

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

Relating to the Commission's Proceeding to
Develop a Policy Statement Addressing
Alternatives to Traditional Cost of Service
Ratemaking

DOCKET U-210590

INITIAL COMMENTS OF PUBLIC COUNSEL

November 29, 2021

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I. INTRODUCTION

1. The Public Counsel Unit of the Washington Attorney General’s Office (“Public Counsel”) files these comments in response to the Washington Utilities and Transportation Commission’s (“Commission”) Second Notice of Opportunity to File Written Comments dated October 20, 2021 (“Notice”). The purpose of the current docket is to provide guidance on alternatives to traditional cost of service regulation, including performance measures or goals, targets, performance incentives, and penalty mechanisms.
2. In December 2018, the Commission opened a docket to inquire about the adequacy of the current regulatory framework used in Washington to regulate energy utilities. Public Counsel urged the Commission in that docket to carefully evaluate whether the current regulatory framework is failing to meet the state of Washington’s objectives.¹ Public Counsel encouraged the Commission to implement changes only after careful consideration of the advantages and disadvantages of cost of service regulation and after identifying the specific problems arising from the current regulatory framework.²
3. At the time, Washington was experiencing an evolving technological and public policy environment.³ Developing industry trends and new technologies were impacting the energy section generally, although in different degrees among the states.⁴ Examples include declining

¹ Initial Comments of Public Counsel, ¶ 2, *Notice of Inquiry into the Adequacy of the Current Regul. Framework Employed by the Comm’n in Addressing Developing Indus. Trends, New Techs., and Pub. Pol’y Affecting the Util. Sector*, Docket U-180907 (filed Jan. 17, 2019).

² Initial Comments of Public Counsel, ¶ 3, Docket U-180907.

³ Initial Comments of Public Counsel, ¶¶ 6–7, Docket U-180907.

⁴ Initial Comments of Public Counsel, ¶ 7, Docket U-180907.

Distributed Energy Resources costs, improved information technologies that enable smart grid applications, adoption of cloud-based applications, and transportation electrification.⁵

4. The Clean Energy Transformation Act (CETA) of 2019 had not yet been enacted, but stakeholders generally agreed that public policy decisions would ultimately be made, settling the long-standing debate about clean energy and environmental goals.⁶ CETA expresses a clear preference for nonemitting and renewable electric generation and requires electric utilities to provide carbon neutral electricity by 2030 and carbon free electricity by 2045. CETA requires electric utilities to eliminate coal-fired electric generation from Washington load by 2025.

5. In Docket U-180907, the Commission held a workshop in December 2018, and requested that stakeholders file written comments in January and April 2019.

6. During the 2021 Legislative Session, Engrossed Substitute Senate Bill 5295 passed. ESSB 5295 requires utilities to file multiyear rate plans in their general rate cases.⁷ ESSB 5295 also requires the Commission to conduct a proceeding to develop a policy statement addressing alternatives to cost of service ratemaking.⁸ The Commission must provide “clarity and certainty to stakeholders on the details of performance-based regulation.”⁹ ESSB 5295 essentially requires the Commission to complete the work it began in 2018, which would have considered the advantages and disadvantages of performance-based regulation. Moreover, although ESSB 5295 specifically references a policy statement, the Commission has discretion to promulgate agency

⁵ *Id.*

⁶ Initial Comments of Public Counsel, ¶ 6, Docket U-180907.

⁷ RCW 80.28.425.

⁸ ESSB 5295, 67th Leg., 2021 Reg. Sess., §§ 1(1) and (2) (Wash. 2021).

⁹ ESSB 5295, 67th Leg., 2021 Reg. Sess., § 1(1) (Wash. 2021).

rules, if it determines that rules would be better suited to provide guidance than a policy statement.¹⁰

7. Below, Public Counsel responds to the questions posed in the Commission’s Notice.

II. RESPONSES TO NOTICE QUESTIONS

A. Do you have any thoughts, concerns, or suggestions on the proposed scope or timing of Phase 1?

8. Although ESSB 5295 created a “cart before the horse” scenario by requiring utilities to file multiyear rate plans before the Commission conducts a robust analysis of the current regulatory framework and how performance-based regulation should develop, Public Counsel is pleased that the Work Plan anticipates a degree of analysis and engagement that may allow for adequate policy development. The Work Plan anticipates that Phase 1 will take approximately one year to complete, as measured from the first substantial workshop planned for March 2022.

9. It is unclear what the Commission anticipates for December 2021 “RAP Report on PBR – Literature Review and Best Practices.” One interpretation is that RAP will provide a report or presentation in the docket. Another interpretation is that the Commission intends to engage in literature and best practices review and that it also expects stakeholders to engage in a similar exercise during this time period. It may be beneficial to create a central library of PBR literature and best practices. Public Counsel believes it would be appropriate and useful for the library of resources to be housed with the Commission, and both the Commission and stakeholders could

¹⁰ WAC 480-07-920(4) (allowing conversion of any interpretive or policy statement into rules through a formal rulemaking).

contribute to the library. It could be available through the docket or some other publically-accessible portal, so it is available to stakeholders and members of the public.

10. The Work Plan lists only one workshop in March 2022 for Phase 1. Public Counsel believes it would be beneficial to hold additional workshops to discuss the comments anticipated to be filed in June 2022 (Regulatory Objectives, Principles for Metric Design) and October 2022 (Identifying Performance Metrics). In our experience, it is useful for the Commission to have an opportunity to ask questions of stakeholders and to hear stakeholders engaging with and responding to one another. Additional workshops will also provide greater opportunity for broader public involvement or the involvement of organizations that have not traditionally been involved in UTC proceedings. Workshop interaction with the Commission is helpful to stakeholders to better understand the Commission's priorities and concerns. The draft Work Plan anticipates that the Commission will issue a policy statement on Phase 1 in March 2023 without the benefit of additional workshops to discuss important issues with stakeholders, and Public Counsel encourages the Commission to hold additional workshops.

B. What are the most important issues for the Commission to address in Phase 1?

11. The Commission should clearly identify the guiding goals and factors applicable in this docket. In Docket U-180907, Public Counsel identified certain priority goals that should be used to guide the Commission's evaluation of Washington's existing regulatory framework and any future changes to that framework.¹¹ Those priority goals are still largely applicable. Moreover, they are consistent with the non-exclusive factors the Legislature included in ESSB 5295.¹² A

¹¹ Initial Comments of Public Counsel, ¶ 21, Docket U-180907.

¹² ESSB 5295, 67th Leg., 2021 Reg. Sess., § 1(1) (Wash. 2021).

comparison of Public Counsel’s priority goals from Docket U-180907 and the non-exclusive factors listed in ESSB 5295 is shown in Table 1, below.

Table 1
Comparison of Public Counsel Priority Goals and ESSB 5295 Non-Exclusive Factors

Public Counsel’s identified priority goals in Docket U-180907	Non-exclusive factors identified in ESSB 5295
<p><i>Affordability</i> – regulation should strive to maintain reasonable and stable customer bills, with a focus upon total energy costs to consumers and protection of low-income and other disadvantaged customers.</p>	<ul style="list-style-type: none"> • Lowest reasonable cost planning, • Affordability, • Increases in energy burden, • Cost of service, • Resource acquisition (including conservation, generation, demand side management expansion, attainment of state’s energy and emissions policies), and • Rate stability
<p><i>Utility Cost Control</i> – regulation should encourage efficient and optimal utility capital investments and operating expenses, mitigating the capital expenditure bias caused by cost of service regulation and encouraging an optimal balance of input resources. This goal must be properly balanced with the other goals listed below.</p>	<ul style="list-style-type: none"> • Lowest reasonable cost planning, • Resource acquisition (including conservation, generation, demand side management expansion, attainment of state’s energy and emissions reduction policies), • Increases in energy burden, and • Procurement process
<p><i>Reliability</i> – a high level of service reliability at reasonable cost, with an ability to adapt to changing conditions and rapidly recover from service disruptions.</p>	<ul style="list-style-type: none"> • Increases in energy burden, • Service reliability, • Clean energy or renewable procurement, • Conservation acquisition, • Procurement process, and • Rapid integration of renewable energy resources
<p><i>Safety</i> – employee and public safety must remain a priority goal, given the inherent risks attached to utility service.</p>	<ul style="list-style-type: none"> • Service reliability, and • Fair compensation of utility employees
<p><i>Customer Equity and Engagement</i> – with impending changes to the electric system, reasonable sharing of costs and benefits of the current and future electric system across customer groups, with equal access to products, service, information, and opportunities to control energy bills.</p>	<ul style="list-style-type: none"> • Customer satisfaction and engagement, • Cost of service, • Affordability, • Increases in energy burden, • Integration of renewable energy resources, • Conservation acquisition, and • Demand side management expansion

<p><i>Capital Market Access</i> – regulation should maintain utilities’ financial integrity and access to capital on reasonable terms.</p>	<ul style="list-style-type: none"> • Cost of service
<p><i>Advancing Washington’s Public Policy Goals</i> – any modifications to the regulatory framework must help achieve state policy where there is a nexus with the Commission’s authority and the state’s policy goals.</p>	<ul style="list-style-type: none"> • Affordability, • Clean energy or renewable procurement, • Conservation acquisition, • Demand side management expansion, • Attainment of state energy and emissions reduction policies, and • Rapid integration of renewable energy resources

12. Public Counsel believes that the Commission should consider and identify the regulatory principles that must be maintained regardless of how the regulatory framework shifts. With clearly defined principles, the Commission can consider how different approaches to performance-based regulation will either support or undermine those principles. Only those approaches that support the identified regulatory principles should be considered appropriate for adoption. The Work Plan anticipates written comments addressing the regulatory objectives and principles for metric design. In the Commission’s notice seeking comments, it would be ideal for the Commission to identify the principles it intends to uphold, while inviting stakeholders to discuss or expand on the regulatory objectives and principles they deem important.

13. The Commission should evaluate how changes to the regulatory framework may affect the alternative regulatory tools already deployed by the Commission. The Commission has approved various mechanisms designed to address common criticisms of cost of service regulation, including decoupling on a “revenue per customer” basis and negotiated multiyear rate plans for Puget Sound Energy, Avista, and Pacific Power. It is possible that changes made to the regulatory framework may render past tools unnecessary or inconsistent with identified priorities.

14. The Commission should also ensure that each topic is clearly identified. ESSB 5295 provides that the Commission may consider performance measures or goals, targets, performance incentives, and penalty mechanisms. Metrics, targets, and goals are very different from performance incentive mechanisms that might include both incentives and penalties. It might be useful to identify various metrics, targets, and goals, but each may not be appropriate for incentives or penalties. It is important that the Commission carefully guide the discussion with sufficient clarity regarding when the discussion is focused on metrics, targets, and goals, and when the discussion is focused on performance incentives and penalty mechanisms. This clarity will ensure that discussions do not become muddled with stakeholders talking past each other and will yield helpful comments for the Commission.

C. Do you have any thoughts, concerns, or suggestions on the overall Work Plan, including on the proposed scope or timing of Phases 1 through 4?

15. The Commission is required to submit a report to the Legislature regarding this docket by December 2021. Public Counsel suggests that the Commission file the report to the Legislature in this docket, so it is easily available for stakeholders and members of the public.

16. Phase 1.A. of the work plan is described as “identify regulatory objectives, metric design principles.” It is highly appropriate to begin the inquiry by identifying regulatory objectives, but the Commission also needs to assess and evaluate the current regulatory framework for how well it meets objectives and where weaknesses exist. Doing both will “establish a foundation from which to implement modifications and/or refinements to the current regulatory framework.”¹³

¹³ *In re: Pub. Utils. Comm’n Instituting a Proc. to Investigate Performance-Based Regul.*, Docket 2018-0088, Order 35542 Admitting Intervenors and Participant and Establishing a Schedule of Proceedings, at 34 (Haw. June 20, 2018), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A18F21A72048B01105>.

17. From the draft plan, it is not apparent that assessing and evaluating the current regulatory framework is intended as part of the scope of this docket. Indeed, Phase 1 is described as “performance metrics,” which signals that evaluating the current regulatory framework may not be contemplated as an essential component of the analysis. Both exercises—identifying regulatory principles and evaluating the current regulatory framework—help to identify the specific problems to be addressed by alternatives to traditional cost of service regulation. As the Public Utilities Commission in Hawaii noted, comprehensively evaluating the current regulatory framework identifies which components may not be functioning as intended or no longer align with the public interest.¹⁴ Additionally, in evaluating the current situation, the Commission and stakeholders can identify specific areas of utility performance that should be targeted for improvement.¹⁵ Without doing the foundational work of evaluating the current framework and identifying regulatory principles, metric design principles will be difficult to craft because stakeholders and the Commission will not have a clear view on what problems are being addressed.

18. Phase 1.B. is described as “identify performance metrics.” Identifying performance metrics may be appropriate after identifying regulatory principles, assessing the current regulatory framework, and identifying metric design principles. This work, however, will be done without the benefit of Commission guidance about the issues addressed in Phase 1.A. Public Counsel encourages the Commission to provide guidance about Phase 1.A. issues through

¹⁴ *In re: Pub. Utils. Comm’n Instituting a Proc. to Investigate Performance-Based Regul.*, Docket 2018-0088, Order 35411 Instituting a Proceeding to Investigate Performance-Based Regulation, at 5–6 (Haw. Apr. 18, 2018), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A18D18B60624J02464>.

¹⁵ *Id.*

its notice seeking comments on Phase 1.B. or through an interim or draft policy statement that is offered for discussion.

19. Phase 2 is divided into two parts. Phase 2A involves reporting and review and Phase 2B involves multiyear rate plan revenue adjustment mechanisms. Phase 2A.A. is described as “establish performance metrics for each utility,” and Phase 2A.B. is described as “establish reporting and review process.” Phase 2B.A. is described as “identify approaches to utility cost containment,” and Phase 2B.B. is described as “identify principles for designing revenue adjustments within multi-year rate plans.” The topics described in the work plan for Phase 2 require a good foundation to be established in Phase 1, and are logical “next steps” for this docket. Altogether, Phase 2 will take approximately a year to complete, and this appears to be on par with what was anticipated in a similar docket in Hawaii.¹⁶

20. Public Counsel encourages the Commission to remain flexible with the time periods for each phase. It may be necessary to dig deeper into various topics, causing those topics to require more time to process, while other topics might move more quickly than initially anticipated.

21. Phase 3 will focus on performance incentive mechanisms and will identify performance baselines, establish goals and targets, and establish incentive mechanisms. It is unclear whether Phase 3 will establish uniform incentive mechanisms across the utilities, identify categories that would be appropriate for incentive mechanisms, or establish incentive mechanisms for each specific utility. It is also unclear whether the Commission contemplates establishing penalty mechanisms in addition to incentive mechanisms. In any event, any mechanism must be based on

¹⁶ *In re: Pub. Utils. Comm'n Instituting a Proc. to Investigate Performance-Based Regul.*, Docket 2018-0088, Order 35411, at 55 (Phase 1, Assessment and Evaluation, anticipated to take nine months; Phase 2, Design and Implementation, anticipated to take approximately 12 months.).

sufficient information and data, and the utilities are in the best position to provide data specific to their companies.

22. Phase 4 will establish a process to reevaluate and improve the policies developed in this docket. Public Counsel believes that it is important to recognize that policies, even when designed with the best intentions and the best information available, should be evaluated and tested over time to ensure that they are still functioning appropriately. Implementation may uncover unintended consequences, circumstances may change, new information may become available, and new solutions may be developed. Being nimble and able to adjust as the future requires is an important aspect of policy making.

D. Are there additional topics the Commission should consider addressing, or any additional phases the Commission should consider in this Work Plan?

23. As noted above, evaluating the current regulatory framework is an important foundational component to the inquiry in this docket.

24. The Notice describes the Legislative directive from ESSB 5295. It would be useful for the Commission to share its goals for the docket. For example, the Hawaiian Commission stated in a similar docket that it sought to “examine revenue and incentive mechanisms that encourage exemplary utility performance as well as PBR elements that may, over time, result in more fundamental changes to the regulatory framework.”¹⁷ The Hawaiian Commission continued by identifying the priorities it has for what performance-based mechanisms would add to Hawaii’s regulatory framework. Specifically, that commission identified greater cost control and reduced

¹⁷ *In re: Pub. Utils. Comm’n Instituting a Proc. to Investigate Performance-Based Regul.*, Docket 2018-0088, Order 35411, at 5.

rate volatility, efficient investment and allocation of resources whether classified as capital or operating expense, fair distribution of risks between utilities and customers, and fulfillment of state policy goals.¹⁸ The Commission could provide similar guidance to help direct the work in this docket.

25. The Commission might consider whether using a facilitator or moderator for each workshop would provide benefit to the inquiry. A facilitator experienced in leading multi-stakeholder, high-stakes discussions could be beneficial in this docket.

E. Do you have any other comments you would like to offer on the proposed Work Plan or on the development of policy under RCW 80.28.425 more generally?

26. Public Counsel offers the following general comments.

1. Advantages and disadvantages of cost of service regulation should be considered to ensure that alternative methods of regulation are implemented only if they offer improvements to the regulatory framework.

27. Traditional cost of service regulation offers both advantages and disadvantages. The Commission should consider the advantages and disadvantages of cost of service regulation in deciding how to implement ESSB 5295. Changes made to Washington's regulatory framework should not diminish utility accountability, and should allow the Commission to adequately and constitutionally balance the interests before it. Changes made to Washington's regulatory framework should result in fair, just, reasonable, and sufficient rates paid in exchange for safe and reliable service.

28. Tension occurs when moving away from cost of service regulation and toward alternative methods of ratemaking. Public Counsel believes that the overarching goal of any new regulatory

¹⁸ *Id.*

framework the Commission considers for implementation should be to preserve the important advantages of cost of service regulation while improving upon the disadvantages and more closely aligning regulatory incentives with public policy goals.

29. Advantages of cost of service regulation include fact-based and verifiable pricing, financial stability, regulatory lag and cost control, service quality and resilience, and compliance with public policy goals.¹⁹ Fact-based and verifiable pricing reduces the dependence on forecasts and assumptions in setting utility rates. Even jurisdictions that use forecasted test years use actual cost data as important benchmarks to evaluate forecasts.
30. When utility revenues are established in a comprehensive manner that allows for timely recovery of costs incurred to provide service, the utility is financially secure and has access to capital on reasonable terms. Likewise, recovery of costs positively impacts service quality, resilience, and compliance with public policy goals, including environmental, non-emitting and renewable energy, and energy efficiency goals. On the other hand, regulatory lag – the concept that there is a timing difference between when a cost is incurred and when it is recovered in rates – provide utilities with a modest incentive to control costs.
31. Frequently discussed disadvantages of cost of service regulation include diminished incentives for cost control, throughput incentive, capital investment incentive, and indirect impact of benchmarks on a utility’s financial results.²⁰ Diminished incentives for cost control occur because, generally, higher costs result in higher revenues, despite regulatory lag. Similarly, increased capital investment provides utilities with higher revenues and a larger base on which to

¹⁹ Initial Comments of Public Counsel, ¶ 14, Docket U-180907.

²⁰ Initial Comments of Public Counsel, ¶ 15, Docket U-180907.

earn a return. Without decoupling, utilities have a throughput incentive to sell increasing amounts of energy from year to year. And, benchmarks—which can be difficult to design—do not directly impact utility financial results unless the regulator imposes performance incentive measures with financial rewards and penalties at stake.

32. Administrative complexity is sometimes identified as a disadvantage of cost of service regulation.²¹ Administrative complexity arises from the frequency of filed rate cases along with the number of rate adjustment mechanisms being used that require reconciliation filings and regulatory review. Multiyear rate plans and performance incentive and penalty mechanisms simply introduce new and different filings, rather than eliminating the need for regulatory review and oversight. Indeed, such plans and mechanisms may not reduce Commission Staff or stakeholder responsibilities or workloads.²²

33. Any new or modified regulatory mechanism should be carefully analyzed by the Commission to determine whether it offers a desired benefit or improvement to Washington’s regulatory framework. Any new or modified regulatory mechanism should be defined with particularity and carefully calibrated to each utility, so identified priority goals are met in a manner that is consistent with the public interest and utility performance is optimized. This is a substantial and important undertaking, which the Legislature recognized when it required the Commission to allow for participation and consultation with regulated utilities, Public Counsel, residential, industrial, commercial, and low-income customers and organizations, and environmental and community organizations and stakeholders.²³

²¹ Initial Comments of Public Counsel, ¶ 15, Docket U-180907.

²² Initial Comments of Public Counsel, ¶ 15, n.8, Docket U-180907.

²³ ESSB 5295, 67th Leg. 2021 Reg. Sess., § 1(2) (Wash. 2021).

2. Performance-based regulation consists of a range of options that may be implemented independently or more comprehensively.

34. Performance-based regulation is not an all-or-nothing option. As Public Counsel noted in Docket U-180907, updating Washington’s regulatory framework does not necessarily require total abandonment of cost of service regulation.²⁴ Rather, the Commission may consider whether different approaches to performance-based regulation would improve Washington’s regulatory framework. Performance-based regulation tools include multiyear rate plans, performance incentive (and penalty) mechanisms, and cost recovery trackers.

35. The Commission should establish criteria to evaluate performance-based regulation options and the goals, outcomes, advantages, and disadvantages that each provide. Public Counsel suggests the following criteria be used:

- (1) Are the financial outcomes acceptable to all parties in relation to the risks assumed?
- (2) Are desired public interest goals defined and measured? Is it necessary to reasonably reward good or exemplary operational performance to meet these goals? Alternatively, is poor operational performance reasonably punished?
- (3) Does the utility have the proper incentives to encourage cost-effective service of customers, or are modifications needed to improve upon traditional cost of service regulation?

²⁴ Initial Comments of Public Counsel, ¶ 27, Docket U-180907.

(4) Does an alternative to cost of service regulation offer efficient and transparent regulatory processes that protect to public interest in just and reasonable rates and access to equitable, safe, efficient, reliable, and resilient service?²⁵

III. CONCLUSION

36. Public Counsel appreciates the significant undertaking contemplated by the Notice. As with the inquiry in Docket U-180907, Public Counsel believes that decisions made in this docket must be based on careful deliberation, analysis of facts, identification of critical regulatory principles, evaluation of impact on priority goals, and evaluation of whether existing tools continue to be sufficient and relevant or whether they are superseded by advantages offered by performance-based regulatory tools.

37. The Legislative directive to the Commission to develop a policy statement addressing alternatives to traditional cost of service ratemaking, including performance-based measures, targets, incentives, and penalties, will require significant effort. The comments offered are preliminary in nature, and Public Counsel intends to work collaboratively and comprehensively with the Commission and stakeholders. Public Counsel looks forward to engaging in a robust discussion with the Commission and stakeholders. Assistant Attorneys General Lisa Gafken and Ann Paisner and Regulatory Analysts Corey Dahl and Aaron Tam will participate in this docket for Public Counsel. Questions about these comments may be directed to the team as follows:

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²⁵ Initial Comments of Public Counsel, ¶¶ 28–29, Docket U-180907. Public Counsel’s comments also detailed the advantages and disadvantage that multiyear rate plans, performance incentive mechanisms, and trackers may provide from ¶ 30 through ¶ 61. Rather than reproduce those comments here, they are incorporated by this reference.

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38. Public Counsel appreciates the opportunity to offer these comments. We look forward to reviewing comments filed by other stakeholders.

Dated this 29th day of November 2021.

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