

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION**

**Amended Petition of**

**DOCKET UE-070725**

**PUGET SOUND ENERGY, INC.**

**For an Order Authorizing the Use of the  
Proceeds from the Sale of Renewable  
Energy Credits and Emission Reduction  
Allowances for Renewable Resource  
Research, Development, and  
Demonstration Projects and the  
Associated Accounting Treatment**

**BRIEF ON BEHALF OF COMMISSION STAFF**

**March 17, 2010**

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**HIGHLY CONFIDENTIAL PER PROTECTIVE ORDER**

**Redacted VERSION**

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## I. OVERVIEW AND SUMMARY

1           Puget Sound Energy, Inc. (PSE) must comply with the renewable resource portfolio standards of the Energy Independence Act (Act).<sup>1</sup> The Act, like other similar statutes around the country, requires a utility such as PSE to have a certain percentage of renewable resources in its resource portfolio.<sup>2</sup> A utility may comply with the Act by acquiring renewable resources, or by acquiring an interest in the physical attributes of renewable facilities, embodied in what are called Renewable Energy Credits (RECs).<sup>3</sup>

2           PSE has acquired renewable resources in advance of the Act's compliance deadlines. Consequently, PSE is able to sell RECs to compliance-needy utilities.<sup>4</sup> To a much smaller degree, PSE has also been a seller of similar items called Carbon Financial Instruments (CFIs).

3           To date, PSE has received substantial revenues from sales of RECs and CFIs, and will receive substantially more REC revenues over the next several years, pursuant to existing REC sales contracts.<sup>5</sup> In this docket, PSE seeks an accounting order from the Commission prescribing how these proceeds will be accounted for and distributed.

4           The key question is: Who is entitled to the benefits of these REC proceeds? The obvious and logical answer: The REC benefits should go to PSE's retail ratepayers, because they are the ones burdened with the responsibility of paying rates sufficient for PSE to recover all of the costs of the resources that generate the RECs and CFIs. However, this has

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<sup>1</sup> RCW 19.285.

<sup>2</sup> RCW 19.285.040(2)(a).

<sup>3</sup> RCW 19.285.040(2)(d).

<sup>4</sup> Compliance-needy utilities may be subject to the Act or a statute with similar renewable portfolio standards. In this case, the RECs were generated from sales to utilities located in California, a state that has renewable portfolio standards even more rigorous than the Act. Among other things, in California, a utility purchasing a REC must also purchase an equivalent amount of energy. De Boer, TR. 158:1-4.

<sup>5</sup> Parvinen, Exh. No. MPP-1HCT at 7:14-17. The specific REC proceeds amounts are confidential, and are shown in ¶ 19, *infra*.

not stopped two claimants from hoping the Commission will give them exclusive and substantial shares of this money.

5           The first claimant is PSE. PSE wants up to 40 percent of REC revenues, capped at \$21.1 million, so PSE may enjoy a compensated write-off of an account receivable the Company booked in 2001. This "California Receivable" relates to certain PSE power sales to California. PSE claims these power sales made the subsequent sale of RECs possible, but there are at least two reasons why the Commission should reject that claim:

- PSE incurred the California Receivable while under a rate plan in which PSE took the risk and enjoyed all the rewards of highly lucrative transactions such as these. Therefore, PSE alone must bear all the risk related to the California Receivable; but, in any event,
- PSE failed to prove it would have received fewer REC revenues in the open market, absent those power sales and the subsequent litigation.

Should the Commission decide to award PSE a compensated write-off of the California Receivable using REC money, the Commission should deduct the \$4.6 million in outside legal fees associated with the California Receivable litigation, which PSE's ratepayers have supported in the rates.

6           The second claimant consists of PSE and the three low income advocacy groups. They hope the Commission will carve out a special, separate share of REC and CFI proceeds for the exclusive benefit of a single customer group: PSE's low income customers. Not only that, they want \$10 million in REC proceeds before anyone else gets a share, and 20% of all further REC proceeds, up to an additional \$10 million.<sup>6</sup>

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<sup>6</sup> Under this proposal, low income customers would receive not only the exclusive benefits from their proposed low income programs, but also a share of the REC benefits received by all ratepayers. Thus, if the



7           They want this money to fund two programs to provide low income customers energy efficiency benefits that otherwise would not be available, including house structure repairs, and installation of solar panels and solar hot water heating facilities.

8           PSE and the low income advocates could be correct that these special low income programs further various social welfare goals, but that is not the issue. The issue is whether their claim is reasonable and lawful. The record shows it is neither reasonable nor lawful:

- No customer group has a unique status entitling it to an exclusive share of REC proceeds;
- The funding of the proposed low income programs is unduly preferential, in violation of RCW 80.28.090.

In any event:

- PSE and the low income advocates base their claim on certain “public policy” factors as well as the policy in RCW 70.164, none of which is within the Commission’s jurisdiction to consider;
- The proposed low income programs are not cost-effective; and
- Using REC money to fund these programs violates the “benefit should follow burden” principle.

9           In the end, the Commission should reject the claims for exclusive shares of REC proceeds made by PSE and the low income advocates. The Commission should return the REC proceeds to all ratepayers by requiring PSE to: 1) Book the net proceeds from the sale

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Commission granted the Amended Petition as filed, the low income customers’ share would greatly exceed \$20 million.

of RECs and CFIs in a regulatory liability account; 2) Use that account to reduce rate base; and 3) Amortize the balance in the account over 10 years.

## II. FACTS

10 PSE is seeking an accounting order from the Commission specifying the proper disposition of REC proceeds. An accounting order is necessary because without one, PSE would simply book the revenue in the month it is received.<sup>7</sup> The Commission would not otherwise capture these revenues for ratepayers absent a complaint or an appropriately-timed rate filing or other filing, such as the petition here.

### A. PSE's Petitions

11 PSE initiated this docket on April 13, 2007, when it filed its original Petition. In that Petition, PSE asked to distribute REC proceeds two ways:

- **For research and development:** PSE would fund research and development (R&D) of renewable energy resources;<sup>8</sup> and
- **For all ratepayers:** For any REC revenue not used for renewable resource R&D within 18 months from when PSE booked that revenue, PSE would credit that revenue to all of its customers.<sup>9</sup>

12 In the Petition, PSE noted that the R&D aspect of its proposal would benefit customers because the revenues would be used to “develop renewable generation resources to be used to serve customers.”<sup>10</sup>

13 On October 7, 2009, PSE filed its Amended Petition. In the Amended Petition, PSE abandoned its request that REC and CFI proceeds go first to renewable R&D that would

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<sup>7</sup> De Boer, Exh. No. TAD-28.

<sup>8</sup> Petition at ¶ 18, 4<sup>th</sup> bullet (April 13, 2007).

<sup>9</sup> Petition at ¶ 20, last item (April 13, 2007).

<sup>10</sup> Petition at ¶ 17, item (2)(i) (April 13, 2007).

benefit all PSE customers. In its place, PSE wants up to 60 percent of REC revenues (capped at \$41.1 million) exclusively for PSE and low income customers, as follows:

- **For PSE:** Up to 40 percent of REC revenues, capped at \$21.1 million, for a compensated write-off of the California Receivable;<sup>11</sup>
- **For low income ratepayers:** Up to 20 percent of REC revenues, capped at \$20 million, for two new programs exclusively to benefit low income ratepayers, with the first \$10 million paid immediately;<sup>12</sup> and
- **For all ratepayers:** Whatever money is left after the PSE and the low income proposals (i.e., the amounts over \$41.1 million), PSE would return to all customers via a credit to PSE's Storm Damage regulatory asset account.<sup>13</sup>

14 PSE filed testimony in support of the Amended Petition, through PSE witness De Boer, and a group of witnesses who filed supporting Joint Testimony: PSE, the NW Energy Coalition, The Energy Project, and the Renewable Northwest Project.

#### **B. Nature and Amounts of PSE's RECs and CFIs<sup>14</sup>**

15 According to PSE, RECs and CFIs are intangible assets related to certain types of generating facilities that represent the rights to claim the environmental attributes of such facilities. In the case of RECs, these attributes are sufficient to allow the REC owner to comply with renewable portfolio standards to the same extent as if it owned the resource.<sup>15</sup>

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<sup>11</sup> Amended Petition at 8, ¶¶ 18-19 (October 7, 2009).

<sup>12</sup> Amended Petition at 6-8, ¶¶ 14-17 (October 7, 2009).

<sup>13</sup> Amended Petition at 8-9, ¶¶ 20-21 (October 7, 2009).

<sup>14</sup> In this docket, it was not necessary for Staff to explore all facets of the nature of RECs and CFIs. Consequently, PSE's descriptions will suffice.

<sup>15</sup> Amended Petition at 3, ¶¶ 4-6 (October 7, 2009). For the REC sales primarily at issue here, PSE "bundled" the RECs with a power sale in the same amount of megawatt-hours as represented by the RECs purchased. De Boer, TR. 158:1-4.

In California, a utility purchasing RECS must buy a “bundled REC,” which is a REC plus energy in an amount equal to the energy the REC represents.<sup>16</sup>

16 In the case of CFIs, the resource attributes are sufficient to allow the owner of the CFI to comply with certain emissions standards, to the same extent as if it owned the lower emitting resources.<sup>17</sup>

17 RECs and CFIs are traded in the open market. For CFIs, trading is done on the Chicago Climate Exchange.<sup>18</sup> While there is no similar exchange for trading RECs, two REC sub-markets have evolved: the “compliance market” and the “voluntary market.”<sup>19</sup> The compliance market consists of states which have renewable portfolio standards. A utility purchases RECs in this market to comply with a state’s renewable portfolio standards. The voluntary market consists of states that do not have renewable portfolio standards. Thus, a utility purchasing RECs in the voluntary market is not doing so to comply with any statutory requirement.<sup>20</sup>

18 In working toward compliance with the renewable portfolio standards in the Act,<sup>21</sup> PSE has acquired certain renewable resources that generate electricity, as well as RECs: The Hopkins Ridge wind plant, the Wild Horse wind and solar plant, the Klondike III Purchased Power Agreement, plus certain upgrades to PSE’s hydro facilities.<sup>22</sup> As the Act’s requirements become more stringent through time, PSE will need to use these renewable resources to comply with the Act. Consequently, PSE’s level of excess RECs will decline,

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<sup>16</sup> De Boer, TR. 158:1-4 and Exh. No. TAD-13.

<sup>17</sup> Amended Petition at 4-5, ¶¶ 8-10 (October 7, 2009).

<sup>18</sup> Amended Petition at 4, ¶ 8 (October 7, 2009).

<sup>19</sup> De Boer, TR. 151:22-24. Staff used the term “non-compliance market” to describe this “voluntary” market.

<sup>20</sup> Parvinen, Exh. No. MPP-1HCT at 5:16 – 6:3.

<sup>21</sup> Amended Petition at 3, ¶ 7 (October 7, 2009).

<sup>22</sup> Amended Petition at 3, ¶ 7 (October 7, 2009).

with no excess likely by 2020, when PSE must be in compliance with the Act's most stringent renewable portfolio standard.<sup>23</sup>

19 The result of PSE having excess REC's to sell, and then selling them into the market, has yielded substantial revenues, and will continue to do so. As of November 30, 2009, PSE had [REDACTED]<sup>24</sup> in net cash proceeds from the sale of REC's, and [REDACTED]<sup>25</sup> in net cash proceeds from the sale of CFIs. Based on its existing contracts, PSE estimates that future REC sales from 2009 to 2015 will total [REDACTED].<sup>26</sup>

**C. The Commission's Ratemaking Treatment of the Resources that Generate REC's and CFIs**

20 As Staff explained, all of PSE's retail ratepayers pay PSE rates that reflect all the costs of the resources that generate REC's and CFIs:

The Commission includes the corresponding investment amounts for these projects in PSE's rate base and power supply calculations for ratemaking purposes. The Commission sets PSE's rates to allow PSE an opportunity to recover the operating costs, taxes, and depreciation associated with these resources, as well as a return on the money PSE invested to acquire the resources. The Commission allocates the cost of these resources to the customer classes using a generation-based allocation factor.<sup>27</sup>

21 The foregoing facts are uncontested: Witnesses for Public Counsel, Industrial Customers of Northwest Utilities (ICNU) and The Kroger Company (Kroger) testified to the same facts;<sup>28</sup> PSE agreed to Staff's cost recovery testimony;<sup>29</sup> and PSE and the low income

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<sup>23</sup> Amended Petition at 3-4, ¶ 7 (October 7, 2009). Similarly, but in much smaller magnitude in terms of dollars and time-frame, PSE also had excess CFIs to sell. However, PSE has no prospects for future CFI sales, and thus its membership on the Chicago Climate Exchange expired in November, 2009. Amended Petition at 4-5, ¶ 10 (October 7, 2009); De Boer, TR. 108:11 – 109:2. Therefore, from here on out, we refer primarily to REC's.

<sup>24</sup> Norwood, Exh. No. SN-4HC at 6, last line, last column.

<sup>25</sup> Norwood, Exh. No. SN-5HC at 9, last line, last column.

<sup>26</sup> Norwood, Exh. No. SN-5HC at 4, last line, last column.

<sup>27</sup> Parvinen, Exh. No. MPP-1HCT at 6:21 – 7:6.

<sup>28</sup> Public Counsel: Norwood, Exh. No. SN-1HCT at 3:16-20; 11:20 – 12:3; ICNU: Schoenbeck, Exh. No. DWS-1CT at 10:19-21; Kroger: Higgins, Exh. No. KCH-1T at 3:14-17; 6:1-7.

<sup>29</sup> De Boer, TR. 145:21 – 146:12: all of PSE's resource-related costs are part of revenue requirements and included in rates, "such things as reasonable operations and maintenance costs, property taxes, income taxes, depreciation, and a reasonable return on shareholders' investment in the wind facilities."

advocates specifically acknowledge that low income customers pay no more in rates reflecting the costs of the REC-related renewable resources than any other residential customers.<sup>30</sup>

### III. ANALYSIS

22 PSE has received substantial revenue from selling RECs and CFIs associated with renewable resources. The basic question is who is entitled to the monetary benefit of those sales? The record makes clear that all PSE ratepayers are entitled to all of these benefits, and no one else has proven they are entitled to an exclusive share.

**A. The Commission Should Provide All Net REC and CFI Revenue to Ratepayers in the Same Manner Those Ratepayers Pay Rates that Cover the Costs of the Resources Generating those RECs and CFIs**

23 All PSE retail ratepayers pay in rates for the resources that generate the RECs and CFI at issue in this docket.<sup>31</sup> No single group of customers made a contribution to these resources to the exclusion of any other customer group, nor do these resources exclusively serve any particular group of PSE customers.<sup>32</sup> In particular, low income residential customers do not pay any more in rates for these resources than any other group of residential customers.<sup>33</sup>

24 Therefore, as Staff concluded: “all retail customers should share the proceeds from the sale of these RECs/CFIs on the same basis as the Commission allocates these resources in the rate making process.”<sup>34</sup> Public Counsel, ICNU and Kroger concur.<sup>35</sup>

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<sup>30</sup> Panel, Exh. No. J-13.

<sup>31</sup> See ¶¶ 20-21, *supra*.

<sup>32</sup> Parvinen, Exh. No. MPP-1HCT at 11:14 – 12:2.

<sup>33</sup> Id. and Panel, Exh. No. J-13.

<sup>34</sup> Parvinen, Exh. No. MPP-1HCT at 3:20 – 4:2.

<sup>35</sup> Public Counsel: Norwood, Exh. No. SN-1HCT at 3:16-20; 4:3-7; 10:3-6; 11:20 – 12:3; 23:22 – 24:2 (Public Counsel takes no position in its testimony regarding the low income proposal: Norwood, Exh. No. SN-1HCT at 4:15-20. Apparently, Public Counsel views the low income proposal as REC money going to “PSE

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Staff's recommended treatment of REC proceeds satisfies the "benefit should follow burden" principle because the benefits of the RECs and CFIs follow the burden of cost responsibility. Thus, the fair and principled approach to distributing the REC and CFI sales proceeds is to provide them to all ratepayers in the same manner those ratepayers pay in rates for the resources that generate the RECs. Though PSE tries to make the analysis more complicated than it needs to be, the proper analysis is truly as straightforward as that.

**1. PSE's "False Premise" Argument Falls Flat**

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PSE stands alone in contesting Staff's principled analysis. PSE contends Staff's analysis is founded on the "false premise" that ratepayers provided the capital to fund the renewable resources at issue, and they buy the resources when they pay their electric bills.<sup>36</sup> Notably, PSE's witness fails to support this contention with a cite to Staff testimony. This is not surprising, because nothing in Staff's testimony supports PSE's contention.

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In fact, as we just explained, Staff's case is premised on the fact that all ratepayers bear the burden of cost responsibility for these resources that generate the RECs, and thus it is fair and appropriate to give all ratepayers the benefits.

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In any event, PSE acknowledged that the risks investors take when they invest capital in PSE are reflected in the cost of that capital, and that cost is returned to investors through the fair return element of the ratemaking formula.<sup>37</sup> As such, there is no reason to compensate investors yet again for supplying that capital, by awarding them REC proceeds, too.

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customers," i.e., as opposed to the Company); ICNU: Schoenbeck, Exh. No. DWS-1CT at 2:19-3:2; Kroger: Higgins, Exh. No. KCH-1T at 3:18-21; at 5:10-22; and at 6:1-7.

<sup>36</sup> De Boer, Exh. No. TAD-3HCT at 4:1-14 and at 6:9-19.

<sup>37</sup> De Boer, TR. 112:13 – 113:1.

29 PSE goes on to suggest that no one anticipated that REC proceeds would be available.<sup>38</sup> However, even assuming the REC proceeds are extraordinary and unanticipated, consistent treatment requires that ratepayers should get the REC proceeds.

30 For example, during the nuclear plant construction era of the 1970s, utility investors provided every penny of the investment PSE made in attempting to construct major nuclear power plants, just as PSE's investors have invested in, and now own, PSE's renewable resources today. A substantially adverse, extraordinary event occurred when PSE had to abandon those projects before they generated a single kilowatt hour of electricity. Investor ownership and funding of these projects did not prevent the Commission from requiring ratepayers to "share" risk with utility investors either indirectly, by approving substantially higher rates through a large increase in the utility's return on equity,<sup>39</sup> or directly, by requiring ratepayers to return to investors every cent of what those investors prudently invested in those failures.<sup>40</sup>

31 The instant case presents the reverse situation. Instead of a substantially *adverse* event, like nuclear plant abandonment, we have a substantially *beneficial* event: PSE's successful sales of RECs for substantial sums of money. Consistent with its nuclear plant abandonment decisions, the Commission could respond, either by: 1) Giving the REC proceeds to investors and then decreasing PSE's return on equity; or 2) Giving the REC proceeds to ratepayers. Inasmuch as PSE has not offered to lower its return on equity, and

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<sup>38</sup> De Boer, Exh. No. TAD-3HCT at 4:15- 5-22; TR. 114:10-28.

<sup>39</sup> *Utilities & Transp. Comm'n v. Pacific Power & Light Co.*, Cause U-82-12, Fourth Supplemental Order at 29 (February 1, 1983).

<sup>40</sup> *Utilities & Transp. Comm'n v. Puget Sound Power & Light Co.*, Cause U-82-38, Third Supplemental Order at 19-20 (July 25, 1983), *aff'd*, *People's Org. for Wash. Energy Resources v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 711 P.2d 319 (1985).



there is no record on the magnitude of that reduction, the preferred course on this record is for the Commission to provide the REC proceeds to ratepayers.

**2. Low income customers have no special claim to REC proceeds**

32 We invite the Commission to scour the record to find any legitimate justification for tying REC proceeds to the proposed programs that exclusively benefit low income customers. The Commission will come up empty.

33 The closest the low income advocates came to connecting their proposed programs to REC proceeds was when the Panel offered the point that renewable resources generated the RECs, and one of the proposed low income programs would install renewable energy facilities on low income housing structures.<sup>41</sup>

34 However, while their statement is accurate, it does nothing to justify an exclusive share of REC proceeds for low income customers, because *any* customer group could offer the identical point in an attempt to claim an exclusive share of REC proceeds for installing renewable energy facilities on their own homes. In other words, the low income advocates provide no logical reason why their clients should get cutting edge technology before any other PSE customers.

35 The low income advocates made a similar attempt to justify a special status for low income customers by pointing to past low income R&D successes with compact insulation, ducting, door-fans and CFIs.<sup>42</sup> However, there is no evidence that R&D is needed for the programs at issue here. In any event, even if there was such a need, that still would not justify an exclusive share for low income customers, because PSE *all* customers should be able to participate in a renewable R&D program.

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<sup>41</sup> Panel, TR. 92:15-18 (Gravatt).

<sup>42</sup> Panel, TR. 104:8 – 105:19 (Eberdt).

36 PSE should be able to implement such a utility-wide R&D program, because PSE proposed one in its Petition initiating this docket.<sup>43</sup> Notably, PSE saw no need for an exclusive share of low income R&D in that program.

37 The low income advocates' final attempt to justify a special status for their clients is their argument that "we need to invest in all [energy efficiency]" "to meet the climate challenge."<sup>44</sup> Obviously, this is just one more argument that does nothing to justify an exclusive share of REC proceeds for low income customers, because, assuming the Commission is authorized to address this challenge, there is no reason why *all* customers should not share in that effort and enjoy whatever benefits may come from it. No group of customers should get preferential treatment.<sup>45</sup>

38 When all is said and done, PSE and the low income advocates offer no evidence to challenge Staff's central point that all ratepayers should benefit from the REC proceeds, and no group of ratepayers should get an exclusive share. Therefore, the Commission should require PSE to distribute REC proceeds based on the manner in which the Commission allocates to the customer classes the costs of the renewable resources that generate the RECs.

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<sup>43</sup> Petition at ¶¶ 17-18.

<sup>44</sup> Panel, TR. 101:23-25 (Gravatt).

<sup>45</sup> Moreover, as we explain in ¶¶ 90-91, *infra*, RCW 19.285.040(1) mandates that PSE acquire all cost-effective conservation. Therefore, to the extent the proposed low income programs are cost-effective, there is no need to use REC proceeds to pay for what PSE will do anyway. To the extent the proposed low income programs are not cost-effective, the Commission should not use REC proceeds to fund such programs anyway.

**B. PSE is Not Entitled To a Compensated Write-Off of the California Receivable Using REC Proceeds<sup>46</sup>**

39 In 2000-2001, PSE made lucrative power sales to California, a few of which ultimately became embroiled in litigation. Many years have passed, yet a \$21.1 million account receivable still sits on PSE's books related to those litigated power sales transactions. PSE booked this account receivable in early 2001,<sup>47</sup> and it is now called the California Receivable. PSE wishes the Commission would use REC proceeds to achieve a compensated write-off of that receivable. For the reasons that follow, the Commission should not grant that wish.

**1. Rate Plan: PSE reaped all the rewards, so PSE must now bear all the risks surrounding the California Receivable**

40 When PSE made the power sales that gave rise to the California Receivable, PSE was operating under a Commission-approved rate plan<sup>48</sup> under which, among other things, PSE bore the risks and reaped the rewards of whatever the market would provide.<sup>49</sup> This includes the risk of an uncompensated write-off for "a good market power sales transaction gone bad." This describes precisely the California Receivable.<sup>50</sup>

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<sup>46</sup> One point made by Staff was that an uncompensated write-off of the California Receivable would not have any rate impact. Parvinen, Exh. No. MPP-1HCT at 15:7-19. Staff's accounting of such a write-off is explained in De Boer, Exh. No. TAD-9. PSE contested that accounting in De Boer, Exh. No. TAD-3HCT at 21:14-19 and Exh. No. TAD-10, but PSE agreed that under PSE's accounting for an uncompensated write-off, there also would be no ratepayer impact. De Boer, TR. 109:14-25. For Staff, that closes the matter; it is not necessary for the Commission to address the accounting for an uncompensated write-off of the California Receivable.

<sup>47</sup> De Boer, Exh. No. TAD-1T at 6:3-10; Amended Petition at 8:¶ 19.

<sup>48</sup> *In re Application of Puget Sound Power & Light Co. and Washington Energy Co.*, Dockets UE-951270 & UE-960195, 14<sup>th</sup> Supplemental Order Accepting Stipulation, Approving Merger (February 5, 1997) at Appendix A, Stipulation, page 4:5-24, establishing a five-year rate plan "continuing through December 31, 2001," in which "PSE's financial results will be a function of management's ability to achieve these [merger] savings in order to provide shareholders with an opportunity to earn a reasonable return on investment."

<sup>49</sup> Parvinen, Exh. No. MPP-1HCT at 17:18 - 18:5.

<sup>50</sup> Parvinen, Exh. No. MPP-1HCT at 18:1-3.

41 In other words, because PSE booked the California Receivable during the rate plan,  
PSE must remain solely at risk for that transaction.<sup>51</sup> As Staff explained:

During the rate freeze period, PSE bore the risk and received the rewards for all of its transactions, including all of its wholesale sales to California utilities. PSE should not be granted recovery from the REC proceeds for a cost attributable to a time period where rate payers were not impacted by those transactions, one way or the other.<sup>52</sup>

42 As Mr. Schoenbeck similarly testified, PSE's wholesale sales activities during the rate plan were "solely for the benefit or detriment of its shareholders," and thus there is "absolutely no justification for now allowing PSE's current shareholders to benefit from the net revenues from REC the sales ..."<sup>53</sup>

43 The Commission should summarily reject PSE's proposal to award 40% of REC and CFI proceeds (capped at \$21.1 million) to enable PSE to achieve a compensated write-off of the California Receivable. However, should the Commission decide not to address the rate plan issue, we next provide ample other reasons for the Commission to deny PSE relief.

**2. PSE has not proven a substantial nexus between the litigation over the California Receivable and the amount of REC proceeds**

44 As Staff explained, for PSE to prevail in its argument that the account receivable is linked to the REC benefits sufficient to justify a compensated write-off using REC money, PSE needs to prove that PSE received more in REC proceeds than it would have received but for the litigation.<sup>54</sup>

45 In simple terms, PSE needs to produce concrete facts identifying the amount of proceeds it would have achieved from REC sales in the compliance market absent the

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<sup>51</sup> Parvinen, Exh. No. MPP-1HCT at 17:18 – 18:5; Public Counsel: Norwood, Exh. No. SN-1HCT at 15:20 – 16:2; ICNU: Schoenbeck, Exh. No. DWS-1CT at 9:19 – 10:15.

<sup>52</sup> Parvinen, Exh. No. MPP-1HCT at 18:1-5.

<sup>53</sup> Schoenbeck, Exh. No. DWS-1CT at 9:21-19 – 10:8.

<sup>54</sup> Parvinen, Exh. No. MPP-1HCT at 16:19 – 20:6.

litigation, and then compare that to the proceeds PSE actually received. If PSE would have achieved less from REC sales absent the litigation, then it is fair to attribute that excess in REC proceeds to the litigation, and the California Receivable. On the other hand, if PSE would have achieved the same or more REC proceeds absent the litigation, that shows PSE simply received no more than what it would have achieved if it sold the RECs in the open market. In that scenario, there is no reason to reward PSE for doing what it otherwise could have done.

46           Instead of concrete facts, PSE tried to shift the burden of proof to other parties to show PSE would have received more in REC proceeds absent the settlement.<sup>55</sup> Obviously, that attempt must fail, because PSE bears the burden of proof in this proceeding.

47           PSE also tried statements such as the California Receivable litigation “led to agreements” to sell the RECs; that this “significantly increased” the REC proceeds;<sup>56</sup> and without the litigation, the REC sales “would not have occurred.”<sup>57</sup> While these are conclusions, not facts, they do not hold water anyway, because the evidence shows the REC sales prices at issue are independent of the California Receivable litigation.

**a.       The auction process**

48           The structure of the settlement negotiations exemplifies this separation of the REC prices from the litigation. In fact, [REDACTED] provides ample evidence for the Commission to conclude that PSE’s REC sales transactions were at market prices, and thus, there is no justification to award PSE a compensated write-off of the California Receivable using REC proceeds.

<sup>55</sup> De Boer, Exh. No. TAD-16C, second to last paragraph: [REDACTED]

<sup>56</sup> De Boer, Exh. No. TAD-1T at 2:11-17.

<sup>57</sup> De Boer, Exh. No. TAD-1T at 7:14 – 8:3.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>58</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>59</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>60</sup>

[REDACTED]

[REDACTED]<sup>61</sup> As for PG&E, PSE testified that “settlement of the California Litigation was not contingent upon a completed agreement for the sale of RECs to [PG&E] ...”<sup>62</sup>

Because of that, PG&E had a strong incentive to pay no more than market price for the RECs. [REDACTED]

[REDACTED]<sup>63</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**b. The public filings before the California Public Utilities Commission**

The publicly available records also confirm that PSE’s REC sales were at market prices. As Mr. Schoenbeck carefully documented, PG&E and SCE confirmed in pleadings

<sup>58</sup> De Boer, Exh. No. TAD-3HCT at 8:12-20; TR. 121:4-10; and Norwood, Exh. No. SN-14HC at 2-3.

<sup>59</sup> TR. 173:14-22.

<sup>60</sup> De Boer, TR. 173:14-22; TR. 124:14-25.

<sup>61</sup> De Boer, TR. 177:3-9; TR. 125:4-7.

<sup>62</sup> De Boer, Exh. No. TAD-1T at 7:3-11. SCE, PG&E and San Diego Gas & Electric were the investor-owned utilities in the litigation. De Boer, TR. 121:4-13.

<sup>63</sup> See De Boer, TR 174:24 – 175:7.

filed before the California Public Utility Commission (CPUC) that they paid no more than market price for PSE's RECs.<sup>64</sup>

52 For example, SCE ([REDACTED]) specifically represented to the CPUC that SCE's REC purchase was a market transaction: "The Puget [REC] Contract's pricing is not dependent on the Settlement Agreement and SCE would have chosen to enter into the Puget Contract independent of the Settlement Agreement."<sup>65</sup>

53 Notably, the CPUC determined the reasonableness of the settlement of the California Receivable litigation [REDACTED]

[REDACTED]<sup>66</sup> In doing so, the CPUC issued resolutions specifically finding that these California utilities paid a fair market price for the RECs.<sup>67</sup>

54 This substantial, unambiguous evidence proves there is no nexus between the litigation and the amount of REC sales proceeds PSE achieved sufficient to justify the Commission awarding PSE a write-off of the California Receivable at ratepayers' expense.

55 Not only does PSE not challenge the veracity of the foregoing evidence, [REDACTED]<sup>68</sup> but then promptly tries to explain it away, by inviting the Commission to simply chalk it all up to [REDACTED]<sup>69</sup> The Commission should politely decline PSE's invitation.

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<sup>64</sup> Schoenbeck, Exh. No. DWS-1T at 7:22 – 9:4 and Exh. Nos. DWS-6 through DWS-14 cited therein.

<sup>65</sup> Exh. No. DWS-8 at 3, first new paragraph.

<sup>66</sup> De Boer, TR. 145:5-12; TR. 164:6-10.

<sup>67</sup> For SCE: Schoenbeck, Exh. No. DWS-13, CPUC Resolution E-4244 at 17 (June 18, 2009) ("SCE's analysis demonstrates that the Puget contract is reasonable as compared to its 2008 shortlist [etc.]"); and Schoenbeck, Exh. No. DWS-12, CPUC Resolution E-4300 at 10 (December 17, 2009) ("The total expected costs of the PPA, as estimated by SCE, are reasonable based on their relation to bids received in response to SCE's solicitation"); For PG&E: Schoenbeck, Exh. No. DWS-14, CPUC Resolution E-4278 at 11 (October 15, 2009) ("PG&E determined that the PPA is reasonable relative to proposals received in response to PG&E's 2008 solicitation because the PPA's market valuation compares favorably with bids from its 2008 solicitation").

<sup>68</sup> De Boer, Exh. No. TAD-23HC; TR. 142:11-23; TR. 144:25-145:4.

<sup>69</sup> De Boer, TR. 171:1-15.

Take, for example, Resolution E-4728,<sup>70</sup> where the CPUC evaluated the evidence PG&E submitted to support the reasonableness of the amount PG&E paid PSE for RECs. This factual support included a “least-cost, best-fit bid evaluation” which contained a “determination of the bid’s market value,” and a comparison to PGE’s 2008 resource solicitation.<sup>71</sup> This reflects principled, substantial evidence-based decision-making by the CPUC, not [REDACTED]<sup>72</sup>

**c. PSE’s own REC price information**

With all of the foregoing evidence against it, PSE is left with the unenviable task of trying to defend its position with insufficient evidence, consisting of its own bids and transactions. PSE does so by repeatedly and simplistically referencing the [REDACTED]

[REDACTED]<sup>73</sup> The Commission should emphatically agree with PSE that this [REDACTED]

[REDACTED]<sup>74</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>70</sup> Schoenbeck, Exh. No. DWS-14.

<sup>71</sup> Schoenbeck, Exh. No. DWS-14, CPUC Resolution E-4278 at 11 (October 15, 2009).

<sup>72</sup> The Commission also will note that the CPUC resolution regarding the PG&E REC transaction was contested by the Division of Ratepayer Advocates (DRA), which claimed PG&E paid too much for the RECs. Schoenbeck, Exh. No. DWS-14, CPUC Resolution E-4278 at 8 (October 15, 2009) (The Division of Ratepayer Advocates (DRA) protested that “[t]he price of the renewable or green attribute is too high.”). If the evidence supporting a fair market price for the RECs PG&E purchased was insubstantial, the DRA could have sought judicial review; DRA did not seek judicial review.

<sup>73</sup> E.g., De Boer, Exh. No. TAD-3HCT at 7-10; TR. 144:17-24; TR. 180:1-12; TR. 185:22-25; TR. 186:1-17.

<sup>74</sup> De Boer, TR. 180:10-16.



[REDACTED]<sup>75</sup>

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>76</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Put another way, a deficiency in the record regarding the market price for RECs is PSE's responsibility, not the Commission's, the Staff's or that of any other party or entity. On this record, PSE simply has not borne its burden of proving it is entitled to a compensated write-off of the California Receivable using REC proceeds.<sup>77</sup>

**3. If the Commission awards PSE a compensated write-off of the California Receivable, the Commission should offset any such compensation by the amount of litigation expenses ratepayers have already paid**

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If the Commission decides that shareholders deserve some amount of REC and CFI proceeds, the Commission should offset that amount by \$4.6 million. This is the amount of PSE's outside legal fees for litigating the California Receivable; litigation that arose from

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<sup>75</sup> De Boer, TR. 187:13-20.

<sup>76</sup> De Boer, TR. 187:10-11.

<sup>77</sup> Of course, even if PSE could prevail on this aspect of the issue, the Commission still should not direct any REC and CFI proceeds to shareholders because of the rate plan, which we discussed in ¶¶ 40-43, *supra*.

rate plan era transactions.<sup>78</sup> This offset will credit ratepayers for the \$4.6 million in litigation costs by which they already have been unfairly burdened.<sup>79</sup>

61 As we have explained, the litigated power sales transactions at issue here occurred when PSE was enjoying a rate plan under which it bore all the risks and earned all the benefits of these sorts of transactions.<sup>80</sup> Yet, according to PSE, these ongoing litigation costs are simply “regular operations costs and, as such, are included in rates.”<sup>81</sup> PSE is wrong. There is no apparent defensible basis for having ratepayers fund litigation arising from, and based on conduct exclusive to, the rate plan era.

62 A review of the Commission’s rate orders since 2001 shows that no one raised the issue whether PSE’s California Receivable litigation legal fees are recoverable in rates. Surely, there is no basis now for the Commission to let shareholders enjoy even more ratepayer dollars related to these rate plan era transactions.

63 PSE’s shareholders cannot have their cake and eat it, too, i.e., enjoy the benefit of a compensated write-off of the California Receivable, plus the benefit of having ratepayers fully fund PSE’s outside legal fees for litigation related to that receivable. If the Commission grants PSE an exclusive share of REC proceeds, the Commission should reduce that amount by \$4.6 million.

**C. Low Income Ratepayers Are Not Entitled To an Exclusive Share of REC Proceeds to Fund Special Low Income Programs**

64 PSE and the low income advocates want up to 20 percent of REC money (minimum of \$10 million; maximum of \$20 million) to solve two problems they apparently are unable

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<sup>78</sup> Schoenbeck, Exh. No. DWS-15, Attachment A, last column, “Total” line; De Boer, TR. 183:19-25; TR. 184:4-19.

<sup>79</sup> That figure is shown in Schoenbeck, Exh. No. DWS-15, last line, last column.

<sup>80</sup> See ¶¶ 40-43, *supra*.

<sup>81</sup> Schoenbeck, Exh. No. DWS-15, page 1, part b.

to solve under existing programs. The first problem they describe as “one of the greatest obstacles to making low income homes more efficient”, i.e., the need to repair the housing structure before the energy efficiency measures are applied.<sup>82</sup>

65 They searched far and wide to find money to fund this program.<sup>83</sup> They now want to latch onto REC money because other funding sources are “inadequate,” “diminishing,” subject to competing claims, and on top of all that, no federal “stimulus money” is available.<sup>84</sup> Consequently, they want up to \$16 million of REC money (80 percent of the 20 percent overall share of REC proceeds, capped at \$16 million) to fund a new program to repair low income housing along with providing energy efficiency measures.

66 The second problem the low income advocates want to solve with REC dollars is to “[e]xpand the capacity of low income agencies to install and maintain” renewable energy systems, such as thermal hot water systems and photovoltaic systems.<sup>85</sup> To solve this problem, they want up to \$4 million in REC money to acquire and install solar facilities on low income housing structures.

67 To get this \$20 million in REC proceeds, the low income advocates want \$10 million from PSE right away, by capturing REC money PSE currently has on hand, plus 20 percent of every new REC dollar that comes in, until they get another \$10 million.<sup>86</sup>

68 Needless to say, there are considerable problems with these proposals.

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<sup>82</sup> Amended Petition at 6-7, ¶ 15. The Panel similarly characterized this as a “bottleneck.” Panel, TR. 82:11-18 (Sieg).

<sup>83</sup> According to the low income advocates, the programs currently unable to fulfill their needs include: Energy Matchmaker, HOME, Community Development Block Grants, the Weatherization Assistance Program (U.S. Dep’t of Energy), and the American Recovery and Reinvestment Act. Panel, Exh. No. J-1T at 15-16.

<sup>84</sup> Panel, Exh. No. J-1T at 15:4 – 16:10.

<sup>85</sup> Amended Petition at 7, ¶ 16.

<sup>86</sup> Amended Petition at 6, ¶ 13 and at 7: ¶ 17.

**1. Funding the proposed low income programs would constitute an undue preference; the “safe harbor” of RCW 80.28.068 does not apply**

69 PSE is prohibited from giving preferential treatment to any customer class or group:

No ... electrical company ... shall make or grant any undue preference or advantage to any person ... or to any particular description of service in any respect whatsoever, or subject any person ... or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.<sup>87</sup>

70 As we explained earlier,<sup>88</sup> PSE and the low income advocates provide no reasonable, fact-based justification for giving PSE’s low income customers a \$20 million preference over other PSE customers. Therefore, we conclude their proposed funding of the low income programs would constitute an undue preference, in violation of RCW 80.28.090.

71 The ensuing legal issue is whether the low income proposals are nonetheless lawful under the “safe harbor” of RCW 80.28.068, which states:

Upon request by an electrical or gas company, or other party to a general rate case hearing, the commission may approve rates, charges, service, and/or physical facilities at a discount for low income senior customers and low-income customers. Expenses and lost revenues as a result of these discounts shall be included in the company’s cost of service and recovered in rates to other customers.

72 In their direct testimony, PSE and the low income advocates cite RCW 80.28.068 for the sole proposition that this is where “the Legislature has also demonstrated the importance of low-income energy assistance.”<sup>89</sup> Consequently, it is not apparent whether they also rely on this section as authority for the Commission to approve their specific proposals in this docket, or not.

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<sup>87</sup> RCW 80.28.090.

<sup>88</sup> See ¶¶ 32-38, *supra*.

<sup>89</sup> Panel, Exh. No. J-1T at 7:5-13.

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What is apparent is that RCW 80.28.068 operates in a context other than this docket. For example, under that section, the context is a request by a party in a “general rate case hearing,”<sup>90</sup> for PSE to offer services and/or physical facilities to low income customers “at a discount,” and where PSE collects the expenses and lost revenues related to the discount through the cost of service.

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That is not the context here. This docket is not a “general rate case hearing,” there is no “discount”<sup>91</sup> from the price of other PSE services or facilities PSE provides; and the inclusion of expenses and lost revenues in PSE’s cost of service has not been addressed, let alone accomplished.

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Therefore, if approved, the low income proposal would constitute an undue preference in violation of RCW 80.28.090. The “safe harbor” of RCW 80.28.068 does not apply. However, should the Commission decide not to reach this legal issue, we next offer several other reasons why the Commission should reject the exclusive low income programs proposed in this case.

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<sup>90</sup> The Legislature made a deliberate choice to limit low income discount requests to general rate case hearings. As originally enacted, RCW 80.28.068 authorized only the utility to request a low income discount. Laws of 1999, ch. 62, § 1 (“Upon request of an electrical or gas company ...”). The Legislature amended that section in 2009. The original bill would have also authorized a low income discount request by “a party.” S.B. 5290, § 1, 61<sup>st</sup> Leg., Reg. Sess. (Wash. 2009). However, that bill was amended to change “a party” to “a party *in a general rate case hearing*.” S.S.B. 5290, § 1, 61<sup>st</sup> Leg., Reg. Sess. (Wash. 2009) (emphasis added). This is the version that was enacted. Laws of 2009, ch. 32, § 1.

<sup>91</sup> Given the context of RCW 80.28.068, the obvious meaning of “discount” is its plain meaning: a “reduction from the gross amount of value of anything ... as ... a reduction from the price made to a specific customer or class of customers.” Webster’s Third New Int’l Dictionary (1968) at 646. Therefore, even if this docket were a general rate case hearing, RCW 80.28.068 would not apply because PSE and the low income advocates have proposed no discounts from anything.

## 2. PSE and the low income advocates base their case on “public interest” factors the Commission cannot consider

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To justify their proposed low income programs, PSE and the low income advocates rely on a long list of what they call “public interest” factors,<sup>92</sup> including:

- “Preservation of the affordable housing stock”;<sup>93</sup>
- “Expand[ing] the capacity of low income agencies to install and maintain small-scale renewable systems”;<sup>94</sup>
- Developing “a skilled support network” for placing solar facilities on low income houses;<sup>95</sup>
- Having renewable energy “available to all economic strata”;<sup>96</sup>
- Putting people to work “right away” making home repairs;<sup>97</sup> and
- “Enhanc[ing] the work of providers” who are implementing the federal Weatherization Assistance Program (WAP).<sup>98</sup>

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The question<sup>99</sup> is not whether these “public interest” factors are important; they are. The question is not whether the Legislature could authorize the Commission to cure these problems. It clearly could. The question is whether the Legislature granted the Commission this authority. In fact, the Legislature did not empower the Commission to do these things.

<sup>92</sup> While the prepared testimony of PSE and the low income advocates recites these factors, Exh. Nos. J-9 and J-10 indicate PSE has not taken into account any of these factors in analyzing the cost-effectiveness of any conservation measure. However, in those exhibits, PSE stated it could take such factors into account. Staff asked what statute PSE relied on for that statement. PSE responded that it had not reviewed the statutes sufficiently to determine whether such considerations were legally justified. Exh. No. J-10 at 1, last paragraph.

<sup>93</sup> Panel, Exh. No. J-1T at 18:10-11.

<sup>94</sup> Panel, Exh. No. J-1T at 10:5-6.

<sup>95</sup> Panel, Exh. No. J-1T at 10:7.

<sup>96</sup> Panel, Exh. No. J-1T at 18:20-21; Panel, TR. 102:5-9 (Gravatt).

<sup>97</sup> Panel, Exh. No. J-1T at 18:15-16.

<sup>98</sup> Panel, Exh. No. J-1T at 19:8-11. The Panel explains the “WAP” acronym in Exh. No. J-1T at 15:18-19.

<sup>99</sup> This paragraph paraphrases the issue statement of the United States Supreme Court in *Nat’l Assoc. for the Advancement of Colored People v. Fed. Power Comm’n*, 425 U.S. 662, 665, 98 S. Ct. 1806, 48 L. Ed 2d 284 (1976). In that case, the Court held that the Federal Power Commission (FPC) was not statutorily empowered to combat employment discrimination by prescribing utility employment policies and adjudicating violations of those policies.

As the court stated in *Jewell v. Utilities and Transportation Commission*, 90 Wn.2d 775, 777, 585 P.2d 1167 (1978), “the commission is not the keeper of the social conscience of the citizens of this state.” Rather, the Commission’s charge is to regulate “in the public interest, *as provided by the public service laws*”,<sup>100</sup> and it is clear that Title 80 is the source for the “public interest.”<sup>101</sup>

For example, in *Cole v. Utilities & Transportation Commission*, 79 Wn.2d 302, 485 P.2d 71 (1971), the court upheld the Commission’s decision to disallow intervention in a natural gas proceeding to competing unregulated fuel oil dealers. The court observed: “[The fuel oil dealers] fail to point out any section of Title 80 that suggests that non-regulated oil dealers are within the jurisdictional concern of the commission.”<sup>102</sup> The court went on to conclude that “the commission correctly determined that it has no authority to consider the effect of a regulated utility upon an unregulated business.”<sup>103</sup>

Another case in which the court distinguished the public interest associated with Commission action from other public interests is *Washington Independent Telephone Association v. Telecommunications Ratepayers Association for Cost-Based and Equitable Rates*, 75 Wn. App. 356, 880 P.2d 50 (1994) (*WITA*). In that case, the court affirmed a superior court order that reversed a Commission decision to create the Community Calling Fund (CCF). The court noted that the challenger (TRACER) “does not contest that the CCF

<sup>100</sup> RCW 80.01.040(2) (emphasis supplied).

<sup>101</sup> This is not to say the Legislature cannot charge the Commission with statutory duties outside the four corners of Title 80. For example, the Commission must adhere to RCW 34.05, the Administrative Procedure Act, because the Legislature includes the Commission within the scope of that chapter. Other examples are RCW 42.21C (the State Environmental Policy Act) and RCW 54.48 (under which the Legislature provides the Commission a limited regulatory to approve boundary agreements between Commission-regulated electrical companies and non-regulated electrical cooperatives). By the terms of these statutes, they apply directly to the Commission. This is different from the approach of PSE and the low income advocates, which is to rely on statutes and other policies that do not apply to the Commission.

<sup>102</sup> 79 Wn.2d at 306.

<sup>103</sup> *Id.*

is in the public interest, but it correctly observes that the CCF is not authorized by the public service laws.”<sup>104</sup>

81           In other words, the issue is not how many public interest factors PSE and the low income advocates can muster, but whether the Commission is empowered to consider them in the first place. As a matter of law, the Commission cannot consider the principal factors upon which PSE and the low income advocates rely.

82           This fundamental flaw in their presentation is further showcased in their reliance on programs from other states: Oregon’s net metering program; the California Solar Initiative; and Montana’s System Benefits charge.<sup>105</sup>

83           It is true these programs generate funds for low income programs, and two of these programs (the California Solar Initiative and the Montana System Benefits charge) grant low income customers exclusive shares of overall program funding. However, the critical fact ignored by PSE and the low income advocates is that each of these programs is created and administered pursuant to an explicit grant of statutory authority:

- Oregon’s net metering statute authorizes the use of excess energy credits for low income energy assistance (among other things);<sup>106</sup>
- The California Solar Initiative was launched by two decisions of the California Public Utility Commission (CPUC) pursuant to a statute requiring the CPUC to create incentives for renewables and other distributed

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<sup>104</sup> 75 Wn.2d at 368.

<sup>105</sup> Panel, Exh. No. J-1 at 11:14 – 12:6.

<sup>106</sup> OR. REV. STAT. § 757.300(3)(d): “...any remaining unused kilowatt-hour credit accumulated during the previous year shall be granted to the electric utility for distribution to customers enrolled in the electric utility’s low-income assistance programs, credited to the customer-generator or dedicated for other use as determined by the commission, for a public utility, ... following notice and opportunity for public comment.”



generation resources.<sup>107</sup> The California Legislature promptly endorsed the Solar Initiative,<sup>108</sup> and mandated that a minimum 10 percent of total Solar Initiative funding be used to benefit low income customers.<sup>109</sup>

- Montana's "System Benefits" statute mandates that a minimum 17 percent share of total program funding be used for low income weatherization assistance.<sup>110</sup>

84 The Commission enjoys no similar statutory authority to create a comparable, exclusive fund to benefit low income customers.

85 To be sure, PSE and the low income advocates itemize a few benefits their new programs might have to PSE in its capacity as a regulated electric utility, though this is not a focus of their presentation. For example, they offer generalized claims that these programs will make PSE's generation and distribution system more efficient and reliable,<sup>111</sup> and even

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<sup>107</sup> In these decisions, the CPUC cited various statutes, including California Public Utility Code § 399.15(b), Paragraphs 4-7, now codified as § 397.15(b)(4) – (7). Subparagraphs (6) & (7) respectively require the CPUC to implement "incentives for ... distributed generation" and "differential incentives for renewable or super clean distributed generation resources." See CPUC Rulemaking Docket 04-03-107, *Order Instituting Rulemaking Regarding Policies, Procedures and incentives for Distributed Generation and Distributed Energy Resources*, Decision 05-12-044, *Interim Order Adopting Policies and Funding for the California Solar Initiative* (December 15, 2005) at 6 and Decision 06-01-024, *Interim Order Adopting Policies and Funding for the California Solar Initiative* (January 12, 2006) at 3-4. (Among other statutory support, these decisions reference "AB 970" (Assembly Bill 970), which initially was codified California Public Utility Code § 399.15 (it is now codified as § 397.15), and "AB-1890," which was California's 1996 electric industry restructuring legislation. That statute contained a \$540 million program for renewables).

<sup>108</sup> E.g., CAL. PUB. UTIL. CODE § 2851(a) (refers to the CPUC "implementing the California Solar Initiative," and prescribes implementation standards and funding limits for that implementation).

<sup>109</sup> CAL. PUB. UTIL. CODE § 2851(4)(c)(1): "The commission shall assure that not less than 10 percent of the funds for the California Solar Initiative are utilized for the installation of solar energy systems on low-income residential housing. Notwithstanding any other law, the commission may modify the monetary incentives made available pursuant to the California Solar Initiative to accommodate the limited financial resources of low-income residential housing."

<sup>110</sup> MONT. CODE § 69-8-402(1): "Universal system benefits programs are established for the state of Montana to ensure continued funding of and new expenditures for energy conservation, renewable resource projects and applications, and low-income energy assistance"; MONT. CODE § 69-8-402(5): "A utility's minimum annual funding requirement for low-income energy assistance and weatherization assistance is established at 17 percent of the utility's annual universal system benefits funding level and is inclusive within the overall universal system benefits funding level."

<sup>111</sup> Panel, Exh. No. J-1T at 19:1-5 and TR. 92:7-14 (Gravatt).

reduce peak and capacity demand.<sup>112</sup> However, there is no showing these considerations confer \$20 million of benefits to PSE ratepayers as a whole. In fact, when Staff asked PSE to support these claims by quantifying these and similar alleged impacts on PSE as a regulated utility, PSE failed to provide that support.<sup>113</sup> All of this leaves the Commission only to guess what the exact nature and magnitude of these benefits might be. In any event, to the extent these factors apply, PSE already should have considered them in the cost-effectiveness analysis. As we explain later,<sup>114</sup> that analysis comes up short. The Commission deserves better.

86           The Commission should be faithful to the *Cole* and *WITA* cases and rule that the public service laws under which the Commission regulates simply do not contain “public interest” factors such as preserving affordable housing, improving the quality of services offered by unregulated low income agencies, enhancing federal programs in which the Commission has no role, or putting people to work repairing deficient housing structures. Because none of these factors are within the jurisdictional concern of the Commission, the Commission should not and cannot consider them.

### 3.       **RCW 70.164 does not apply to the Commission**

87           PSE and the low income advocates also want the Commission to rely on “policy direction” from RCW 70.164.<sup>115</sup> However, like almost all of the “public interest” factors we just discussed, this statute provides no basis for Commission action, either, because the Legislature did not “direct” any policy to the Commission.

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<sup>112</sup> Panel, Exh. No. J-1T at 19:1-5.

<sup>113</sup> Panel, Exh. No. J-11. In this data request, Staff specifically asked for this information because “[w]e wish to consider the impact of the proposed programs on each of the foregoing elements.” Exh. No. J-11, second paragraph, last sentence. The lack of responsive information renders the record lacking in any details regarding the actual impact of the proposed low income programs on reducing peak demand, improved system reliability, etc., and whether such benefits are worth \$20 million.

<sup>114</sup> See ¶¶ 90-94, *infra*.

<sup>115</sup> Panel, Exh. No. J-1T at 5:17-7:21.

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For example, in the last paragraph of RCW 70.164.010 (the only part of that section which PSE and the low income advocates fail to quote in their direct testimony at page 6), the Legislature states: “The program implementing the policy of this chapter is necessary to support the poor and infirm and also to benefit the health, safety and general welfare of all citizens of this state.” Obviously, the Legislature is giving “policy direction” only to the Department of Commerce, the agency the Legislature charged with implementing and administering the program referenced in that section.<sup>116</sup> Put another way, in RCW 70.164, the Legislature did not direct the Commission to do anything.

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PSE and the low income advocates have tied their boat to the wrong dock. If they want to foster the legislative policy embodied in RCW 70.164.010, or advance such public interests as affordable housing and other matters the Commission does not regulate, their recourse is to the Legislature, not to REC proceeds.

#### **4. The proposed low income programs are not cost-effective**

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Staff raised the issue whether the proposed low income programs are cost-effective,<sup>117</sup> but it may not be necessary for the Commission to resolve that issue. The Commission could first assume the proposed programs are indeed cost-effective. Under that assumption, PSE likely will acquire the conservation without REC proceeds, pursuant to PSE’s statutory obligation under RCW 19.285.040(1) to “acquire all available conservation that is cost-effective, reliable and feasible.” In that circumstance, the Commission should

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<sup>116</sup> RCW 70.164.030 establishes the “Low Income Weatherization Assistance Account” to be administered by “the department,” per RCW 70.164.040 et al. “Department” means the Department of Commerce. RCW 70.164.020(1). The Commission is not mentioned in RCW 70.164, either by name or by way of a general reference to all state agencies, for example.

<sup>117</sup> Parvinen, Exh. No. MPP-1HCT at 11:19 – 13:7.

reject the proposed low income programs, because there would be no reason for the Commission to use REC money to fund what PSE would otherwise do.<sup>118</sup>

91           Then, the Commission could assume the proposed programs are not cost-effective. In that circumstance, the Commission should also reject the low income proposal, because using REC proceeds to fund non-cost-effective conservation is an inappropriate, wasteful use of precious ratepayer dollars. Either way, the Commission would reject the use of REC proceeds for the proposed programs, without resolving the cost-effectiveness issue. Nonetheless, we will address that issue.

92           Under PSE's tariff, a conservation measure must pass the total resource test [TRC test] and the utility cost test [UC test].<sup>119</sup> PSE may only consider "non-energy benefits" under the TRC test.<sup>120</sup> Consequently, with a .94 benefit/cost ratio,<sup>121</sup> the proposed low income programs fail the UC test and therefore, they are not cost-effective.<sup>122</sup>

93           The Panel confirmed the proposed low income renewable program is not cost effective: "There is no cost-effectiveness test that I know of that is applied to solar installations" because solar facilities "have above market costs."<sup>123</sup> The record shows this testimony to be somewhat of an understatement. According to the Panel, the proposed low income solar program contemplates a cost of \$7 per watt,<sup>124</sup> for a whopping \$7,000 per

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<sup>118</sup> In Panel Exh. No. J-12, last page, paragraph (a), PSE suggests only conservation it will pursue under the mandate in RCW 19.285.040(1) is conservation the Commission approves. If the Commission might approve the proposed low income programs in compliance with the statutory mandate, it would be premature for the Commission to fund those programs using REC proceeds now. If the Commission would not approve the proposed low income programs under the statutory mandate because they are not cost effective, then the Commission should not use REC proceeds for that purpose.

<sup>119</sup> Panel, Exh. No. J-8 at 5, PSE Tariff G, Schedule 83, ¶ 7: "a Measure must reasonably be expected to satisfy the Total resource Cost Test and the Utility Cost Test." See also, Parvinen, TR. 204:15-24.

<sup>120</sup> Panel, Exh. No. J-8 at 3 and the page after 3 (which is unmarked), PSE Tariff G, Schedule 83, ¶¶ 4p and 4aa.

<sup>121</sup> Panel, Exh. No. J-4.

<sup>122</sup> Parvinen, TR. 204:15 – 205:13.

<sup>123</sup> Panel, TR. 79:14-17 (Gravatt).

<sup>124</sup> Panel, TR. 90:12-18 (Gravatt).

megawatt.<sup>125</sup> As Commissioner Oshie observed, if the facilities contemplated by the low income renewable program were cost-effective today, “almost everybody would have one on their roof ....<sup>126</sup>

94           The proposed low income programs are not cost-effective, and for that reason alone, the Commission should not authorize the use of REC proceeds to fund them.

**5.     The proposed low income programs fail the “benefit should follow burden” principle**

95           Assuming the low income advocates can surmount each of the foregoing hurdles,<sup>127</sup> the Commission is still left with the gaping hole in PSE and the low income advocates’ case: There is no evidence that low income customers are burdened any differently than other customers with regard to these resources. As Staff put it, the proposed \$20 million low income programs do not provide commensurate benefits to other PSE customers.<sup>128</sup> Consequently, low income customers are not entitled to an exclusive \$20 million benefit in the form of their proposed low income programs.

96           Nor have the low income advocates provided any justification why they should receive immediately \$10 million of REC proceeds currently in PSE’s hands, plus a 20 percent claim on each subsequent REC dollar as it comes in (capped at an additional \$10 million). As ICNU demonstrated, all by itself, this “up front” payment featured in their proposal visits a significant economic disadvantage upon other PSE customers.<sup>129</sup>

97           In the end, because all PSE retail customers pay rates designed to recover all costs of these resources, all such customers should get REC benefits in a commensurate manner.

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<sup>125</sup> Parvinen, TR. 207:1-5. We apologize for our arithmetic failure at TR 206:6-7; it was getting late.

<sup>126</sup> TR 79:2-5.

<sup>127</sup> See ¶¶ 69-94, supra.

<sup>128</sup> Parvinen, Exh. No. MPP-1HCT at 12:14-16.

<sup>129</sup> Schoenbeck, Exh. No. DWS-1HCT at 6:5-12.

Giving \$20 million to one group of customers to the exclusion of all others would violate the “benefit should follow burden” principle in every respect.<sup>130</sup>

**D. The Commission Should Adopt Staff’s Regulatory Liability Method to Distribute REC and CFI Proceeds to Ratepayers**

98 Staff proposes the Regulatory Liability method as an equitable means to implement Staff’s recommendation that the Commission provide REC and CFI proceeds to all ratepayers.<sup>131</sup> As Staff explained, the Regulatory Liability method matches the goal that REC and CFI revenues should be returned to the ratepayers who pay rates to cover all of the costs of the related resources, in the same manner in which rate classes are assigned cost responsibility for those resources.<sup>132</sup> The mechanics of this method are acceptable to PSE.<sup>133</sup>

99 Under the Regulatory Liability method, PSE will book the REC and CFI proceeds in a regulatory liability account, which will be used to reduce PSE’s rate base for ratemaking purposes. PSE would amortize the balance in the account over ten years, to give customers a long-term benefit of the unamortized balance.<sup>134</sup> This method is substantially the same accounting treatment the Commission approved in Docket UE-001157,<sup>135</sup> which involved revenues from PSE’s sales of excess sulfur dioxide emissions credits, which are similar to CFIs.<sup>136</sup>

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<sup>130</sup> Parvinen, Exh. No. MPP-1HCT at 11:17-18.

<sup>131</sup> Kroger also proposes a regulatory liability method. Higgins, Exh. No. KCH-1T at 9:4-6. Kroger suggestion of a rolling, three-year amortization is not substantially different from Staff’s proposal.

<sup>132</sup> Parvinen, Exh. No. MPP-1HCT at 8:15-23.

<sup>133</sup> De Boer, Exh. No. TAD-3HCT at 19:13-19; TR. 110:1-17.

<sup>134</sup> Parvinen, Exh. No. MPP-1HCT at 3:14-4:18 and at 9:4-5.

<sup>135</sup> *In re Petition of Puget Sound Energy Inc., for an Order Regarding Authorization to Sell Sulfur Dioxide Emissions Allowances and an Associated Accounting Order*, Docket UE-001157, Order at 2 (October 25, 2000); Parvinen, Exh. No. MPP-1HCT at 20:1-6.

<sup>136</sup> Parvinen, Exh. No. MPP-1HCT at 20:3.

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Staff's proposed method is the same in concept as the method PSE has proposed for returning REC and CFI revenues to ratepayers, i.e., using REC proceeds to reduce PSE's Storm Damage regulatory asset.<sup>137</sup> However, as Staff explained, in setting rates, the Commission does not allocate the Storm Damage account in the same manner as it allocates the resources that generate the REC and CFI proceeds.<sup>138</sup> The result of PSE's selection of the Storm Damage account is a "mismatch [that] creates disproportionate shares of the REC/CFI benefits among customer classes."<sup>139</sup>

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Staff considered a direct refund approach, which could be accomplished via a rate credit, or as an immediate rate base reduction of the sort proposed by Public Counsel for the REC and CFI revenues currently on PSE's books.<sup>140</sup> This approach is conceptually sound, in terms of returning the REC benefits to customers in the same way customers pay for the underlying resources. However, it provides only short term benefits and produces rate instability, evidenced by a likely rate increase as the credit expires.<sup>141</sup>

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In sum, the Commission should accept Staff's proposed Regulatory Liability method as the means to return REC and CFI revenues to ratepayers. First, it is conceptually sound, and the amortization period more closely matches the period the benefits will accrue. Second, it is a workable method, evidenced by the fact that it is being used by PSE today for revenues from PSE's sales of excess sulfur dioxide emissions credits. Finally, unlike the direct refund approach, the Staff's proposed method also provides long-term benefits and stable rates, and it does not result in a rate increase when the REC monies are used up.

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<sup>137</sup> Parvinen, Exh. No. MPP-1HCT at 18:10-22.

<sup>138</sup> Parvinen, Exh. No. MPP-1HCT at 19:6-9.

<sup>139</sup> Parvinen, Exh. No. MPP-1HCT at 19:8-10.

<sup>140</sup> See Norwood, Exh. No. SN-1HCT at 4:7-14.

<sup>141</sup> Parvinen, Exh. No. MPP-1HCT at 9:8-23; see also De Boer, Exh. No. TAD-1T at 10:3-7.

**E. The Commission Need Not Order Additional REC Reporting by PSE**

103 Public Counsel recommends the Commission require PSE to file reports on RECs in the same manner as PacifiCorp.<sup>142</sup> The Commission should not adopt this recommendation because the accounting for PSE's RECs in the Amended Petition should address any reporting concerns. Moreover, as PSE correctly points out, in whatever manner the Commission decides to distribute REC proceeds, PSE filings will be required,<sup>143</sup> and appropriate mechanisms are in place to allow Staff and others to scrutinize those filings. Should a need for further information arise in the future, the Commission can require reporting at that time.<sup>144</sup>

**IV. CONCLUSION**

104 Many cases before the Commission present perplexing and complex issues. In most respects, this case is not one of them. In this case, the right choice is the obvious one: Provide REC money to the ratepayers in the same manner the Commission sets the rates for PSE to recover the costs of the resources that generated the RECs in the first place. No more, but certainly no less.

105 For the reasons stated in this brief, the Commission should return the REC proceeds to all ratepayers by requiring PSE to: (1) Book the net proceeds from the sale of RECs and

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<sup>142</sup> Norwood, Exh. No. SN-1HCT at 25:9-20.

<sup>143</sup> De Boer, Exh. No. TAD-3HCT at 20:9-12.

<sup>144</sup> RCW 80.04.210.

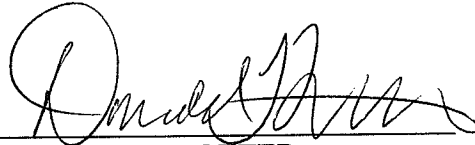


- CFIs in a regulatory liability account; (2) Use that account to reduce rate base; and  
(3) Amortize the balance in the account over a period of 10 years.

Dated this 17<sup>th</sup> day of March 2010.

Respectfully submitted,

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Donald T. Trotter", written over a horizontal line.

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