

BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of  
  
PUGET SOUND ENERGY, INC.  
  
For a Declaratory Order Regarding the  
Transfer of Assets to Jefferson County  
Public Utility District.

NO. \_\_\_\_\_

[PROPOSED] ORDER GRANTING  
PUGET SOUND ENERGY, INC.'S  
PETITION FOR DECLARATORY  
ORDER

**I. MEMORANDUM**

1. On July 15, 2010, Puget Sound Energy, Inc. ("PSE") petitioned the Washington Utilities and Transportation Commission ("Commission" or "WUTC") for a declaratory order related to the transfer of certain assets from PSE to Public Utility District #1 of Jefferson County ("JPUD").

2. PSE is currently providing electric service to customers located in Jefferson County, Washington in accordance with the rules and regulations of the WUTC, including, but not limited to, PSE rates and tariffs on file therewith.

3. PSE states in its Petition that in November 2008, the citizens of Jefferson County voted to approve Proposition 1, authorizing JPUD to construct or acquire electrical

facilities for the generation, transmission or distribution of electric power in Jefferson County. JPUD is so authorized pursuant to RCW 54.16.040.

4. PSE states that Washington law also provides JPUD with authority to acquire PSE's assets by eminent domain. PSE states that JPUD then initiated settlement negotiations with PSE in July of 2009 to acquire PSE's transmission and distribution assets within Jefferson County under threat of "exercising the authority to condemn the PSE facilities."<sup>1</sup> PSE states that the settlement negotiations led to a tentative settlement agreement that was memorialized in a Letter of Intent ("LOI") dated April 30, 2010.

5. PSE states that on June 11, 2010, PSE and JPUD entered into an Asset Purchase Agreement ("APA") as the definitive settlement agreement contemplated under the LOI. PSE states that the transactions described therein are proceeding under JPUD's threat of condemnation.<sup>2</sup> If consummated, PSE adds, the APA will constitute a settlement between the Parties and a disposal of property to a special purpose district pursuant to RCW 80.12.020(2).

6. The APA identifies certain regulatory approvals that must be satisfied as a condition precedent to closing the transactions contemplated by the APA. These approvals include, but are not limited to, an order from the Commission confirming (a) the purchase price is an amount that is sufficient to fully compensate PSE for the sale of the Assets, (b) that the provisions of this APA pertaining to PSE's transition of its responsibilities to provide electrical service to its customers in the Service Territory are consistent with PSE's public service obligations; and (c) that the transfer of the assets is authorized by RCW

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<sup>1</sup> See PSE's Petition at ¶7.

<sup>2</sup> See PSE's Petition at ¶8.

80.12.020(2). The APA states that PSE must apply for an order requesting resolution of these regulatory uncertainties on or before July 15, 2010.<sup>3</sup>

7. PSE believes the transfer of the assets described in Exhibit A of the APA (the "Assets") is authorized by RCW 80.12.020(2). PSE requests an order declaring that the transfer of the Assets is so authorized and that the Commission need not undertake any further review the proposed transaction for purposes of RCW 80.12.020. However, if the Commission were to reach a contrary conclusion with respect to its statutory jurisdiction, PSE requested approval of the proposed transaction and the transfer of the Assets for purposes of RCW 80.12.020.

8. PSE also requested an order declaring that the amount of the \$103 million purchase price described in the APA is an amount that is sufficient to fully compensate PSE for the sale of the Assets.

9. Finally, PSE requested an order declaring that the provisions of the APA pertaining to PSE's transition of its responsibilities to provide electrical service to its customers in the service territory are sufficient and consistent with PSE's public service obligations.

## **II. DISCUSSION**

### **A. Commission Approval of the Asset Transfer**

10. No public service company may sell, lease, assign or otherwise dispose of property that is necessary or useful in the performance of its duties to the public without having secured from the Commission an order authorizing it to do so. RCW 80.12.020. Similarly, WAC 480-143-120 states,

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<sup>3</sup> See Exhibit No. KRK-3 at 20.

A public service company may not complete a transfer of property necessary or useful to perform its public duties unless the company first applies for, and obtains, commission approval.

One exception to these provisions, however, is a transfer of assets to a special purpose district, defined in RCW 36.96.010 to specifically include public utility districts.<sup>4</sup> JPUD is a public utility district; therefore, the transfer of Assets to JPUD is authorized by RCW 80.12.020(2) and the Commission need not undertake any further review of the proposed transaction for purposes of RCW 80.12.020.

**B. The Amount of the Purchase Price**

11. PSE's Petition also seeks to determine whether the \$103 million purchase price for the Assets is sufficient to fully compensate PSE.<sup>5</sup> PSE states that its proposed transition is a settlement entered into under threat of condemnation. PSE states that the proposed purchase price constitutes JPUD's last and best offer of settlement.<sup>6</sup> PSE states that its only other "option" is to reject JPUD's offer of settlement and place PSE at substantial litigation risk in the context of defending a hostile acquisition in condemnation proceedings. PSE does not think that this would ultimately be in the public interest.

12. PSE goes on to state that a failure to consummate the settlement would potentially harm JPUD's ability to execute its desired transition plan. Therefore, PSE states,

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<sup>4</sup> See RCW 80.12.020(2).

<sup>5</sup> In seeking this determination, PSE is not seeking any determination as to the accounting treatment of the sale proceeds or allocation of the sale proceeds as between its customers and investors. PSE states that it will file an accounting petition regarding the sale proceeds if and when the transaction is ultimately completed. Rather, PSE seeks only to determine that the Commission is satisfied that the PSE's customers are not entitled to claim proceeds for the sale of these Assets in an amount *in excess of* \$103 million. PSE states that, were the Commission to so determine, PSE has the right to terminate the APA and proceed to seek such amount in condemnation proceedings.

<sup>6</sup> See Exh. No. KRK-1CT at 5.

JPUD has insisted that the APA include provisions that ensure prompt resolution of the all regulatory contingencies.

13. The Assets are generally defined in the APA as an asset, facility or property that "constitutes a real property interest located in the Service Territory or an improvement or fixture located thereon that is used by and useful to PSE to provide retail electric service to customers located in the Service Territory in accordance with the rules, regulations of, and the rates and tariffs on file with the WUTC".<sup>7</sup> PSE notes that no generation facilities are involved in this transaction, nor are any generation facilities affected by this transaction. PSE points out, however, that the APA provides for due diligence activities (i.e., confirmation that the asset list is complete and accurate) and for improvements to the existing transmission and distribution system<sup>8</sup> that are likely to occur during the 18 to 36 month transition period.<sup>9</sup> PSE states that these adjustments will be overseen by a Transition Advisory Committee ("TAC"), and corresponding adjustments to the purchase price will be made by the TAC to reflect the net book value of any improvements made to the Assets (a price increase) and the value of any Assets removed from service (a price decrease) during the transition period. This mechanism, PSE states, ensures that there is no financial disincentive during the transition period to make investments necessary to maintain safe and reliable service to PSE's customers.

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<sup>7</sup> Exh. No. KRK-3 at 10.

<sup>8</sup> See PSE's Petition at ¶17.

<sup>9</sup> The closing of the transactions contemplated under the APA is to take place on a date that is no earlier than eighteen (18) months, and not later than thirty-six (36) months from the Effective Date of the APA. See Exh. No. KRK-3 at 25.

14. In his prefiled direct testimony, Exhibit No. KRK-1CT, PSE witness Karl R. Karzmar describes in detail the methodology the parties used to determine the fair market value of the Assets as well as alternatives to the sale and risks associated with such alternatives. JPUD and PSE both used and primarily relied upon the Replacement Cost New Less Depreciation ("RCNLD") and Reproduction Cost Less Depreciation ("RCLD") methodologies to establish a price range for purposes of settlement negotiations. PSE states that the primary contingency influencing PSE's price range was real estate values.

15. In view of uncertainty regarding real estate values, PSE included a contingency in the APA that afforded PSE the opportunity to obtain the opinion of a third-party appraiser in order to verify real-estate values. PSE states that this contingency was set to expire on July 1, 2010, and on June 29, 2010 PSE was advised by its appraisers that their determination of real estate values was *less than* the number that PSE had used for purposes of negotiations.<sup>10</sup> Having resolved this uncertainty, PSE states that the proposed purchase price of \$103 million reflects the fair market value of the Assets and provides a substantial premium over the net book value of these Assets. PSE believes this amount is sufficient to fully compensate PSE for the sale of the Assets.

16. PSE adds that the Purchase Price is particularly favorable when considered in light of the risks associated with the alternative of condemnation. PSE states that the transaction at hand is complex, and it is possible that a jury could be persuaded to return an award for an amount substantially less than the proposed purchase price. Therefore, PSE believes that due to the elimination of the risk of an unfavorable award, and the avoidance of

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<sup>10</sup> These actual values have been designated confidential by PSE and shall not be disclosed here, pursuant to a protective order in this proceeding.

substantial litigation costs, delay, and uncertainty, the purchase price of \$103 million is sufficient to fully compensate PSE for the sale of the Assets.

**C. The APA Provisions Regarding PSE's Transition of its Responsibilities to Provide Electrical Service to its Customers in the Service Territory.**

17. At closing of the transaction, PSE states that JPUD will assume full and complete responsibility for providing electric service to PSE's existing customers in the Service Territory.<sup>11</sup> During the transition period the APA provides:

PSE will, during the Transition Period, construct, operate and maintain the Assets, and provide electric service to its customers in the Service Territory, at substantially the same quality and level of service that PSE provides to its other customers, and to so construct, operate, maintain and serve in accordance with the rules and regulations of the WUTC (including, but not limited to, PSE rates and tariffs on file therewith).<sup>12</sup>

However, PSE states that it is within JPUD's discretion to determine when it is ready to close and displace PSE as the service provider.

18. The APA contains provisions that are intended to reflect a smooth transition. As noted above, the APA contains provisions that ensure that PSE has no disincentive to continue to make investments that are necessary to maintain safe and reliable service to PSE's customers. PSE states that the APA also provides a structure pursuant to which the parties will facilitate an efficient transition with agreed upon measures for transition of customer data, maps and any materials related to the location and configuration of the Assets, arrangements regarding requests for transmission interconnections and transmission services,

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<sup>11</sup> *See id.* at 25.

<sup>12</sup> *See id.* at 19.

billing records, electric service cut-over planning and procedures, and security and communication protocols.<sup>13</sup>

19. PSE states that it has both the means and the obligation to continue to serve its customers consistent with the rules and regulations of the WUTC and PSE rates and tariffs until such time as JPUD closes and takes title to the Assets. At closing, PSE continues, JPUD will take title to these Assets and will have both the means and the responsibility under state law to serve these customers. At closing, PSE will be unable to serve and will have no responsibility to do so. Therefore, PSE has requested an order declaring that the transition of its responsibilities to provide electrical service to its customers in the Service Territory is sufficient and consistent with PSE's service obligations.

### **III. APPROPRIATENESS OF DECLARATORY ORDER**

20. PSE references WAC 480-07 and RCW 34.05.240(1), in its request for a declaratory order. A declaratory order requires a showing:

- (a) That uncertainty necessitating resolution exists;
- (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- (c) That the uncertainty adversely affects the petitioner;
- (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and
- (e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.

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<sup>13</sup> See *id.* at 35.



21. PSE states that the uncertainty to be resolved by PSE's Petition is threefold: 1) whether RCW 80.12.020(2) authorizes PSE to transfer the Assets without further review or approval by the Commission, 2) whether the price PSE will receive for the Assets is sufficient to fully compensate PSE for the sale of Assets, and 3) whether the provisions of this APA pertaining to PSE's transition of its responsibilities to provide electrical service to its customers in the Service Territory are sufficient and consistent with PSE's public service obligations. PSE states that these questions require interpretation and application of Washington law and the Commission's rules.

22. PSE states that there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion. The APA was entered into under threat of condemnation and as an offer of settlement. PSE adds that if the parties do not consummate the APA, JPUD will proceed with condemnation proceedings. PSE states that the controversy bearing on this settlement and the subject matter of this Petition involves uncertainty surrounding the legal authority for, and implications of, the transfer of Assets to JPUD. PSE believes a declaratory order addressing the outstanding issues would conclusively resolve these uncertainties, would satisfy a condition precedent in the APA, and would therefore not be merely an advisory opinion.

23. PSE states that doubts surrounding the rights and obligations of PSE in transferring Assets and the amount of the purchase price expose PSE to the uncertainty and delay of litigation such that a declaratory order is required. PSE states that if it had not pursued resolution of these uncertainties, a condition precedent to closing would not occur and JPUD would likely pursue condemnation. PSE adds that due to the uncertainties associated with a determination of damages in a complex condemnation proceeding, there is significant litigation risk that adversely affects PSE.

24. PSE states that the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested. PSE adds that resolution of the questions raised in its petition will not result in any adverse effect to others or the general public.

#### **IV. FINDINGS AND CONCLUSIONS**

25. PSE is engaged in the business of furnishing electric and gas service within the state of Washington as a public service company and is subject to the jurisdiction of this Commission.

26. Jefferson County Public Utility District #1 ("JPUD") is a special purpose district as defined in RCW 36.96.010.

27. The citizens of Jefferson County voted to approve Proposition 1, authorizing JPUD to construct or acquire electrical facilities for the generation, transmission or distribution of electric power in Jefferson County. JPUD is so authorized pursuant to RCW 54.16.040. Jefferson County is also authorized to acquire PSE's assets by eminent domain

28. On July 15, 2010, PSE filed a Petition for Declaratory Order with the Commission.

29. A declaratory order in this proceeding is in the public interest.

30. The purchase price of \$103,000,000 is sufficient to fully compensate PSE for the sale of its assets.

31. The provisions of the asset purchase agreement at issue in this proceeding regarding PSE's transition of its responsibilities to provide electrical service to its customers in the service territory is sufficient and consistent with PSE's service obligations.

## V. DETERMINATION AND ORDER

WHEREFORE, THE COMMISSION HEREBY DETERMINES:

32. the transfer of Assets from Puget Sound Energy, Inc. to Jefferson County Public Utility District is authorized by RCW 80.12.020(2);

33. the purchase price of \$103,000,000 is sufficient to fully compensate PSE for the sale of its assets, and

34. provisions of the Asset Purchase Agreement regarding transition of PSE's responsibilities to provide electrical service to its customers in the service territory are sufficient and consistent with PSE's service obligations.

35. This order shall in no way affect the authority of this Commission over rates, services, accounts, evaluations, estimates, or determination of cost or any matters whatsoever that may come before it, nor shall anything herein be construed as an acquiescence in any estimate or determination of costs claimed or asserted.

36. The Commission retains jurisdiction over the subject matter of the Petition and PSE to effect the provisions of this order.

DATED at Olympia, Washington, and effective this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

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JEFFREY D. GOLTZ, Chairman

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PATRICK J. OSHIE, Commissioner

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PHILIP B. JONES, Commissioner