**BEFORE THE WASHINGTON**
**UTILITIES AND TRANSPORTATION COMMISSION**

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| WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION<br><br>Complainant,<br>v.<br><br>PUGET SOUND ENERGY, INC.<br><br>Respondent. | DOCKET UG-230968 |

# REPLY BRIEF OF PUBLIC COUNSEL

November 21, 2024

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ATTORNEY GENERAL OF WASHINGTON
PUBLIC COUNSEL
800 5TH AVE., SUITE 2000
SEATTLE, WA 98104-3188
(206) 464-7744

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ATTORNEY GENERAL OF WASHINGTON
PUBLIC COUNSEL
800 5TH AVE., SUITE 2000
SEATTLE, WA 98104-3188
(206) 464-7744

## I. INTRODUCTION

*1.* To quote Puget Sound Energy (PSE or the Company), "As the total number of available allowances declines, PSE can make a choice—reduce emissions or acquire compliance instruments to cover emissions obligations, whichever is most cost effective."[1] Under well-established ratemaking principles, when a utility is presented with a choice which will affect rates, a utility is more likely to ignore price impacts if it "knows regardless of price fluctuations, that it will be made whole by rate payers."[2] In this context, a mechanism that aligns ratepayers' interests in cost-effective management choices with those of the shareholders by giving the Company an economic stake in the choices it will make on behalf of customers is appropriate. The Washington Utilities and Transportation Commission (Commission) should affirm its order to direct PSE to adopt a risk sharing mechanism that addresses both allowance prices and allowance quantity.

*2.* The Commission should reject PSE's and Utilities and Transportation Commission Staff's (Staff) invitation to close this Docket with either no mechanism or an inadequate one. At a minimum, the record is sufficient to permit the Commission to reject PSE's proposed mechanism, which Staff now admits is flawed.[3] Contrary to PSE's Motion to Strike Portions of Joint Environmental Advocates' Opening Brief,[4] there is no prejudice to any party from continuing to refine and develop a risk sharing mechanism proposal either in this Docket or

[1] Puget Sound Energy Post-Hearing Brief, ¶ 21 (filed Nov 7, 2024).
[2] *Wash. Utils. & Transp. Comm'n v. PacifiCorp d/b/a Pacific Power & Light*, Dockets UE-230172 & UE- 210852, Order 08/06, ¶ 390 (Mar. 19, 2024).
[3] Staff Post Post-Hearing Brief, ¶ 7. Staff does not necessarily disagree with the criticisms that the Joint Environmental Advocates (JEA) and Public Counsel raised about PSE's proposal.
[4] Puget Sound Energy's Motion to Strike JEA's Brief (filed Nov 15, 2024).


ATTORNEY GENERAL OF WASHINGTON
PUBLIC COUNSEL
800 5TH AVE., SUITE 2000
SEATTLE, WA 98104-3188
(206) 464-7744

future dockets. The Commission should seriously consider ordering PSE to adopt a risk sharing mechanism as proposed by the Joint Environmental Advocates (JEA) to share the risks of non-compliance with the Climate Commitment Act (CCA) and incentivize PSE to make cost-effective choices between purchasing allowances and decarbonization efforts. The Commission should order PSE to resubmit a risk sharing mechanism that addresses allowance prices with sharing bands that create actual incentives.

## II. ARGUMENT

*3.* Nothing in PSE's opening brief undermines the conclusion that a risk sharing mechanism is appropriate. PSE's legal analysis of the CCA statutory language is flawed; the CCA does not remove existing regulatory tools from the Commission's authority. Nor, given its concessions about its choices, does PSE establish a lack of control that might militate against a risk sharing mechanism. Further, PSE is not prejudiced by consideration of JEA's proposal as modified to conform to evidence. The Commission should reject PSE's proposed risk sharing mechanism as inadequate, and order PSE to adopt a risk sharing mechanism that will incentivize effective allowance purchasing strategy and seriously consider adopting JEA's proposal to align Company and ratepayer interests on decarbonization.

### A. A Risk-Sharing Mechanism is Legally and Factually Appropriate.

*4.* The Commission's described the need for a  mechanism which would "share risk such that all parties are encouraged to reduce their emissions, and in turn, the costs required for CCA compliance."[5] Disagreeing with this directive, PSE suggests that because the CCA did not

[5] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy.,* Docket UG-230470, Order 01, ¶ 22 (Aug. 3, 2023).

explicitly include a risk sharing mechanism, the Commission should not alter the legislative scheme by adding one.[6] PSE also asserts that the Commissions should give the CCA markets more time to incentivize customers to change behavior.[7] This argument is legally flawed as it requires the Commission to ignore the statutory directive to use all available policy tools and violates basic statutory construction canons. PSE's assertions are factually flawed for the reasons noted in JSE's brief. PSE's assertions are factually flawed for the reasons noted in JEA's brief and in this Commission's order, which noted a mechanism should "share risk such that all parties are encouraged to reduce their emissions, and in turn, the costs required for CCA compliance."[8]

*5.* It is a well-established principal of statutory construction that the Legislature is presumed to be familiar with existing interpretations of the law, and absent an indication to overrule a particular interpretation, statues are construed to be consistent with prior interpretations.[9] Here, the Commission has a 20-year history of using risk-sharing mechanisms to align shareholder and ratepayer interests.[10] Moreover, in the CCA, the Legislature indicated it wanted "coordinated, comprehensive, and multisectoral implementation of policies, programs, and laws, as other enacted policies are insufficient."[11] The Legislature's silence about risk sharing mechanisms within the CCA cannot be strained to mean a rejection of a well-known regulatory tool as part of a comprehensive multisectoral approach to CCA implementation. If anything, the CCA's

[6] PSE Post-Hearing Brief, ¶¶ 20-23
[7] *Id*, ¶ 24.
[8] *Puget Sound Energy, Inc.,* Docket UG-230470, Order 01, ¶ 22 (Aug. 3, 2023).
[9] *In re Estate of Bowers*, 132 Wn. App. 334, 342-42 (Wash. Ct. App. 2006).
[10] *See e.g. Wash. Utils. & Transp. Comm'n. v. Puget Sound Energy*, Dockets UE-011570 & UG-011571 (*consol.*), 12th Supp. Order ¶¶ 23–24, (June 20, 2002) (adopting a risk sharing mechanism for power costs under its general authority).
[11] RCW 70A.65.005(2)..

language supports the use of all appropriate ratemaking tools to support what PSE admits is a "comprehensive market-based mechanism aimed at reducing greenhouse gas emissions from large emitters."[12]

*6.* PSE's argument against a risk-sharing mechanism is based on a misinterpretation of Commission policy. Citing to the Alternative Forms of Regulation Interim Policy Statement from April of this year, PSE claims that "fundamental principles" require any cost sharing mechanism to address only factors within the utilities control.[13] But the text of the interim statement makes it clear, first, that this consideration does not "limit[] the Commission's authority…[or] hinder the advancement of equity and energy justice."[14] Moreover, the interim statement also includes "factors that are reasonably affected by the utility's actions and not entirely based on external influences."[15] Neither this policy statement, nor the Commission's precedent with risk sharing mechanisms turns on a utility's total control over an expense. Inherent in the concept of risk sharing is some level of expense that is beyond anyone's control. The purpose is to allocate that risk and to incentivize PSE to use what control it has to minimize the magnitude of risk. Emission reduction fits easily within this policy statement and existing precedent. PSE admits that its actions can, and do, affect emissions reduction, and the outcomes are not "entirely" based on external factors; PSE has significant input on the planning and

[12] Direct Testimony of Jason Kuzma, Exh. JK-1T at 2:7-8.
[13] PSE Brief, ¶ 14.
[14] *See*, *in re the Proceeding to Develop a Pol'y Statement*, Interim Pol'y Statement Addressing Performance Measures and Goals, Targets, Performance Incentives, and Penalty Mechanisms, ¶ 22, Docket U-210590 (Apr. 12, 2024).
[15] *Id.*

programming in support of decarbonization.[16] Application of a risk sharing mechanism in this case is entirely consistent with Commission policy.

*7.* The record in this case clearly establishes PSE has sufficient control over costs to warrant a risk sharing mechanism. PSE admitted in the hearing that it was, at a minimum, a partner in decarbonization efforts.[17] And in its opening brief, PSE admitted that compliance with the CCA presents the utility with a choice about the most cost-effective strategy, including decarbonization.[18] Not only is PSE a partner in meeting the CCA's avowed goal of reducing emissions, as JEA notes in its brief, utilities are the party best positioned to plan for, incentivize, and drive emissions reductions.[19] A risk sharing mechanism that incentivizes PSE to make cost-effective decisions to partner with consumers on emission reduction would only serve the CCA's purpose, not impair it. Given PSE's resources to plan for and invest in clean energy, it is simply good ratemaking policy to give PSE a financial stake in the outcome of its own decision making.

*8.* PSE also suggests that because of the complexity and evolving statutory landscape of Washington's attempt to address the existential threat of climate change justifies caution.[20] This argument is misguided. The CCA identifies a clear goal of reducing emissions. The Commission and parties are familiar with the tools with which a utility may support decarbonization including providing incentives and assistance to customers who want to switch, improving efficiency, and investing in the transition to electrification.[21] The fact that there is legal uncertainty does not

[16] JEA Post-Hearing Brief, ¶ 12.
[17] Matt Steuerwalt, TR. 82:23–85:20.
[18] PSE Post-Hearing Brief, ¶ 21.
[19] JEA Post-Hearing Brief, ¶12.
[20] PSE Post-Hearing Brief, ¶¶ 24–27.
[21] *See*, JEA Brief Post-Hearing, ¶ 12.

justify a utility failing to take immediate planning steps to use existing tools. The duty to serve does not change that reality. Assuming it survives legal challenge, the passage of Initiative 2066 heightens the importance of PSE's effective planning around decarbonization programming as that bill complicates more compulsory options directed at customers. If customers or builders cannot be compelled to switch by direct regulation, then incentives and assistance with transition through a utility are increasingly critical. Convincing customers of the economic and social utility behind reducing reliance on energy that pollutes and corrupts our climate will be difficult. Incenting PSE to apply its considerable expertise to assist the public in implementing that switch is good policy.

### B. The Commission Should Deny PSE's Motion to Strike.

*9.* Claiming prejudice, PSE asks the Commission to strike the portion of JEA's brief in which JEA adjusted its proposal in response to the testimony in the hearing and in cross-answering testimony. The Commission should deny the motion as PSE suffered no prejudice in the proceeding and there are ample alternative remedies.

*10.* First, contrary to PSE's claim in the motion, every component of JEA's proposal was presented in evidence. Altering the sharing band thresholds to direct calculation of percentiles of market prices was detailed in Public Counsel's cross-answering testimony from Dr. Earle[22] and data requests submitted during testimony.[23] Similarly, Dr. Earle raised the issue of discontinuous incentives in his cross-answering testimony[24] and JEA witness William Gehrke indicated his

[22] Cross-Answering Testimony of Robert Earle, Exh. RLE-4.
[23] Earle, TR. 152:15–153:13, *see also,* Earle, Exh. RLE-8X.
[24] Earle, Exh. RLE-1CT at 23:6–24:2.


ATTORNEY GENERAL OF WASHINGTON
PUBLIC COUNSEL
800 5TH AVE., SUITE 2000
SEATTLE, WA 98104-3188
(206) 464-7744

willingness to add a sharing band to address that concern.[25] Mr. Gehrke also articulated a possible treatment of allowance prices above the ceiling price in response to Chair Danner's questions.[26] Finally, JEA's reference to added price focused risk sharing mechanism is clearly a reference to Public Counsel's extended testimony about the flaws in PSE's own proposal. PSE had the opportunity to examine both Dr. Earle and JEA witness William Gehrke during the hearing on these issues but chose not to. While the specific parameters of JEA's final proposal changed from direct testimony through cross-answering testimony and the final brief, PSE cannot say that each element was not addressed and supported in the record.

*11.* This is easily distinguishable from the only case PSE cites in which a motion to strike was granted.[27] In that matter, the utility cited to an article that was not submitted into evidence.[28] Here, however, JEA cited only to evidence in the record. PSE's citation to a 2009 general rate case offers no support for its position either.[29] In that case, the Commission denied a motion to strike conditions proposed in a brief where there was a lengthy stakeholder review and a sufficient record.[30] That is the case here as well, where there has been a policy docket with significant stakeholder participation and a full record. PSE might not have seen this particular proposal, but it also cannot legitimately claim to not understand JEA's position. Moreover, here, JEA's brief is clearly in direct response to criticisms leveled at its proposals in cross-answering

[25] Gehrke, TR. 170:24–171:7.
[26] *Id*. at 176:5–20.
[27] PSE Motion to Strike, at 4, fn.17. The other case PSE cites involved a denial of the motion to strike because, among other things.
[28] *Wash. Utils. Transp. Comm'n v. CenturyLink Communications*, Docket UT-181051, Final Order 8 ¶ 60 (June 9, 2023).
[29] PSE Motion to Strike at 4, fn.16.
[30] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy,* Dockets UE-072300 and UG-072301(*consol.*), Final Order 13 ¶ 24 (Jan. 15, 2009).

testimony and during the hearing. Prohibiting a party from addressing, and even agreeing with, counterarguments in a brief would turn procedural rules against procedural fairness itself.

*12.* Second, there is no practical prejudice to PSE in this Docket. PSE may request supplementation of the record to add evidence that it could not have perceived was necessary before JEA's opening brief. PSE may also seek additional time or pages to respond to JEA's articulation of the state of the evidence. Moreover, JEA's proposal, if adopted, would not have an impact until price ceiling units are identified in 2027.[31] The immediate impact will be felt in the new PSE planning docket following passage of the decarbonization bill. PSE, and all the parties, will have ample opportunity to demonstrate whether or how JEA's proposal distorts cost-effective planning around decarbonization programs in that docket and propose necessary alterations. If circumstances change or new evidence comes to light casting doubt on JEA's proposed mechanism, all parties, including PSE, are entitled to seek modification. Whatever perceived prejudice PSE has suffered from JEA's rational response of adjusting to criticisms presented in evidence has adequate remedy short of a motion to strike.

### C. The Commission Should Reject PSE's Proposed Risk Sharing Mechanism.

*13.* PSE's opening brief fails to justify the imposition of PSE's proposed risk sharing mechanism. PSE's argument in favor of its proposal is that it is supported by statistical analysis and the variables are reliable.[32] This does not address the undisputed fact that PSE's proposal is woefully deficient in creating incentive.[33] Whatever the Commission does in this Docket, it should reject PSE's proposed risk sharing mechanism.

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[31] William Gehrke, TR. 173:19–25.
[32] PSE Post-Hearing Brief, ¶ 30.
[33] Earle, TR. 147:1–6.


ATTORNEY GENERAL OF WASHINGTON
PUBLIC COUNSEL
800 5TH AVE., SUITE 2000
SEATTLE, WA 98104-3188
(206) 464-7744

*14.* Public Counsel does not join Staff in recommending that the Commission abandon efforts to improve current proposals. As a mechanism to encourage emission reduction, JEA's proposal has merit and could be adopted now along with the modifications made to address Public Counsel's concerns. But JEA's proposal is inadequate to incentivize a cost-effective allowance purchasing strategy, and that aspect should also be addressed in any CCA risk sharing mechanism. As discussed in Public Counsel's opening brief,[34] and conceded in Staff[35] and JEA's[36] opening briefs, PSE's concept of using market performance to set appropriate sharing bands could be fashioned into an effective risk sharing mechanism if based on average random trading prices with dead and sharing bands around an average market performance. The Commission has the authority to order PSE to develop and propose a risk sharing mechanism along the lines Public Counsel has outlined. Whether in this Docket or a future docket, the Commission is free to be directive about what it considers to be an appropriate target for a risk sharing mechanism (i.e. allowance price and allowance quantity), and what level of incentive is appropriate.

*15.* Public Counsel would have preferred that this Docket end with the adoption of a well-designed and consensual risk sharing mechanism. After all, PSE's CCA rates were implemented provisionally, meaning that PSE is not prejudiced by any delay in determining how to share risk. Ratepayers, however, are already paying one hundred percent of projected CCA costs. Delay

[34] Public Counsel Post-Hearing Brief, ¶ 9 (filed Nov 7, 2024).
[35] Staff Post-Hearing Brief, ¶ 7. ("Staff finds that the basic concept outlined by Public Counsel witness Earle is worth exploring in a future case.")
[36] JEA Post-Hearing Brief, ¶ 30. ("JEA also recommends that the commission adopt, at the end of this compliance period, an added component…to address Public Counsel's price risk concerns related to PSE's market performance.")


ATTORNEY GENERAL OF WASHINGTON
PUBLIC COUNSEL
800 5TH AVE., SUITE 2000
SEATTLE, WA 98104-3188
(206) 464-7744

falls most heavily on ratepayers, and Public Counsel shares JEA's concern that PSE "has repeatedly foot-dragged and been unwilling to engage with the development of a risk-sharing mechanism."[37] The parties have made progress in more closely identifying the risks—allowance prices and allowance quantity—that are the proper targets of a risk sharing mechanism. With respect to allowance quantity, the Commission should consider JEA's proposal. With respect to price, the parties all seem to be in agreement a market performance approach. To prevent further delays, the Commission should feel comfortable directing PSE to propose a more fulsome mechanism with actual incentives. As Staff correctly notes, the burden to propose an appropriate risk sharing mechanism is on PSE, not on the non-company parties.[38] The Commission should order PSE to meet its burden.

## III. CONCLUSION

*16.* The Commission should affirm its order to direct PSE to adopt a risk sharing mechanism that will incentivize PSE to make cost effective choices in acquiring allowances and in reducing emissions.[39] A risk sharing mechanism aligns shareholder and ratepayer interests by sharing the risk of poor allowance purchasing strategy and effective decarbonization programming – turning an academic debate into motivated policy decision making. A risk sharing mechanism aligns shareholder and ratepayer interests by sharing the risk of poor allowance purchasing strategy and effective decarbonization programming–turning an academic debate into motivated policy decision making. Based on the record in this matter, the Commission should determine that PSE

[37] JEA Post-Hearing Brief, ¶ 21.
[38] Staff Post-Hearing Brief, ¶ 9.
[39] PSE Post-Hearing Brief, ¶ 21.


ATTORNEY GENERAL OF WASHINGTON
PUBLIC COUNSEL
800 5TH AVE., SUITE 2000
SEATTLE, WA 98104-3188
(206) 464-7744

has failed to meet its burden to propose an appropriate mechanism and order PSE to do so either in this Docket or in a future docket. The Commission should also seriously consider adopting JEA's proposal to align Company and ratepayer goals for cost-effective decarbonization programs.

DATED this 21st day of November 2024.

ROBERT FERGUSON
Attorney General

TAD ROBINSON O'NEILL, WSBA No. 37153
Assistant Attorney General, Interim Unit Chief

*Attorney for Public Counsel Unit*

800 Fifth Avenue, Suite 200
Seattle, WA 98104
Tad.ONeill@ATG.WA.GOV