BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, INC., Respondent.	DOCKETS UE-111048 and UG-111049 (*consolidated)*

REPLY BRIEF OF PUBLIC COUNSEL

MARCH 26, 2012

I. THE LOWER SNAKE RIVER (LSR 1) WIND PROJECT

A. Staff's Brief Reflects A Misunderstanding Of The Public Counsel/ICNU[1] Case.

1. Commission Staff mistakenly asserts that Public Counsel challenges the prudence of LSR 1 in part on the grounds that its price exceeds the expected rate year price of market energy purchases.[2] This claim appears based on Mr. Norwood's introductory statement in Direct Testimony that the cost of LSR 1 is approximately $139/MWh (including the Treasury Grant credit), several multiples of the forecasted rate year market prices.[3] This dramatic price disparity does not by itself establish that LSR 1 was imprudent in this case. However, it does justify the most careful scrutiny by the Commission of whether Puget Sound Energy (PSE) has carried its burden of proof as to need, cost-effectiveness, and customer benefit, regarding a resource which no party argues is needed until at least 2016, and which produces significant excess renewable energy after that date.

2. Staff also argues that in the prudence analyses LSR 1 may only be compared to other renewable resources, asserting that Public Counsel did not make any such comparisons. [4] First, Staff overlooks the fact that Public Counsel evaluated the potential for PSE to meet renewable portfolio standard (RPS) requirements through renewable energy credit (REC) purchases and banking. Public Counsel concluded that the Company failed to seriously evaluate these alternatives, both in the Integrated Resource Plan (IRP) and Request for Proposal (RFP) analyses, despite the fact that they may well have been substantially less expensive than the

---

[1] The LSR 1 portion of this Reply Brief is filed on behalf of both Public Counsel and ICNU.
[2] Staff Initial Brief, ¶ 59.
[3] Exh. No. SN-1CT, p. 3:12-16 (containing confidential figure showing the multiple).
[4] Staff Initial Brief, ¶¶ 61-62.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 5th Ave., Suite 2000
Seattle, WA 98104-3188

acquisition of LSR 1.[5] If the Company had considered the option of banking the considerable number of RECs produced by PSE-owned resources, the development of LSR 1 could have been delayed until 2019.[6]

3. Furthermore, Staff's brief fails to recognize that excess resources will be acquired through the development of LSR 1.[7] Even if LSR 1 is deemed prudent, to the extent these resources are excess to need, they provide no benefit to customers and are not "used and useful" under Washington law.[8] The record in this case shows that with LSR 1 online, PSE will not only meet, but will exceed RPS requirements, up to and including 2020. This is clearly shown in the Company response to Staff Data Request No. 202.[9] This exhibit provides PSE's forecasted REC position through 2020, using RECs not contracted for sale, and assuming LSR 1. The spreadsheet assumes no REC banking. The exhibit shows surpluses ranging from 52 percent to 117 percent through 2019. Even a cursory review of this forecast data shows that, if REC banking is considered, PSE would exceed the RPS in 2020.[10] Similar information was presented to the Board of Directors on May 5, 2010.[11] The costs of these excess resources may not be incorporated in a lawful rate.

---

[5] Public Counsel Initial Brief, ¶¶ 49-60. Additionally, Public Counsel carefully examined the 2010 RFP process and analysis in which LSR 1 was compared to other renewable resources and found that there were serious flaws in the Company's approach to this evaluation. *Id.* ¶¶ 71-75.

[6] Exh. No. SN-1CT, pp. 33-36. Additionally, despite the significant risk that the Southern California Edison 2 contract would be terminated, PSE did not model a banking option utilizing those RECs to meet need.

[7] Staff Initial Brief, ¶ 55. Mr. Nightingale's testimony likewise fails to recognize this issue. PSE Initial Brief, ¶¶ 146-148 (no acknowledgement of excess position).

[8] *See* Public Counsel Initial Brief, ¶¶ 80-89.

[9] Exh. No. RG -41C CX, p. 3. (Forecasted Renewable Energy Credit Position Using P50 Generation Data).

[10] *See also,* Puget Sound Energy, *2011 Integrated Resource Plan,* Figure 5-3, pp. 5-7. This shows the Company in an excess position with LSR 1 through 2019, without considering REC banking. The data does not include the terminated SCE 2 contract. *See also,* Exh. No. MWD-1T, p. 7:6-7. NWEC's witness Ms. Decker, while differing with Mr. Norwood's calculations, acknowledges that PSE will have excess resources. ("PSE will have generated half again as many RECs as it needed over the first eight RPS compliance years.")

[11] Exh. No. RG-13HC, p. 174. (Exhibit M, May 2010 Board of Director Materials). This shows that the Board was informed that LSR 1 would put PSE in excess of RPS need for 2012-2019. It also shows that the IRP "need" is considerably higher than the actual renewable need of the RPS.

B. I-937 Does Not Restrict The Use of Renewable Energy Credits.

4. A key flaw in PSE's LSR 1 analysis is its failure to adequately evaluate a "REC only" purchase strategy as an alternative to LSR 1. Addressing this point on brief, PSE states: "The RPS banking provisions provide, at most, a hedge against wind generation uncertainty, wind curtailment policies, and load uncertainty, and should not be used as a tool to defer meeting the requirements of the state mandated RPS." [12] This position finds no support in the Energy Independence Act (EIA). The PSE brief cites no provision that so restricts the use of REC banking, referring only to the testimony of Ms. Decker and Mr. Nightingale.[13] Ms. Decker relies on general descriptions of Renewable Northwest Project's (RNP) sense of the intent of the legislation as preferring physical compliance. While this may be RNP's preference, this interpretation is not supported by the plain language of the statute.

5. RCW 19.285.040(2)(a) states that utility companies "shall use eligible renewable resources *or acquire renewable energy credits, or a combination of both"* to meet the applicable annual targets.[14] This language is plain and unambiguous. RCW 19.285.040(2)(e) states that "[t]he requirements of this section may be met for *any given year*" with RECs "produced during that year, the preceding year, or the subsequent year."[15] The language "any given year" unambiguously allows the use of RECs to comply with RPS requirements every year. Utilities are given flexibility. The EIA does not contain any deadline that would require utilities to use RECs as a temporary measure and then shift solely to physical compliance by a date certain. No

[12] PSE Initial Brief, ¶ 133.
[13] PSE Initial Brief, ¶ 133, n.268.
[14] Emphasis added.
[15] Emphasis added.

party has cited any reference to hedging in the EIA. Where, as here, the language is clear and unambiguous, there is no need to resort to a study of legislative intent as Ms. Decker suggests.[16]

6. Finally, it should be noted that PSE's position on this point is not consistent with its earlier position before the Commission. In its 2007 Petition for An Accounting Order regarding RECs, PSE stated unqualifiedly that "RECs may be used to demonstrate compliance with a Renewable Portfolio Standard."[17] PSE went on to describe in detail the operation of the EIA REC banking feature, giving RECs a "potential value over three years."[18] There is no support for PSE's reading of the EIA to restrict the use of RECs to hedging.[19]

C. The Commission Should Discount PSE's New Claim Of $190 Million In Benefits.

7. PSE's brief highlights a claim that the construction of LSR 1 in 2012 provides net present value benefits that are $190 million higher than the construction of a similarly-sized alternative plant in 2016.[20] Both the inclusion and description of this analysis in Ms. Seelig's rebuttal testimony is misleading, implying that the purpose of the PSM III optimization model was to provide this analysis.[21] In fact, there is no evidence that this analysis was done for any other

---

[16] *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204- 206, 11 P.3d 762 (2000) *opinion corrected*, 27 P.3d 608 (2001) (addressing statutory construction and legislative intent in the initiative context). The rules of statutory construction apply. The court reads the statute as the average informed voter would. The court cites the Voters Pamphlet as a source of intent if ambiguity exists. The subjective view of one interested organization such as RNP would not be determinative in that consideration.

[17] Exh. No. RG-38 CX, p. 13.

[18] *Id.*, p. 14 The petition explains that RECs have "a two year vintage life, in that it can be used from the previous year, the current year, or in one subsequent year." Hedging is not mentioned.

[19] For PSE to carry an ongoing 52-117 percent excess supply of RECs (see discussion above) solely for hedging purposes would be a highly questionable and unusual hedging strategy.

[20] PSE Brief, ¶ 125. *See*, Exh. No. AS-4HCT, p. 5, Table 1 and Table 2.

[21] Ms. Seelig's rebuttal testimony stated "PSE's optimization model compares the costs and benefits of building LSR Phase 1 in 2012 with the costs and benefits of building an alternative wind plant in 2016. In doing this analysis, PSE ran each scenario's optimization model twice: once with LSR Phase 1 with a commercial operation date in 2012 and once with a similarly sized alternative plant with a commercial operation date in 2016. For the second run of each scenario, PSE manually removed LSR Phase 1 and inserted a similarly sized alternative plant in 2016 because the optimization model originally did not choose an alternative wind plant in 2016." (Exh. No. AS-4HCT, p. 4:5-12), however, this calculation was not included in any of the "exhaustive" summaries and analyses she mentioned in

purpose than inclusion in rebuttal testimony. It was not a part of the analysis done prior to the Board's decision, was not considered by the Board at the time it approved LSR 1,[22] nor was it included in the direct testimony and exhibits provided by Ms. Seelig and Mr. Garratt.[23] Moreover, this figure is derived from an apples-to-oranges comparison between LSR 1 and a similar sized generic plant in 2016.[24] The analysis relies upon the generic cost assumptions used in the renewable phase of the 2010 RFP evaluation, which, as discussed in Public Counsel's opening brief, did not utilize up-to-date capital cost information.[25] As a result, the analysis also overstates the cost of building the generic resource in 2016, making LSR 1 look more attractive by comparison.

D. Other Parties' Policy Arguments Are Not Germane To Prudence Issues.

8. NWEC's brief makes the argument that PSE, and by extension, the Commission, as part of the prudence analysis, should consider the general societal and environmental benefits of renewable resources, as a factor tipping the scales in favor of early wind because it is "the right

---

the prior paragraph. Furthermore, none of the descriptions of the PSM III model in those summaries or in her direct testimony made this claim. (*See,* for example, Exh. No. AS-3HC, pp. 201-203.).

[22] A review of Exh. No. RG-13HC, which includes the materials provided for the May 5, 2010 Board Meeting, reveals that there is no reference to this analysis. Nor has Public Counsel found any mention of this analysis in the minutes from the May 5, 2010, Board of Director's meeting, which are included in Exh. No. RG-33HC CX.

[23] This is evident from the fact that the $190 million calculation is derived from the PSM III v. 13.9 results, which the Company has confirmed were not included in the Board materials. Additionally, this analysis includes calculations and corrections related to discovery in this docket. *See,* Rebuttal Workpapers of Aliza Seelig; Exh. No. AS-4HCT, Tables 1 and 2; and Exh. No. AS-24CX.

[24] In this calculation the "base" capital costs for the 2016 generic plant are roughly 33% higher than the capital costs for LSR in 2012. Additionally, this generic assumption is 17% higher than the June 2010 updated "base" assumption for 2016 used for the capacity phase of the 2010 RFP evaluation and 44% higher than the "low" assumption for 2016. *See,* Highly Confidential Rebuttal Workpapers of Aliza Seelig, File name: (HC) LSR eqv in 2016_RFP Resource Opt_PSM III v 13.9_Trends.xls. The LSR 1 capital cost is located under the tab: "Acquisition Inputs", Cell: E160. The base case and low capital cost assumptions are located under the tab: "Assumptions", Cell: I60 (base) and Cell: I105 (low). *See also,* Exh. No. AS-23 CX for the file and folder location for the updated generic cost assumptions from the capacity phase, Tab: "To PSM", cell:H39.

[25] Public Counsel Initial Brief, ¶¶ 45-48.

thing to do."[26] Simply put, while utility directors or management are certainly free to further their preferred societal goals, they are not free to do so with the involuntary financial support of their ratepayers. In *Jewell v. WUTC*, the Washington State Supreme Court stated that "[t]he commission is not the keeper of the social conscience of the citizens of this state."[27] In holding that charitable contributions made by investor owned utilities were to be paid by the company's stockholders, and not ratepayers, the *Jewell* court recognized that "[t]here is nothing in the statutory scheme which directs that the [utility] must be a good corporate neighbor..."[28] Numerous jurisdictions agree.[29] The *Jewell* court also warned the Commission of potential First Amendment ramifications.[30] The New York Court of Appeals addressed these potential constitutional issues in *Cahill v. PSC of New York*, holding that an order allowing recovery of the utility's "selected philanthropy"[31] in rates violated ratepayer's First Amendment protection against compelled speech.[32]

9. The reasoning of *Jewell* and *Cahill* does not allow utilities to pursue more renewable energy at ratepayer expense just because it is a "good thing" to do.[33] The voters of Washington state have through I-937 established specific statutory RPS mandates in order to encourage

---

[26] NWEC Initial Brief, ¶ 36; Goltz, TR. 383:1-5 ("is there room in the prudency analysis for the utility, and for use in reviewing the utility's judgment, for us to say, you know, more carbon-free energy is a good thing, so we're going to error on that side.")

[27] *Jewell v. WUTC*, 90 Wn.2d 775, 777, 585 P.2d 1167, 1169 (1978).

[28] *Id.*

[29] *See generally, e.g. Pacific Tel. & Tel. Co. v. CPUC*, 401 P.2d 353 (Cal. 1965) (upholding CPUC's disallowance of recovery of charitable contributions because they are "an involuntary levy on ratepayers" who cannot avoid the levy because of the monopolistic nature of utility service); *Southern Bell Tel. & Tel. Co. v. Florida PSC*, 443 So.2d 92 (Florida 1983); *Cleveland v. PUC*, 406 N.E.2d 1370 (Ohio 1980); *State v. Oklahoma Gas & Electric Co.*, 536 P.2d 887 (Okla. 1975).

[30] *Jewell*, 90 Wn.2d at 779.

[31] *Cahill v. Public Service Commission of New York*, 556 N.E.2d 133, 137-38 (1990).

[32] *See id.* at 138.

[33] While Mr. Norwood addressed this issue at hearing in response to a Bench question, he was not presenting a legal opinion on behalf of Public Counsel.

development of renewable energy. The policies promulgated by RCW 19.285 *et seq.* encouraging development of renewable energy do not abrogate the existing law regarding prudence, however. If a resource is not cost-effective, not needed to meet EIA requirements, and not beneficial to customers, the Commission may not "order ratepayers to make involuntary contributions" to support PSE's corporate "philanthropic" decision to exceed these RPS requirements.[34]

10. NWEC and Sierra Club's largely policy-based arguments about renewable energy are off the mark. This is not a case about whether wind power is desirable. Public Counsel strongly supports diversification of supply, the inclusion of renewable resources in utility portfolios, and utility compliance with the EIA. But renewable resource investments must still be prudent and cost-effective, using ratepayer funds wisely. State law still requires that rates be fair, just, and reasonable. Over-investment in self-build renewable projects shifts the risk of ownership to ratepayers, and reduces utility flexibility to respond to changes in energy markets and renewable resource technology. For example, turbines have seen steady increases in efficiency. Missing the opportunity to take advantage of such developments was specifically presented to the PSE Board as a risk of the LSR 1 transaction.[35] There is no benefit to the public, or renewable policy goals, if substantial capital is misdirected to unnecessary projects.

II. CONSERVATION SAVINGS ADJUSTMENT (CSA) AND DECOUPLING[36]

[34] The Company, through its shareholders can make added contributions to environmental projects. Individual ratepayers may freely choose to support environmental goals by purchasing green power, investing in home conservation measures, or contributing to organizations of their choice. The legislature has the power to tax all Washington residents to advance statewide environmental policy goals.

[35] A "risk analysis" presentation to the Energy Management Committee on May 21, 2009, stated that development of WTG (wind turbine generator) technology is likely to improve capacity factors, resulting in higher project cost now relative to later wind plants. Exh. No. RG-14HC, p. 57.

[36] This portion of the brief is filed on behalf of both Public Counsel and The Energy Project.

11. Regarding the CSA, PSE suggests that Public Counsel and Staff "cannot have it both ways" with regard to the validity of savings estimates for ratemaking purposes,[37] asserting that since these savings estimates are sufficient for planning and target-setting, they should also be rigorous enough for ratemaking. This ignores the simple and fundamental fact that customer usage changes as a result of a range of factors.[38] PSE too has conceded this point.[39] Allowing rates to be increased annually, as they would under the CSA, based on an assumption that customer usage is definitively reduced by the amount of PSE's conservation savings estimates, without taking any other factors into account, is a distortion of fundamental ratemaking principles. [40]

12. PSE's attempt to favorably compare its CSA as a "bottom up approach" similar to the Avista gas decoupling mechanism is inappropriate.[41] The Avista mechanism is calculated based on actual customer load and may result in a positive or negative deferral. The design of the CSA is completely different, relying on conservation program savings estimates, resulting only in increases to rates.

13. In support of its "full decoupling" proposal, NWEC repeats familiar but increasingly hollow refrains. They argue "...full decoupling will further the Commission's energy conservation goals,"[42] yet their proposal does not include any requirement for incremental conservation. They reassert the old rationale that utilities are "discouraged from investing in ...

---

[37] PSE Initial Brief, ¶ 163.
[38] Public Counsel Initial Brief, ¶ 104, n.196; Staff Initial Brief, ¶¶ 198-200.
[39] Piliaris, TR. 629:3-16.
[40] PSE's asserts that no party disputed its calculation that PSE sponsored energy efficiency will reduce its ability to recover $18 million of costs in the rate year, PSE Initial Brief, ¶ 150, disregarding the fact that no other party supports PSE's proposed CSA and that Staff and Public Counsel dispute the savings estimates used as inappropriate for ratemaking.
[41] PSE Initial Brief, ¶ 154 and ¶ 166.
[42] NWEC Initial Brief, ¶ 14.

energy efficiency,"[43] in a state where utilities are required by the EIA to pursue all available, feasible, achievable energy efficiency or face financial penalties, and where PSE describes itself as "aggressive" on conservation.[44]

14. NWEC suggests that PSE proposed substantially lower conservation targets for 2010-2011, in part due to uncertainty about its ability to recover lost margins from conservation.[45] NWEC further asserts that PSE "will not be fully motivated to sustain this leadership [in conservation] unless and until it has more certainty about its ability to recover lost margins due to conservation."[46] It is more appropriate, however, to view the I-937 target experience as an indication of the effectiveness of the statutory scheme. The Commission rejected the methodology and process PSE used to identify the low conservation targets mentioned by NWEC, ruling that the EIA "does not give PSE unrestrained discretion as to the methodology" used to project "all available conservation that is cost-effective, reliable, and feasible."[47] Moreover, in contrast with NWEC's arguments, PSE reiterates its long history of achievements in conservation,[48] and states that NWEC's decoupling proposal would not address the effects of

---

[43] NWEC Initial Brief, ¶ 3.

[44] Stolarski, TR. 694:12-15. In addition, NWEC asserts that opposition to decoupling is simply a "reflexive" response, that opponents are merely saying "that's not the way we do things here." NWEC Initial Brief, ¶ 1. This is not a fair description of Public Counsel's role on this issue generally, or in this proceeding in particular. Public Counsel has been an active participant in every decoupling filing before the Commission in the past decade, conducting discovery, detailed technical analysis, presenting testimony and argument, and making detailed recommendations to the Commission. Public Counsel's positions regarding decoupling are based on reasoned analysis derived from this experience. Moreover, because Public Counsel is intimately aware of the complexity and the administrative burden of decoupling in practice, we strongly dispute NWEC's characterization of its proposal as "simple."

[45] NWEC Initial Brief, ¶ 21.

[46] *Id.*

[47] *WUTC v. PSE,* UE-100177, Order 04, (June 4, 2010), ¶ 129, Conclusion of Law 4.

[48] PSE Initial Brief, ¶ 150. At hearing, Mr. DeBoer stated that PSE's "marketing department is now geared towards selling conservation. DeBoer, TR. 524:14-15. He also agreed that the Company derives a goodwill benefit from offering conservation programs in an era of frequent rate cases. DeBoer, TR. 548: 8-17.

conservation when the underlying use per customer is increasing, which is the trend PSE sees on the electric side.[49]

III. OTHER CONSUMER ISSUES: SQI-9 AND LOW INCOME SUPPORT

15. While neither Staff nor PSE has provided any quantification of the revenue impact of this issue, Staff argues it must be significant because Public Counsel believes the number of increased disconnections after suspension – 17,000 -- is significant.[50] This makes no sense. Public Counsel's point is that the because of the sheer number, the human impact of the increased disconnections is significant. The revenue impact is a separate issue and neither PSE nor Staff points to any evidence that the number of disconnections translates to any specific level of revenue impact on the Company. This SQI metric should be reinstated to restore a proven incentive for PSE to seek alternatives to disconnection.

16. Public Counsel supports the recommendation of The Energy Project for additional rate assistance. Additional low-income rate assistance is particularly justified in current economic conditions and The Energy Project's proposed increases are reasonable.

IV. CONCLUSION

17. For the foregoing reasons, and those set out in the Initial Brief, Public Counsel respectfully requests that the Commission adopt Public Counsel's recommendations in this case.

18. DATED this 26th day of March, 2012.

ROBERT M. McKENNA
Attorney General

Simon J. ffitch
Senior Assistant Attorney General

[49] DeBoer, TR. 552:22-553:1 and TR. 525:24-526:16. Despite NWEC's arguments regarding the need to address PSE's disincentives, financial barriers, and psychological motivations, PSE itself opposes the NWEC solution to its problems.
[50] Staff Initial Brief, ¶ 223.