BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE JOINT APPLICATION OF PUGET SOUND ENERGY, ALBERTA INVESTMENT MANAGEMENT CORPORATION, BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION, OMERS ADMINISTRATION CORPORATION, AND PGGM VERMOGENSBEHEER B.V. FOR AN ORDER AUTHORIZING PROPOSED SALES OF INDIRECT INTERESTS IN PUGET SOUND ENERGY	**Docket U-180680** **JOINT APPLICANTS' RESPONSE TO JOINT PETITION FOR ADJUDICATION OF PUBLIC COUNSEL, ALLIANCE OF WESTERN ENERGY CONSUMERS, THE ENERGY PROJECT, AND THE WASHINGTON AND NORTHERN IDAHO DISTRICT COUNCIL OF LABORERS**

I. INTRODUCTION

1. Puget Sound Energy ("PSE"), together with the Alberta Investment Management Corporation ("AIMCo"), the British Columbia Investment Management Corporation ("BCI"), OMERS Administration Corporation ("OMERS"), and PGGM Vermogensbeheer B.V. ("PGGM") (together, PSE, AIMCo, BCI, OMERS and PGGM are referred to as the "Joint Applicants"), respond to the Joint Petition for Adjudication ("Petition") filed by Public Counsel, the Alliance of Western Energy Consumers ("AWEC"), The Energy Project, and the Washington and Northern Idaho District Council of Laborers ("WNIDCL") (together, Public Counsel, AWEC, and WNIDCL are referred to as "Joint Petitioners").

2. The Petition should be denied because an adjudication is unnecessary in this case. The proposed transfers of the upstream, non-controlling 43.99 percent indirect ownership interest in PSE, currently held by funds managed by Macquarie[1] to the Purchasers[2] (the "Proposed Transactions") do not transfer a "controlling interest" in PSE as defined by Washington law, contrary to Joint Petitioners' assertions. The Proposed Transactions, in which the current owners will retain ownership of approximately two-thirds of PSE's parent company, Puget Holdings LLC ("Puget Holdings"), is significantly different from the PSE transaction ten years ago, in which a consortium of private investors converted Puget Energy, Inc. ("Puget Energy"), then a publicly traded company, into a private company.

3. The change in minority upstream ownership interest in the Proposed Transactions is also much different than the other adjudicated transactions over the past two decades that Joint Petitioners have cited, such as the Scottish Power, MidAmerican and Montana-Dakota Utility transactions.[3] In contrast to those transactions in which a 100 percent ownership interest was transferred and the ownership was completely transformed, the Proposed Transactions involve only a transfer of the interests of one minority shareholder. The transfer modestly increases the ownership shares of current upstream owners AIMCo and BCI and adds two new minority members—OMERS and PGGM—both of which are

[1] The term "Macquarie" refers to Macquarie Infrastructure Partners Inc. and Padua MG Holdings LLC, collectively.

[2] The term "Purchasers" refers to AIMCo, BCI, OMERS and PGGM.

[3] Petition at ¶ 7, n. 4.

highly stable and highly qualified institutional investors with business models similar to the existing upstream owners. The proposed change in upstream ownership will have no impact whatsoever on PSE's management or day-to-day operations. In support of the Proposed Transactions, Joint Applicants filed a robust application ("Joint Application") and have supplemented the Joint Application with additional information requested by Commission Staff to facilitate a comprehensive, yet efficient, review process.

4. The concerns raised by Joint Petitioners, including attempts to confuse and muddy the legal standard applicable in this case, the introduction of extreme hypothetical scenarios that bear no resemblance to the Proposed Transactions nor the past ten years of history, and baseless concerns over foreign investors, are red herrings, and do not warrant the prolonged, adversarial adjudication that Joint Petitioners urge. The Commission has full discretion to consider the Proposed Transactions through the Open Meeting process and Joint Petitioners cite no law requiring an adjudication. Joint Applicants agree with Commission Staff that the Open Meeting is the appropriate forum to consider the Proposed Transactions and to address questions and concerns raised by stakeholders, while providing for an efficient review process that limits the burden placed upon Commission Staff, the Commission, and the parties.[4] The Commission should deny the Petition.

[4] *See* U-180680 Recessed Open Meeting Memo, at 3-4 (Nov. 5, 2018).

II. BACKGROUND

5. Joint Applicants have requested that the Commission authorize the transfer of the upstream non-controlling ownership interest held by Macquarie. As explained in the Joint Application, after the closing of the Proposed Transactions, Macquarie will no longer hold any direct or indirect interest in either PSE's ultimate parent company, Puget Holdings, or PSE. Joint Applicants seek approval for the Proposed Transactions that will transfer Macquarie's non-controlling minority ownership interest to well-qualified, institutional investors, with no change to PSE's operations, management, and commitment to its customers or this Commission.

6. The Proposed Transactions are different from the transaction approved by the Commission in Docket U-072375. In 2008, Puget Holdings sought to acquire "all of the outstanding shares of common stock issued by Puget Energy . . . in a financial transaction that would ultimately result in Puget Energy no longer being a publicly traded company."[5] Puget Holdings and its members—primarily pension plans[6]—became PSE's ultimate parent company.

7. In contrast, the Proposed Transactions before the Commission today will not change PSE's parent company; PSE will continue to be indirectly owned by Puget Holdings. Three of the five existing members in Puget Holdings will

[5] *In the Matter of the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For an Order Authorizing Proposed Transaction*, Docket U-072375, Order 08: Approving and Adopting Settlement Stipulation; Authorizing Transaction Subject to Conditions, at ¶ 1 (Dec. 30, 2018) (the "2008 Acquisition Order").

[6] *Id.* ¶ 41 (noting that all the members of the investor consortium "manage investments largely for government pension funds, corporate pension funds, endowments and foundations, and Taft-Hartley (i.e., labor union pension) funds.").

continue as owners of Puget Holdings; two of them, AIMCo and BCI, will be increasing their ownership share by a few percent. Having been indirect owners of PSE for the past decade, AIMCo and BCI have a strong understanding of PSE's current business model, practices, and strategies. OMERS and PGGM, the two new members that are buying the remaining share of Macquarie's interest in Puget Holdings, are well-funded, well-qualified investors, with experience investing in the energy sector and with regulated utilities, and who through both testimony and commitments are confirming their support for PSE as a reputable, well-run utility with stable regulatory oversight and a strong management team. Although the Proposed Transactions require Commission approval because they involve the sale of more than ten percent of the indirect ownership of PSE, they do not involve the acquisition of a controlling interest in Puget Holdings or PSE, as was the case in 2008, and PSE will continue to operate in the same manner as it has been operating.

8. Since the Commission approved the indirect acquisition of PSE by Puget Holdings, PSE has maintained and grown its local work force, maintained its headquarters in Bellevue, and appointed to its board independent, local board members, including the current board chair, Steven Hooper. Under the current private ownership structure, PSE has made significant investments in clean energy, energy efficiency, local infrastructure and customer service. Puget Holdings has supported the objectives reflected in PSE's Integrated System Plan that support the "Safe. Dependable. Efficient." mission of the public service company.

9. Under private ownership, PSE has sustained and grown a company-wide safety culture benefitting customers and employees, helped Washington transition away from coal, brought more clean energy into the Pacific Northwest, invested $1 billion in customers' homes and businesses, created an innovative industry-leading renewable energy program, launched the Pacific Northwest's first utility-led electric vehicle program with at-home fast charging units, invested more than $7 billion in critical infrastructure, and earned recognition as a national leader in Corporate Citizenship, Communications, Outage Information, Environmental Stewardship, Billing & Payment, Price, and Energy Efficiency. PSE is a well-run public service company that provides excellent service to a growing region. Under private ownership, PSE has taken actions and made investments that benefit its customers and the community and has worked constructively with the Commission and stakeholders. PSE intends to continue working with its customers and stakeholders to pursue these and other similar goals. As the Commission recognized in 2008, "[t]he concept of PSE as a 'local company' then, depends not on who owns it, but on who operates it and, most importantly, who regulates it."[7]

10. The Proposed Transactions are consistent with the public interest. As explained in the Joint Application, following the close of the Proposed Transactions, PSE's customers and the communities it serves will see no change in the operation of PSE. The overall corporate ownership structure will not

[7] 2008 Acquisition Order ¶ 14.

change and there will be no harm to customers. The Proposed Transactions will allow PSE to continue its strong leadership providing clean energy in the region while also delivering safe, dependable, and affordable energy to its customers.

11. In the 2008 Acquisition Order, the Commission evaluated Puget Holdings' governance structure, and determined that anything less than a 55 percent share of the interest in Puget Holdings does not constitute a controlling interest.[8] Because the transfer of the minority 43.99 percent share in this case will not "result in a person, directly or indirectly, acquiring a controlling interest in a gas or electrical company,"[9] the net benefit standard does not apply.

12. Comments were due to the Commission on October 24, 2018. As Commission Staff explained in its comments, while the Commission can conduct its review of the Proposed Transactions through the Open Meeting process or through an adjudication, at its discretion, after a thorough review of the Joint Application, Commission Staff has concluded that "prospective purchasers of Macquarie's interest have presented compelling evidence of financial and managerial fitness, in that they have the financial resources to effect the transaction and they have experience in direct ownership of utility and infrastructure assets. In short, Staff's review in these areas did not reveal significant risk of harm."[10]

[8] 2008 Acquisition Order at ¶ 214.

[9] RCW 80.12.020(1).

[10] Docket U-180680, Comments of Commission Staff, ¶ 8 (Oct. 24, 2018) ("Staff Comments").

13. Despite this, Joint Petitioners have requested that the Commission initiate an adjudicative process so they can "conduct discovery, present evidence, and conduct cross-examination"[11] to determine, among other things "[h]ow the company will transition to the new ownership consortium, what risks may be created, and what protections are needed in the new environment."[12] Yet, Joint Petitioners do not actually articulate any risks missed by Staff or necessary protections that have been overlooked. After two months of analysis, Joint Petitioners now ask for more process because they have yet to identify actual downsides of the Proposed Transactions.

14. More process is unwarranted, since, as Commission Staff explained in its comments, the Proposed Transactions represent a dilution of ownership which, in effect, reduces the potential influence of the most powerful shareholder and "[a]ll four purchasers of Macquarie's interest have demonstrated through testimony their respective financial and managerial fitness."[13] As detailed in Commission Staff's comments, an independent review of the purchasers did not uncover anything to contradict the evidence of the Purchasers' fitness, and Commission Staff concluded that each Purchaser is "well-equipped to make informed decisions that impact Puget Holdings and PSE. All of the information that Staff has

[11] Petition at ¶¶ 11, 65.

[12] *Id.* ¶ 22.

[13] Staff Comments at ¶ 28.

reviewed supports the fitness of these particular purchasers to acquire an interest in and provide sound direction through their board representatives to PSE."[14]

III. ARGUMENT

A. The Open Meeting Is the Appropriate Forum for the Commission to Review the Proposed Transactions

15. The Commission's scheduling of an Open Meeting to review, take public comment, and evaluate the Proposed Transactions, is the appropriate forum, and a prolonged adjudication in this case is not necessary. Although the Commission has the authority to determine what forum is best suited to evaluate a property transfer, Open Meetings are the default mechanism:

> Whenever a public service company files an application to merge or consolidate any of its franchises, property or facilities with any other company, it must provide notice to customers. *This notice must be provided thirty days before the commission's open meeting date when the application is scheduled for action*.[15]

Joint Petitioners have cited no statute, Commission or judicial precedent, or rule supporting their view that an adjudication is required. Thus, contrary to Joint Petitioners' suggestion, the Commission's scheduling of an Open Meeting is entirely appropriate and within its authority. Whether the Commission determines an adjudication is necessary is completely discretionary, and Joint Petitioners have no right to such a proceeding. Chapter 80.12 RCW does not mandate any specific procedure and under WAC 480-143-160, the Commission "*may* set an

[14] Staff Comments at ¶ 30.

[15] WAC 480-143-210(1) (emphasis added).

application for hearing and require all parties to the transaction to appear and give testimony" (emphasis added), but the Commission is certainly not required to.

16. Joint Petitioners' suggestion that "the Commission has ordinarily set major transfer of ownership cases for hearing in an adjudicative process"[16] is incorrect but also inapposite, as this is not a major transfer of ownership. First, the examples cited by Joint Petitioners involve the sale of 100 percent of the ownership interest in a company,[17] which represents an entirely different situation than the Proposed Transactions. Second, the Commission has in fact considered transfers of ownership in an Open Meeting setting. As noted by Commission Staff in its Comments, the Commission recently approved of a major utility property transfer application using the Open Meeting process. In Docket UG-170094, the Commission evaluated and ultimately approved an application by a natural gas utility to completely reorganize its ownership structure under RCW 80.12.020, using an Open Meeting process.

17. An adjudication is unnecessary in this case because there are no factual issues left to be resolved. To expedite this process, Joint Applicants submitted a robust Application and have also provided additional information as requested by Commission Staff. Joint Applicants filed the Application on September 5, 2018, and the Commission's notification of a recessed Open Meeting was announced on September 21, 2018, with an open comment period until October 24, 2018.

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[16] Petition at ¶ 32.

[17] *Id.* ¶ 7, n.4 (citing 2008 Acquisition Order at ¶¶ 112-21, which addresses the Scottish Power Acquisition of PacifiCorp, the MidAmerican acquisition of PacifiCorp, and the Montana-Dakota Utilities Company acquisition of Cascade Natural Gas).

Notably, while many comments were submitted, neither Public Counsel, AWEC, nor The Energy Project submitted any formal comments in response to the Application by the deadline, including any actual comments on the proposed refreshed commitments attached to the Joint Application. Submitting comments, however, would have made it possible for the Commission to constructively address any issues raised by Joint Petitioners during the Open Meeting and would have provided Joint Applicants the opportunity to prepare and provide information in response. Aside from generic questions and extreme hypotheticals raised in the Petition, Joint Petitioners failed to submit any substantive written comments.

18. While Joint Applicants fully support a process that is transparent, comprehensive, and provides the Commission the requisite record to issue an order on the Application, Joint Applicants agree with Commission Staff that this process can be expeditiously completed in a manner that avoids a lengthy and expensive adversarial adjudication process and minimizes the burden on all parties, which the Open Meeting process facilitates.

B. The No Harm Standard Is the Appropriate Standard in This Case and Does Not Require an Adjudication

19. Joint Petitioners insist that an adjudication is necessary in this case because they assert a "net benefit" standard is required, which they argue requires a prolonged adjudication to assess. Contrary to Joint Petitioners' suggestion, however, the "no harm" standard governs this case because a "controlling

interest" is not being transferred, as provided under RCW 80.12.020(1), and the "no harm" standard can be addressed through an Open Meeting process.

1. The no harm standard applies because a "controlling interest" is not being transferred

20. For nearly two decades, the prevailing standard governing transfers of property has been grounded by the Commission's rule in WAC 480-143-170, which provides that "[i]f, upon the examination of any application and accompanying exhibits, or upon a hearing concerning the same, the commission finds the proposed transaction is not consistent with the public interest, it shall deny the application." The Commission has interpreted this rule to equate to a "no harm" standard, as it applied in the 2008 Acquisition Order:

> Under Chapter 80.12 RCW and WAC 480-143-170 the standard for review of this transaction is that the Commission will reject it if the Commission determines "the proposed transaction is not consistent with the public interest." Put differently, the Commission will approve the transaction if it is shown to be consistent with the public interest. This is sometimes called the "no harm" standard because, stated either way, the transaction must not harm the public interest in order to be approved.[18]

21. In 2009, the Legislature amended RCW 80.12.020(1) to add the following language (emphasis added):

> The commission shall not approve any transaction under this section that would result in *a person, directly or indirectly, acquiring a controlling interest in a gas or electrical company without a finding that the transaction would provide a net benefit to the customers of the company.*

[18] 2008 Acquisition Order at ¶ 6.

Even after the narrow amendments to RCW 80.12.020(1), however, the no harm standard has remained the prevailing standard for property transfers where there is not a sale of a "controlling interest" in a company.[19]

22. The "net benefit" test under RCW 80.12.010(1) is inapplicable in this case because under the Proposed Transactions, a "controlling interest" is not being transferred. Although RCW 80.12.020(1) does not define "controlling interest," the Washington Business Corporations Act—which generally governs all Washington corporations, including public utilities—defines "controlling interest" as "ownership of an entity's outstanding shares or interests in such number as to entitle the holder at the time to elect a majority of the entity's directors or other governors without regard to voting power which may thereafter exist upon a default, failure, or other contingency."[20]

23. Under RCW 23B.01.400(4), it is evident that the sale of the interests of the Macquarie entities cannot, by definition, be a transfer of a "controlling interest." Under the terms of the existing Second Amended and Restated Limited Liability Company Agreement of Puget Holdings LLC (the "LLC Agreement"), even with its current ownership share of 43.99 percent, Macquarie does not have a controlling interest because it does not have the authority to elect a majority of Puget Holdings' or PSE's boards of directors. Indeed, at present, Macquarie only

[19] *See, e.g.*, *WUTC v. Puget Sound Energy*, Dockets UE-130617 et al., Order 10 at ¶ 13 (Oct. 9, 2014) ("[T]he 'net benefit' test is inapplicable . . . since the transaction involves a sale of assets, not a sale of a controlling interest in the Company. The standard of review for the proposed transaction is the 'no harm' test.").

[20] RCW 23B.01.400(4).

holds three of the ten board seats for Puget Holdings and three of eleven board seats for PSE.[21]

24. Under the Proposed Transactions, no member of Puget Holdings will have sufficient ownership to "elect a majority of the entity's directors or other governors" and in fact, voting will become even more diffuse than is currently the case. CPPIB's interest will not change, and while AIMCo and BCI will increase their interest, their increase only allows them to elect one or two directors, respectively.[22] Similarly, PGGM and OMERS can also elect only one or two directors, respectively. Therefore, under the Proposed Transactions, as required by RCW 80.12.020(1), no *person* will directly or indirectly acquire a controlling interest in PSE because no *person* currently has a controlling interest or will have the ability to obtain a controlling interest as a result of the Proposed Transactions under RCW 23B.01.400(4). Thus, Joint Petitioners' suggestion that the net benefit test is appropriate here is wrong because none of the Purchasers will have a controlling interest in Puget Holdings or PSE as defined by Washington law. In fact, under the Proposed Transactions, the transferred ownership share will be spread over four entities, each of whom will have even less ability to potentially influence Puget Holdings' decision-making.

25. Moreover, the Commission's application of the term "controlling interest" set forth in the 2008 Acquisition Order is comparable to the definition in RCW

[21] *See* U-180680 Recessed Open Meeting Memo, Attachment 3 (PSE's Response to WUTC Staff Informal Data Request No. 001(g) (showing the anticipated Boards of Puget Holdings, Puget Energy, and PSE under the proposed transaction)).

[22] *Id.*

23B.01.400(4) and remains applicable here. In that Order, the Commission determined based on the existing LLC Agreement, that "although the Macquarie funds collectively own 51 percent of Puget Holdings, they do not own a controlling interest because the governance structure requires the support of a 55 percent or more majority of the voting stock for all decisions."[23] In other words, like RCW 23B.01.400(4), the Commission appropriately based its definition of "controlling interest" on what voting powers owners actually hold.[24] Here, the ownership of Puget Holdings and PSE is now even more diffused among the owners and would not come close to meeting the 55 percent threshold.[25]

26. Contrary to Joint Petitioners' suggestion, nothing about the amended version of RCW 80.12.020(1) changes the Commission's application of the term "controlling interest" as set forth in the 2008 Acquisition Order. Indeed, given that the amendment to RCW 80.12.020(1) came after the 2008 Acquisition Order and, as Joint Petitioners argue, was a direct response to the 2008 Acquisition Order, Senate Bill 5055 and the amended RCW 80.12.020(1) are actually an endorsement by the Legislature of the Commission's usage of the phrase "controlling interest." "The Legislature is presumed to know the existing state of the case law in those areas in which it is legislating."[26] Thus, the Commission can presume that the Legislature is aware of and endorsed the Commission's

[23] 2008 Acquisition Order at ¶ 214.

[24] *See Thorpe v. Inslee*, 188 Wn.2d 282, 290, 393 P.3d 1231 (2017) (citations omitted) (an agency's definition of terms is "entitled to substantial weight and great deference").

[25] Joint Applicants also agree with Commission Staff's discussion of "controlling interest" set forth in Staff Comments, at ¶¶ 12-16.

[26] *Woodson v. State*, 95 Wn.2d 257, 262, 623 P.2d 683 (1980) (en banc) (citations omitted).

application of "controlling interest' in the 2008 Acquisition Order. Under either the standard used by the Commission in the 2008 Acquisition Order or under RCW 23B.01.400(4), a controlling interest is not being transferred here and the net benefits test is inapplicable.

2. Joint Petitioners' reliance on hypothetical scenarios, legislative history, and Oregon law is unpersuasive and impermissible because "controlling interest" is unambiguous and defined by Washington law

27. Despite the clear language of RCW 80.12.020(1), RCW 23B.01.400(4), and the 2008 Acquisition Order, all of which demonstrate that a controlling interest is not being transferred, Joint Petitioners nevertheless raise a variety of unconvincing arguments for why an adjudicative process is warranted.

28. First, Joint Petitioners urge the Commission to adopt their desired interpretation of "controlling interest" which they believe "makes intuitive sense" by raising a hypothetical scenario regarding ten owners each having ten percent ownership that is not close to the circumstance presented in this case.[27] However, as explained by the Washington Supreme Court in *Boren*, the Commission need not even address Joint Petitioners' hypothetical scenario because those facts are not before the Commission.[28]

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[27] Petition at ¶ 29.

[28] *State v. Boren*, 36 Wn.2d 522, 531, 219 P.2d 566 (1950) (en banc) ("It must be assumed that a law will be given a reasonable and not a strained construction. We deem it unnecessary and inappropriate, in deciding the question here presented, to consider the possible application of the statute to the hypothetical situation suggested by appellant. Questions arising concerning the application of the statute to questions such as those suggested will be reserved for future consideration, when actually presented for judicial determination.") (citations omitted); *see also Int'l Union of Operating Engineers, Local 286 v. Port of Seattle*, 176 Wn.2d 712, 724, 295 P.3d 736 (2013) ("[B]ut it would be inappropriate for us to explore . . . hypothetical situations here. We must leave those questions for another day."); *Weden v. San Juan County*, 135 Wn.2d 678, 708, 958 P.2d 273 (1998) ("Hypotheticals calling for analysis of the statute's possible application in other circumstances are inappropriate.").

29. But even if the Commission did entertain Joint Petitioners' hypothetical scenario, Joint Petitioners ignore the plain language in RCW 80.12.020(1), which provides that the net benefit test is triggered only if "a person"—i.e., singular—acquires a controlling interest in a power company. This language demonstrates that what the Legislature is expressly concerned about is *one person* having the power to unilaterally control an electric or gas company, not multiple owners having non-controlling interests as Joint Petitioners' hypothetical scenario suggests. Under Joint Petitioners' theory, the net benefit test would apparently apply to nearly every scenario where ownership interests—however small—are transferred. But that is not the law; RCW 80.12.020 requires *a person* to acquire a "controlling interest" in a power company before the net benefit test is triggered. Joint Petitioners' hypothetical scenario does not meet that threshold and should be disregarded.

30. Second, despite the fact that controlling Washington law expressly defines "controlling interest" under RCW 23B.01.400(4), Joint Petitioners nevertheless argue that the net benefit test is still applicable in this case by selectively quoting excerpts of legislative history to the amendments to RCW 80.12.020(1) and Oregon law.[29] As a matter of law, however, Joint Petitioners' reliance on legislative history and Oregon law is impermissible in this case because

[29] Petition at ¶¶ 23-28.

"controlling interest" is not ambiguous and in fact, is defined by RCW 23B.01.400(4), rendering legislative history completely irrelevant.[30]

31. Under Washington law, "[i]f the statute's meaning is plain on its face, then courts must give effect to its plain meaning as an expression of what the Legislature intended."[31] "A statute that is clear on its face is not subject to judicial construction."[32] Indeed, "plain meaning is . . . derived from what the Legislature has said in its enactments . . . [including] *all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question*."[33] In *Chapman*, the Washington Supreme Court determined the meaning of an undefined term in RCW 26.50.110 by using the Legislature's only prescribed definition of the term as contained in an entirely separate statutory scheme and held that the term was unambiguous and "there is no need for judicial interpretation" because "[a] statute that is clear on its face is not subject to judicial interpretation."[34] Only if a statute remains ambiguous after a review of its

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[30] *See O.S.T. ex rel. G.T. v. BlueShield*, 181 Wn.2d 691, 699 n.8, 335 P.3d 416 (2014) (en banc) ("Because the statutory language is unambiguous, we find it unnecessary to inquire into legislative history."); *Shoop v. Kittitas Cty.*, 149 Wn.2d 29, 36, 65 P.3d 1194 (2003) (en banc) ("It is inappropriate to look to the legislative history where the intent can clearly be divined from the plain language of the ordinance.") (citations omitted); *Wascisin v. Olsen*, 90 Wn. App. 440, 443, 953 P.2d 467 (1997) ("[S]tatutory construction is unnecessary and improper when the wording of a statute is unambiguous. . . . As a result, its plain meaning controls and resort to legislative history is not necessary or appropriate."); *Mut. of Enumclaw Ins. Co. v. Grimstad-Hardy*, 71 Wn. App. 226, 232, 857 P.2d 1064 (1993) ("Where the language of a statute is clear and unambiguous, there is no room for judicial construction. Resort to legislative history in such circumstances is thus inappropriate.") (citations omitted).

[31] *State v. Chapman*, 140 Wn.2d 436, 449-50, 998 P.2d 282, *cert. denied,* 531 U.S. 984, 121 S.Ct. 438 (2000).

[32] *Id.*

[33] *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (emphasis added).

[34] *Chapman*, 140 Wn.2d at 448-51, 998 P.2d 282.

legislative enactments, "is [it] appropriate to resort to aids to construction, including legislative history."[35] Nowhere do Joint Petitioners suggest that "controlling interest" is ambiguous. Thus, as a "threshold matter," Joint Petitioners cannot, as a matter of law, appeal to legislative history or Oregon law.

32. But even assuming *arguendo* that the term "controlling interest" was ambiguous (which it is not), neither recitation of legislative history nor resort to Oregon law justify Joint Petitioners' use of the net benefits standard. Joint Petitioners direct the Commission to the deliberations surrounding Senate Bill 5055, including commentary and legislative colloquy, where different—and competing—proposed statutory language was considered. But there is nothing atypical about the legislative history in this case that could overcome the clear language of RCW 80.12.020(1) and RCW 23B.01.400(4). Legislators commonly explore different possible language for statutory amendments, but that does not mean that the discussed but decided against language during legislative deliberations suddenly becomes law.[36] There is simply nothing in the legislative deliberations for Senate Bill 5055 that provides evidence that RCW 80.12.020(1) means anything different than the plain language of the statute, particularly in light of RCW 23B.01.400(4).

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[35] *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 12, 43 P.3d 4.

[36] *See Watson v. City of Seattle*, 189 Wn.2d 149, 162-63, 401 P.3d 1 (2017) ("Statements by individual legislator[s] do[ ] not show legislative intent.") (citations omitted); *Wash. State Legislature v. Lowry*, 131 Wn.2d 309, 326, 931 P.2d 885 (1997), citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S.Ct. 1705 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.") (citations omitted); *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 154-55, 839 P.2d 324 (1992) ("a legislator's comments from the floor are not necessarily indicative of legislative intent"); *North Coast Air Servs., Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 325-26, 759 P.2d 405 (1988) (legislative colloquy not conclusive as to legislative intent).

33. Likewise, Joint Petitioners' reliance on Oregon law is equally unavailing. The Oregon statutes cited by Joint Petitioners bear no resemblance to the language and structure of RCW 80.12.020 and the statutory scheme is remarkably different.[37] While in legislative colloquy on Senate Bill 5055, statutes from other states may have been referenced and compared, but this in no way provides even close to convincing evidence as to how RCW 80.12.020(1) should be interpreted.[38] Indeed, as Joint Petitioners concede, even a prior version of Senate Bill 5055 contained language that was similar to language found in an Oregon statute ("substantial influence"), which the Legislature eventually decided against, ultimately settling on "controlling interest."[39] While Joint Petitioners brush this off as a mere "technical" change,[40] the fact remains that the Legislature expressly decided on different terminology than the Oregon statute.

34. In the end, the Legislature required that for the net benefits test to apply, "a person" must be acquiring a "controlling interest" in the entity at issue. The Legislature could have adopted language used by other states like Oregon; or it could have expressly rejected the Commission's definition of "controlling interest" in the 2008 Acquisition Order; or, given that RCW 23B.01.400(4) was

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[37] *See, e.g.*, *Everett Concrete Products, Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 826, 748 P.2d 1112 (1988) (en banc) ("[A] court need not adopt the construction placed on a similar statute in another state if the language of the statute in the adopting state is substantially different from the language in the original statute.").

[38] *See Fed. Home Loan Bank of Seattle v. Barclays Capital, Inc.*, 1 Wn. App.2d 551, 564, 406 P.3d 686 (2017), *review granted,* 190 Wn.2d 1018, 420 P.3d 706 (2018) (Washington courts need not "imitate the example of other states when Washington law differs") (citations omitted); *Olesen v. State*, 78 Wn. App. 910, 917, 899 P.2d 837 (1995) (rejecting legal theory "grounded upon the law of other states").

[39] Petition at ¶ 28.

[40] *Id.*

enacted in 2017, the Legislature could have defined "controlling interest" differently in a manner that supports Joint Petitioners' theories on controlling interest. But the Legislature did none of those things. Instead, the Legislature used "controlling interest" and has now defined that term under RCW 23B.01.400(4). The Commission is required to give meaning to all words in a statute and cannot substitute those words for others.[41] Given that both Washington law and the Commission have already defined "controlling interest," Joint Petitioners' reliance on legislative history and Oregon law is unpersuasive and has no bearing whatsoever on the applicability of the net benefits test.

35. Finally, Joint Petitioners attempt to muddy the legal standard applicable in this case by suggesting that the terms "controlling interest," "substantial influence," and the "material transfer" provision from the 2008 Acquisition Order, are effectively the same and all warrant a lengthy, adjudicative, net benefit analysis. But this reasoning is wrong and misplaced. In terms of whether the "net benefits" standard applies, the only analysis is whether "a person, directly or indirectly, acquir[es] a controlling interest in a gas or electrical company" as set forth in RCW 80.12.020(1). Joint Petitioners' appeal to an undefined term in an Oregon statute ("substantial influence") is unfounded as the Oregon statute has no bearing whatsoever on Washington law. And Joint Petitioners' suggestion that the ten percent materiality standard set forth in the Ninth Condition to the 2008 Acquisition Order justifies the net benefit standard and an adjudicative process is

[41] *State v. Mehrabian*, 175 Wn. App. 678, 715, 308 P.3d 660 (2013) ("It is a well-settled rule of statutory construction to give meaning to all words used.").

without merit.[42] Condition Nine simply requires that if a member of Puget Holdings sells ten percent or more of its interest, PSE must obtain Commission approval, which is exactly what Joint Applicants have sought to do here.

36. It is evident that, under RCW 80.12.020(1), no Purchaser will acquire a controlling interest in PSE as a result of the Proposed Transactions. Thus, the no harm standard is the appropriate test. Here, Macquarie is selling its interest in Puget Holdings that the Commission has already determined does not amount to a controlling interest, nor would it qualify as such under RCW 23B.01.400(4), to two current members who are already known to the Commission and to two new members whose credentials are well established, all of whom would be obtaining an interest that is far below the Commission's controlling interest standard and that defined by RCW 23B.01.400(4). No single person will be obtaining a controlling interest in PSE which is what RCW 80.02.120(1) requires in order for the net benefit standard to be triggered and Joint Petitioners' argument that the net benefit test applies should be rejected.

3. Joint Petitioners' suggestion that the new members will nevertheless still have a "controlling interest" in Puget Holdings and PSE is baseless

37. Although Joint Petitioners cannot demonstrate that any Purchaser will acquire an indirect "controlling interest" in PSE, and thereby trigger the net benefits test, Joint Petitioners nevertheless attempt to argue that the net benefits test should still apply because the Purchasers will effectively have a "controlling

[42] Petition at ¶¶ 51-54.

interest" over Puget Holdings and PSE. This, however, is false and unsupported by the evidence.

a. The ability to block decisions requiring supermajority approval does not equate to a "controlling interest"

38. Joint Petitioners erroneously equate governance protections that ensure continuity of operations at PSE with "control" over the company.[43] To support their argument, Joint Petitioners point out that provisions of the Amended and Restated Bylaws of PSE require a supermajority of 80 percent of the voting shares to undertake certain significant board actions, including appointment a board chairman, appointing or terminating the CEO, or selling or acquiring a material component of PSE's assets. Joint Petitioners claim that each owner having more than 20 percent of voting rights can thus block important decisions, and therefore each such owner or group of owners "controls" PSE.[44] Joint Petitioners' arguments are not consistent with the Commission's prior rulings or with a common-sense view of what constitutes control.

39. The Commission reviewed Puget Holdings' governance structure in 2008, closely scrutinizing how private ownership could influence control of PSE. The Commission correctly ruled that these same supermajority voting requirements actually protect the ratepayers and do not constitute a controlling interest. In approving Puget Holdings' governance, the Commission correctly found that the 20 percent "potential veto power" does not convey control, explaining:

[43] *Id.* ¶¶ 30-31.
[44] *Id.*

> No single investor or group of affiliated investors holds a controlling stake in Puget Holdings. The aggregated ownership interests of all the Macquarie entities is 51.5 percent, less than the 55 percent threshold required for—"simple majority" rights and substantially less than the 80 percent required for—"supermajority decisions."[45]

As the Commission correctly concluded in the 2008 Acquisition Order, the twenty percent threshold is consistent with a non-controlling investment. As the Commission explained:

> Public Counsel and the dissent . . . disregard the strengths and diversity that the other members of the Consortium bring to the transaction—not only with respect to their substantial and comparatively stable and secure access to pension fund capital and their financial acumen, but their ability to serve as a check on Macquarie's position. No single investor or group of affiliated investors holds a controlling stake in Puget Holdings.[46]

Indeed, the Commission found that such voting requirements were desirable, explaining:

> Here, the six primary investors are all large, sophisticated investors with direct representation on the boards of the holding company and its affiliated entities. As previously discussed, they have structured the governance of their holding company to prevent any single investor from controlling major business decisions and to require a supermajority vote for the most important decisions. Each of these investors is both capable of and can be expected to act in accordance with its interest in protecting its investment in PSE.[47]

There have been no changes to the voting thresholds in Puget Holdings' governance structure since the 2008 acquisition, and there has been a history of

[45] 2008 Acquisition Order at ¶ 254.

[46] *Id.*

[47] *Id.* ¶ 232.

consensus board action at PSE and Puget Holdings. As the Commission recognized in the 2008 Acquisition Order, these types of governance or voting thresholds are customary for investment vehicles as they both (1) act as an important risk mitigation in ensuring that no single member can unilaterally control certain decisions and (2) force collective governance integrity by ensuring the involvement of all or most members in significant corporate changes.

40. Contrary to Joint Petitioners' arguments, the practical effect of the supermajority requirements is to diffuse control among the members of Puget Holdings, not to confer a controlling interest on an individual member. Rather than giving each owner power over corporate changes, the supermajority requirements ensure that any significant change in PSE is widely supported and not done for the benefit of a single owner or small group of members of Puget Holdings. Unless 80 percent of the members of Puget Holdings and at least one independent director agree, the *status quo* will be maintained. Notably, as explained above, upon approval of the Joint Application, each new member of Puget Holdings would hold far smaller respective shares than were originally held by Macquarie, and each new member will have even less of any potential ability to effect a change in direction for PSE. In light of the Commission's prior decisions, Joint Petitioners' arguments that the Purchasers are obtaining a controlling interest due the ability to block proposed changes is without merit and should be rejected.

b. The Canadian members of Puget Holdings are not a single one-dimensional entity that constitutes a "controlling interest"

41. Joint Petitioners argue further that the Proposed Transactions introduce new risk because "Canadian government pension funds" will control "nearly 90 percent of PSE" after the Proposed Transactions close.[48] This position incorrectly assumes that, because four of the current and prospective members of Puget Holdings are Canadian, they constitute a single functional member and will seek to exert coordinated influence over PSE's strategy and operations. This is absurd.

42. On the contrary, each of the current and prospective Canadian members of Puget Holdings are discrete entities that are distinct from each other, having separate management groups, boards of directors, and investment teams. For instance, OMERS is governed by its own independent board of directors.[49] The OMERS board members do not represent the Canadian or Ontarian governments, but rather the employee groups, unions, and associations whose members' pensions are managed by OMERS.[50] Similarly, AIMCo's client base consists of more than thirty different public-sector pension funds, endowment funds and Government of Alberta funds, and by statute, both AIMCo and the AIMCo board operate independently from the Government of Alberta.[51] BCI is governed by a seven-member board, four members of which are appointed by specific BCI

[48] Petition at ¶¶ 9, 32.

[49] *See* Prefiled Direct Testimony of Steven Zucchet, Exh. SZ-1T, at 5:20-6:13 (explaining OMERS' independent functions and fiduciary duties).

[50] *Id.*

[51] *See* Prefiled Direct Testimony of Ahmed Mubashir, Exh. AM-1T, at 4:3-18; 13:3-14:6 (explaining AIMCo's independent functions and fiduciary duties).

clients, two members of which are representative of other BCI clients and a chair appointed by the British Columbia Minister of Finance.[52] The BCI board operates independently of the Government of the Province of British Columbia, and BCI is independent of, and not controlled by, any governmental entity.[53]

43. Far from operating as a uniform or coordinated entity, the various current and prospective Canadian members of Puget Holdings are competitive with, and often may be adverse, to each other in a similar fashion as with other institutional investors, such as when they buy and sell assets from each other or compete in bidding processes; nor do these entities always seek to co-invest in each other's assets. Each current and prospective Canadian member's strategic approach is guided by its own group of stakeholders and pensioners whom it is obligated to serve. Each current and prospective Canadian member owes a separate and distinct fiduciary duty to its own plan members, meaning that each of OMERS, BCI, AIMCo and CPPIB has its own unique set of strategies, priorities, risk appetites, and asset mixes separate and distinct from the other. The fact that the current and prospective Canadian members of Puget Holdings are located in a common country in no way diminishes the fact that they are independent entities with investment and management perspectives as distinct as those of the existing owners and should accordingly be treated as discrete members. Indeed, the Commission routinely resolves intensely fought disputes among United States

[52] *See* Prefiled Direct Testimony of Lincoln Webb, Exh. LW-1T, at 4:12-5:2; 10:1-19 (explaining BCI's independence and fiduciary duties).

[53] *Id.* at 10:1-19.

entities; being from the same country does not make companies think with one mind or pursue a common set of interests. As the Commission itself recognized:

> The Canadian pension funds have made substantial investments in Puget Holdings and have an interest in protecting their individual investments, regardless of Macquarie's interests. There is no reason to think the individual members of Puget Holdings' board will not act independently of each other.[54]

44. As Commission Staff notes in its comments, each of the current and prospective members of Puget Holdings "constitute the same type of entity as the current owners" and are "operated for the benefit of the public sector."[55] Nonetheless, Commission Staff recognizes that each Canadian pension fund seeking a new or increased ownership interest is a separate entity with distinct business interests. Indeed, as Commission Staff explains, the proposed acquisitions will actually result in a "dilution of ownership power"[56] and an increase in "member diversity."[57] Joint Applicants believe that these benefits will contribute to the strength of PSE's board of directors.

c. Joint Petitioners arguments with respect to pension plans and the thirty percent rule are without merit

45. Joint Petitioners have negatively characterized the investment approach adopted by large Canadian pension funds and pension fund managers—like OMERS, AIMCo and BCI—which leads these investors to seek out and invest in valuable infrastructure assets like PSE. In truth, in today's low interest rate

[54] 2008 Acquisition Order at ¶ 254.

[55] Staff Comments at ¶ 41.

[56] *Id.* ¶¶ 24, 41.

[57] *Id.* ¶ 41.

environment, infrastructure assets are a good fit for pension funds given the relative stability of such investments and the long-term horizon of pension obligations. The Commission recognized the benefits of investment in infrastructure assets by pension plans and similar investors in the 2008 Acquisition Order:

> PSE is ideally suited to their plans to place additional funds in infrastructure assets, because these investors are investment funds and specialized infrastructure investors comprised principally of pension funds, foundations and endowments with long-term investment horizons and "large and growing pools of capital for which they need to find a home." They seek out investments such as this one that produce steady, predictable, long-term cash flow streams from high quality assets, and they do not require a sale or defined exit strategy to achieve their investment goals.[58]

46. The fact that PSE will be owned by multiple owners and managers of pension plans and public sector funds also should not raise concerns. As noted by the Commission in the 2008 Acquisition Order, the majority of the investors in Macquarie Infrastructure Partners "are U.S. and Canadian institutions such as government pension funds, corporate pension funds, endowments, foundations and labor unions."[59] Thus, the acquisition of Macquarie's interest in Puget Holdings by four pension funds (two of which are current members of Puget Holdings) does not materially change the ownership landscape. Indeed, when referring to the government and private pension and endowment funds that would

[58] 2008 Acquisition Order at ¶ 141.

[59] *Id.* ¶ 42.

indirectly own PSE in 2008, the Commission endorsed the investors noting that "[m]ore secure sources of capital are difficult to find."[60]

47. Joint Petitioners appear to suggest that OMERS, AIMCo and BCI would be violating the so called "thirty percent rule" through their proposed investments in Puget Holdings because they would collectively be acquiring more than thirty percent of Puget Holdings. That is unequivocally not the case and is a misconstruction of the thirty percent rule which provides that no pension fund can invest in the securities of any corporation where that investment carries more than thirty percent of the votes that may be cast to elect the directors of that corporation.[61] As discussed earlier, each of the Canadian members of Puget Holdings operate independently from each other, and each is aware of and complies with the thirty percent rule. OMERS, AIMCo and BCI do not make investments in companies anywhere in the world without ensuring that those investments are structured to comply with the thirty percent rule. Moreover, compliance with the thirty percent is properly addressed by appropriate Canadian authorities, not the Commission.

d. The Proposed Transactions will not alter the types of members of Puget Holdings

48. Joint Petitioners misconstrue the impact of the Proposed Transactions on Puget Holdings in claiming that Macquarie's exit as a member of Puget Holdings, and the resulting addition of PGGM and OMERS, produces a Puget Holdings that

[60] *Id.* ¶ 150.

[61] Pension Benefits Standards Regulations, 1985, SOR/87-19 (Can.), Schedule III, s. 11(1); Petition at ¶ 35.

"looks very different."[62] As Joint Petitioners acknowledge, the members of Puget Holdings that acquired Puget Energy in 2009 provided the best means to meet the financial challenges then-facing PSE, due in part to Macquarie's proven track record in accessing global capital markets and managing infrastructure investments.[63] As detailed in the Application and the testimony of Ms. Harris, under private ownership, PSE has taken actions and made investments that benefit its customers and the community, with PSE and its employees dedicated to providing great customer service while delivering energy that is safe, reliable, reasonably priced, and environmentally responsible. PSE intends to continue working with the new investor consortium to pursue these and other similar goals, and the Proposed Transaction will not affect daily operations.[64]

49. The Joint Application indisputably demonstrates that the Proposed Transactions simply represent the transfer of a non-controlling minority ownership interest from existing well-qualified, institutional investor members of Puget Holdings to (i) two other existing well-qualified, institutional investor members of Puget Holdings; and (ii) two new, well-qualified, institutional investors with no change to PSE's operations, management, or commitment to its

[62] Petition at ¶ 43. There is irony in the concern stated by Public Counsel and the other Petitioners that "Macquarie is departing entirely from the consortium and no comparable entity will replace it." *Id.* This constitutes nothing less than an about-face by Public Counsel which argued in 2009 about the dangers of Macquarie and the Macquarie model, including the alleged complexity and opacity of Macquarie (2008 Acquisition Order at ¶¶ 222, 254), the Macquarie model's reliance on debt (*id.* ¶ 216) and other issues such as sustainability, inflation of asset prices, high management fee structure, accounting practices that provide an overly robust picture of profitability, and governance and transparency concerns (*id.* ¶ 212). These concerns were rejected by the majority of the Commission.

[63] Petition at ¶ 40.

[64] *See* Prefiled Direct Testimony of Kimberly J. Harris, Exh. KJH-1T, at 11-12.

customers and the Commission. Contrary to Joint Petitioners' unsubstantiated claims, there is no question that the resulting membership of Puget Holdings is qualified to meet PSE's capital needs. The members of Puget Holdings consist of some of the largest institutional investors in the world with substantial experience in infrastructure investment. These investors are recommitting to an existing set of commitments that have functioned extremely well since the 2008 transaction and have further renewed and extended these commitments going forward. The increased diversity of the membership of Puget Holdings that will result from the Proposed Transactions will yield benefits to ratepayers, while maintaining PSE's ability to obtain capital at a reasonable cost. Joint Petitioners' unsubstantiated claims to the contrary should be rejected.

e. The prior transfers of ownership were proper and do not transform the current transactions into a transfer of a controlling interest

50. In the Joint Application, Joint Applicants referred to the corporate reorganization transactions that have been completed over the course of the past decade. As the Commission is aware, Macquarie's owned or managed interest in Puget Holdings has decreased from the initial 51.45 percent to its current ownership interest of 43.99 percent. As part of the transaction approved by the Commission in 2008, Macquarie agreed to sell down certain of the interests it owned or managed at transaction close. These ownership rights were distributed amongst members of Puget Holdings, and the requisite notification was made.[65]

[65] *See* Docket U-072375, Notice of Transfer of Interest (May 27, 2009).

In 2017, in preparation for the Proposed Transactions, Macquarie consolidated the interests owned by its managed funds, notifying the Commission accordingly, with no change of its ownership interests taking place.[66] Separately, FSS Infrastructure Trust ("FSS"), owner of a 3.72 percent ownership interest that Macquarie initially managed on behalf of FSS, elected to divest shortly thereafter, and the Commission was notified accordingly.[67] Each transaction was conducted for legitimate business reasons, and notification was made in accordance with Commitment 26. As explained in the Joint Application, Macquarie has never held a controlling interest in Puget Holdings and Joint Petitioners' insinuation that Joint Applicants intentionally created a transaction structure to avoid regulatory scrutiny is baseless and should be rejected.

C. The Parties Have Had Two Months to Review the Application and Commitments and No Further Review Is Necessary

51. Joint Petitioners have had ample opportunity to review the Application. Since the September 5 filing, Commission Staff has completed a thorough review of the Proposed Transactions and has recommended that it be approved subject to Commission Staff's proposed commitments. Joint Petitioners have received, and have had the opportunity to review, Joint Applicants' responses to Informal Staff Data Requests. However, Joint Petitioners have not reached out to the Joint Applicants requesting additional information and as noted above, Joint Petitioners also did not provide substantive comments to the Joint Application despite having

[66] *See* Docket U-072375, Notice of Transfer of Interest (Oct. 11, 2011).

[67] *See* Docket UE-171127, Notice of Sale of 3.72 Percent Ownership Interest (Nov. 15, 2017).

an extended period to do so. No further review is necessary given the limited scope of the Proposed Transactions and the robust Application and supporting materials that were provided to the Commission.

III. CONCLUSION

52. For the reasons set forth above, the Commission should deny the Joint Petitioners' request for an adjudicative proceeding. Joint Applicants respectfully request that the Commission issue an order approving the Proposed Transactions.

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Respectfully submitted,

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