

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,**

**Complainant,**

v.

**PUGET SOUND ENERGY,**

**Respondent.**

**DOCKET UG-230968**

**PUGET SOUND ENERGY'S  
MOTION TO STRIKE PORTIONS  
OF JOINT ENVIRONMENTAL  
ADVOCATES' OPENING BRIEF**

**I. INTRODUCTION AND RELIEF REQUESTED**

1. Pursuant to WAC 480-07-375, Puget Sound Energy (“PSE” or “the Company”) hereby moves the Washington Utilities and Transportation Commission (“Commission”) to strike the modified risk-sharing mechanism proposed by Climate Solutions, NW Energy Coalition, and Washington Conservation Action (collectively, "JEA") in its post-hearing brief. PSE requests that the Commission disregard JEA's modified risk-sharing mechanism as an improper attempt to present a new proposal that was not put forward or supported by evidence in this proceeding. The parties to this proceeding have not had an opportunity to review, analyze, examine, or rebut the new proposal, and consideration of JEA’s new proposal would prejudice PSE and other parties.

**II. BACKGROUND FACTS**

2. This docket concerns PSE's tariff revision for the 2024 calendar year to recover costs and pass back proceeds associated with the Climate Commitment Act, a cap-and-invest program for greenhouse gas emissions. The Commission suspended the tariff for adjudication and ordered

parties to address, among other issues, the development of a risk-sharing mechanism to allocate the risks and costs of Climate Commitment Act compliance between PSE and its customers.<sup>1</sup>

The Commission stressed that the issue of a risk-sharing mechanism for Climate Commitment Act compliance costs is a complex one, and it would benefit from a full record.<sup>2</sup>

3. JEA filed responsive testimony that proposed a risk-sharing mechanism based on a sharing band at the 97.5th percentile of market prices, an earnings test, and a 30 percent sharing ratio for PSE.<sup>3</sup> JEA's witness, William Gehrke, explained the details and rationale of JEA's proposal in his testimony and exhibits. JEA's proposal was subject to discovery and cross-examination by PSE and other parties.<sup>4</sup> Upon such analysis and examination, PSE<sup>5</sup> and Public Counsel<sup>6</sup> both found critical flaws in JEA's risk-sharing mechanism, not only in the mechanism's methodology and support,<sup>7</sup> but in its operation and impact.<sup>8</sup> In its post-hearing brief, JEA acknowledged several of these criticisms and effectively withdrew its proposal.<sup>9</sup> Rather than merely concede the mechanism's deficiencies, however, JEA now inappropriately attempts to use its brief to present an entirely new risk-sharing mechanism.<sup>10</sup>

4. The proposal presented in JEA's brief is a completely new mechanism that differs fundamentally from the proposal JEA presented prior to the evidentiary hearing. It begins by changing the methodology used to establish sharing bands from a normalized distribution to a percentile of market prices.<sup>11</sup> Then JEA adds a new sharing band "to create a more continuous

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<sup>1</sup> Order 01 at ¶¶ 14, 25.

<sup>2</sup> Order 01 at ¶ 14.

<sup>3</sup> Gehrke, Exh. WG-1T at 22:12.

<sup>4</sup> See, e.g., Mickelson, Exh. CTM-6.

<sup>5</sup> See Mickelson, Exh. CTM-4T at 5:13-8.

<sup>6</sup> Earle, Exh. RLE-1CT at 21:6-24:18.

<sup>7</sup> Mickelson, Exh. CTM-4T at 6:9-8:11.

<sup>8</sup> See, e.g., Earle, Exh. RLE-1CT at 24:3-7.

<sup>9</sup> JEA's Post-hearing Br. at ¶¶ 28-29.

<sup>10</sup> JEA's Post-hearing Br. at ¶¶ 29-30.

<sup>11</sup> JEA's Post-hearing Br. at ¶ 30(1).

penalty structure.”<sup>12</sup> Next, JEA proposes a fundamental change to the prudence review of allowance costs, calling for automatic disallowance of any cost that falls between the actual price and the price ceiling.<sup>13</sup> Finally, JEA proposes an unintelligible addition that it apparently hopes the Commission will create: “JEA also recommends that the Commission adopt, at the end of this compliance period, an added component to the risk-sharing mechanism that has been developed to address Public Counsel’s price risk concerns related to PSE’s market performance.”<sup>14</sup> JEA does not explain how the added component should be developed, what it is, how it is supposed to operate, or what its impact will be.

5. JEA's modified risk-sharing mechanism is presented post-hearing, so it is not subject to discovery or cross-examination by PSE or other parties. While the idea for a part of it may have originated from Public Counsel’s testimony, the new proposal itself is not supported by any evidence or analysis in the record, and it was not presented or challenged in the evidentiary hearing. As explained below, PSE and other parties would be prejudiced by the Commission’s consideration of JEA’s modified risk-sharing mechanism and it should be stricken from the record. Consideration of JEA’s proposal without allowing PSE an opportunity to obtain information about the proposal through discovery or challenge it on the record arguably violates PSE’s due process rights in this adjudication and exposes the Commission to judicial review for arbitrary and capricious decision-making.

### III. ARGUMENT

6. PSE requests the Commission strike paragraphs 26 through 31 of JEA’s Post-hearing Brief. A brief is the opportunity for the parties to present their arguments and authority in support of their positions after the conclusion of an evidentiary hearing.<sup>15</sup> JEA’s brief, however,

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<sup>12</sup> JEA’s Post-hearing Br. at ¶ 30(2).

<sup>13</sup> JEA’s Post-hearing Br. at ¶ 30(3).

<sup>14</sup> JEA articulates no such “added component,” however, citing Public Counsel’s entire cross-answering testimony “generally” and testimony referencing a price issue and a quantity issue. JEA’s Post-hearing Br. at ¶ 30 and note 75.

<sup>15</sup> WAC 480-07-390.

does not present argument or authority in support of its position, it instead concedes that its risk-sharing mechanism is flawed and inappropriately presents an entirely new mechanism for the Commission's one-sided consideration.

**A. PSE is prejudiced because it cannot fully understand JEA's proposal.**

7. The attempt by JEA to change its proposal after a hearing is nothing new. The Commission has allowed post-hearing changes in a party's position when they do not prejudice any party, but the Commission disapproves of such approach and will strike portions of a brief if it believes a party will be prejudiced.<sup>16</sup> In PSE's 2007 general rate case, the parties were considering changes to PSE's power cost only rate case ("PCORC") mechanism, a known and familiar process. Public Counsel and the Industrial Customers of Northwest Utilities made changes to their initial proposals in a post-hearing brief. However, the adjustments were generally clear and definite, the mechanism was a familiar one, and the issues were being considered only after a lengthy review of the same issues in another preceding case. In other words, nothing was new to any party. PSE's PCORC was a well-known process and, while the impacts of changes at that late state may have been disputed, they were certainly understandable.

8. Here, on the other hand, JEA's presentation of a new proposal in briefing crosses the line and prejudices PSE and other parties. JEA is not proposing a simple condition to a well-known process, nor is it referencing a new piece of evidence that PSE could review and rebut in its reply brief.<sup>17</sup> It has effectively withdrawn and replaced its risk-sharing mechanism proposal with a new mechanism. The modified proposal includes a new sharing band, creates wholly revised

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<sup>16</sup> "While we disapprove of the approach Public Counsel and ICNU took in this matter, we will not strike portions of their briefs and deny PSE's and Staff's motions to strike. We caution, however, that our decision could easily tip the other way if we perceive an intentional effort by a party to prejudice others by raising for the first time on brief matters such as those complained of here." *WUTC v. Puget Sound Energy*, Dockets UE-072300 and UG-072301 (consolidated), Final Order 13 at ¶ 24 (Jan. 15, 2009).

<sup>17</sup> See *WUTC v. CenturyLink Communications, LLC*, Docket UT-181051, Final Order 18 at ¶ 60 (June 9, 2023) ("To allow the use of such unadmitted "authorities" as these articles for the purposes of addressing disputed issues of fact would create a dangerous precedent that would potentially deny parties their due process rights in Commission adjudication.").

thresholds, adds an automatic disallowance of certain costs, and requests a totally undefined and unexplained price risk component. A risk-sharing mechanism for Climate Commitment Act costs is a novel and complex issue. PSE and other parties, as well as the Commission itself, need to fully understand a party's proposal and the potential impacts of it on interested parties before the Commission can determine if the proposal will be in the public interest.

9. PSE spent considerable effort in discovery in this proceeding trying to understand the proposed risk-sharing mechanisms, and the Company presented significant evidence addressing the impacts of just one portion of one party's proposal.<sup>18</sup> As stated several times in this proceeding, even small changes can have big consequences,<sup>19</sup> and JEA's proposed modifications are big changes. It is impossible to grasp their impact or understand their operation or scope because JEA introduced them after the record was already closed.<sup>20</sup>

**B. Even if PSE were able to understand JEA's proposal, the Company is prejudiced because it is not able to present evidence rebutting it.**

10. Even if JEA's modifications were clear and straightforward, which they are not, then PSE is entitled to present evidence rebutting them. JEA's modified risk-sharing mechanism imposes a more onerous and arbitrary risk sharing scheme than JEA's original proposal. JEA *clearly* seeks to disallow certain costs that its initial proposal did not seek to disallow, and it *unclearly* seeks some sort of price risk "added component."<sup>21</sup> These changes propose a more aggressive and potentially harmful mechanism than JEA's initial proposal, and JEA presents them post-hearing where they are not subject to any scrutiny or opposition. Such an outcome is not only prejudicial to PSE and other parties, but also unhelpful to the Commission. It directly contradicts the

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<sup>18</sup> See Martin, Exh. JLM-ICTr and Shipman, Exh. TAS-1T, addressing potential impacts of Staff's earnings test.

<sup>19</sup> See Kuzma, TR. 96:8-11. See also, Kuzma, Exh. JK-3T at 80:5.

<sup>20</sup> "The evidentiary record in an adjudication closes at the conclusion of the last day of hearing unless the commission rules otherwise; except that the evidentiary record will also include any exhibit containing public comments and responses to bench requests the commission receives after the hearings conclude." WAC 480-07-830(1)

<sup>21</sup> JEA's Post-hearing Br. at ¶ 30.

Commission's own purpose of initiating this adjudication – creating a full record, including testimony, to consider the complex issue of a risk-sharing mechanism and determine whether PSE's tariff revisions result in fair, just, reasonable, equitable, and sufficient rates.

11. Finally, allowing JEA to submit a new proposal in briefing sets a troubling precedent that encourages parties to game the procedural schedule to their benefit. Public Counsel presented no response testimony in this case and proposed no alternative to PSE's risk-sharing mechanism, choosing instead to evaluate the other parties' presented proposals.<sup>22</sup> JEA then used Public Counsel's critique of other parties' -proposals as a basis for its changed mechanism, which it presents after the record is closed. Allowing parties to propose an entirely new mechanism after discovery and cross examination have concluded is antithetical to the comprehensive and deliberative proceeding the Commission had in mind when it set this matter for adjudication. The Commission should do more than disapprove of the use of such procedural tactics, it should prohibit them.

#### IV. CONCLUSION

12. For the reasons set forth above, PSE respectfully requests that the Commission enter an order striking paragraphs 26 through 31 of JEA's Post-hearing Brief. JEA's significant modifications result in a new risk-sharing mechanism proposal that was not presented in this proceeding. Consideration of JEA's new proposal circumvents the adjudicative process and prejudices PSE and other parties.

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<sup>22</sup> See, Public Counsel Cover Letter (July 18, 2024) and Earle, Exh. RLE-1CT.

Respectfully Submitted this 15<sup>th</sup> day of November, 2024

**PERKINS COIE LLP**



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