounds For Its Objection To The Admissibility Of Mr. Higgins' Testimony Relating To The Sale Of RECs.

A party may bring a motion to strike testimony before the Commission pursuant to WAC 480-07-375(1)(d). The standard for the admissibility of evidence in a Commission proceeding is set forth in WAC 480-07-495(1) which states:

“All relevant evidence is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. The presiding officer will consider, but is not required to follow, the rules of evidence governing general civil proceedings in nonjury trials before Washington superior courts when ruling on the admissibility of evidence.”

The presiding officer may exclude evidence that is irrelevant, repetitive, or inadmissible, whether or not a party objects to the evidence. Parties objecting to the introduction of evidence must state the grounds for the objection at the time the evidence is offered. The presiding officer may permit the party offering rejected evidence to describe briefly for the record its nature and purpose as an offer of proof. A written offer of proof may be required.”

In addition to establishing its own standard the above rule also directs the presiding officer to consider the rules of evidence governing civil proceedings in Washington. Rule 402 of the Washington Rules of Evidence provides:

“All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.”

The Joint Parties’ Motion to Strike is not supported by any assertion that Mr. Higgins’ testimony relating to the sale of RECs is irrelevant, repetitive, or otherwise inadmissible pursuant to WAC 480-07-495(1) or Rule 402. The sole basis for the Motion to Strike is the Joint Parties’ opinion that *“testimony and exhibits regarding the sale of RECs... is more appropriately addressed in the current open Docket UE-070725.”*¹ This is not adequate grounds to support a Motion to Strike. Even if the Commission agrees with the Joint Parties that testimony regarding the sale of RECs is *“more appropriately”* addressed in Docket UE-070725, that alone would not give rise to a sustainable Motion to Strike. The Movant must show that the evidence at issue is *“irrelevant, repetitive or inadmissible.”* The Motion to Strike did not even address this standard.

In fact, the Joint Parties’ Motion Strike fails to cite to a single statute, rule or Commission order that would prevent Kroger or any other party from submitting testimony relating to RECs in this Docket. The Motion to Strike cites the Commission’s Prehearing Conference Order 01 in Docket No. UE-070725, which states among other things that the nature of that proceeding is to address the sale of RECs. However, the Joint Parties do not

¹ Motion to Strike p. 2.

cite to any statement in that Order, or in any other Order, that would limit a party's ability to discuss the treatment of RECs in the context of this general rate case. The Motion to Strike fails to state any grounds for a sustainable objection to the admissibility of Mr. Higgins' testimony relating to the treatment of RECs.

2. Mr. Higgins' Testimony Related To RECs Is "Relevant Evidence."

Mr. Higgins' testimony related to RECs is "*relevant evidence*" in this Docket. Washington courts have held that: "[e]vidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is relevant evidence." *Hayes v. Weiber Enterprises, Inc.* 105 Wash.App. 611, 617, 20 P.3d 496 (2001). Mr. Higgins' testimony establishes Kroger's theory that the allocation of the proceeds of the sale of RECs will have a significant impact on the rates each customer will ultimately pay and therefore should be considered in this general rate proceeding. As Mr. Higgins explains in his Answer Testimony:

*"The REC and CFI sales clearly have implications for PSE's retail electric rates. The \$153.9 million electric rate increase proposed by PSE is substantial. The equities of the proposed allocation of the sale proceeds to PSE and other groups should be considered in the context of the overall impact to customers stemming from the rate case."*²

Kroger did not propose to consolidate Docket No. UE-070725 with this Docket because it understands that it may be administratively more practicable to litigate the issue of the treatment of the proceeds from the sale of RECs separately from the rate case. However, Kroger believes that it is vitally important for the Commission to have an understanding of the rate impact of the various proposed allocations of the proceeds of the sale of RECs when determining the rate allocation in this proceeding and to take those considerations into account when setting rates in this Docket. Mr. Higgins' Testimony addresses this very point.

² Answer Testimony of Kevin C. Higgins pp. 5-6.

III. CONCLUSION

For the reasons stated above Kroger requests that the Commission deny the Motion to Strike of the Joint Parties and admit the Answer Testimony of Kroger's witness Kevin Higgins in its entirety.

DATED this 23rd day of December, 2009.



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