

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

**Consolidated Docket Nos. UE-130617, UE-130583, UE-131099, UE-131230
In the Matter of the Application of Puget Sound Energy, Inc. For an Order
Authorizing the Sale of the Water Rights and Associated Assets of the Electron
Hydroelectric Project in Accordance with WAC 480-143 and RCW 80.12**

BENCH REQUEST NO. 2

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The revised filing includes a waiver of the Resource Enhancement Agreement (REA) transfer requirements.

1. Please provide or cite any testimony, exhibits, contractual provisions, or actions by Electron Hydro, LLC (Electron LLC) and PSE to assure the Commission that PSE customers will be held harmless of obligations assumed by Electron LLC, in lieu of assignment of the REA, in the unlikely event Electron LLC ceases operations or fails to perform under the provisions of the contract prior to the conclusion of the REA obligations.
2. The revised filing does not indicate there is any change in the obligation of Electron LLC to shoulder the costs of the removal and reclamation of the Electron Hydroelectric Facility (Electron Facility).
3. Please provide or cite any testimony, exhibits, or contractual provisions which describes how PSE customers will remain harmless from any costs associated with the Electron Facility removal and reclamation if, in the unlikely event, Electron LLC ceases operations or fails to perform under the provisions of the contract prior to the conclusion of the REA obligations (i.e., a requirement for the posting of decommissioning surety bonds).

Please respond to this Bench Request no later than Friday, July 18, 2014, by 5:00 p.m., with an original and seven (7) copies. If you have any questions concerning this request, please contact Administrative Law Judge Marguerite E. Friedlander at 360-664-1285 or via e-mail at mfriedla@utc.wa.gov.

Response:

1. The Asset Purchase Agreement, dated as of May 30, 2013, by and between Puget Sound Energy, Inc. ("PSE") and Electron Hydro, LLC ("Electron Hydro"),

as amended by Amendment No. 1 dated August 5, 2013, Amendment No. 2 dated December 31, 2013, Amendment No. 3 dated March 31, 2014, and Amendment No. 4 dated June 4, 2014 (the "Asset Purchase Agreement"), provides for a purchase price of \$8.4 million for the Electron Hydroelectric Facility (the "Electron Facility").

On the Closing Date, Electron Hydro LLC will assume the following liabilities and obligations of PSE:

- (1) all continuing liabilities and obligations of [PSE] under the transferred Contracts, Permits, Water Rights and FCC License;
- (2) all liabilities and obligations set forth on Exhibit F; (3) liabilities relating to the Transferred Assets or arising out of the operation or ownership of the Transferred Assets after the Closing Date; (4) any Taxes allocated to Buyer pursuant to Article 5; and (5) any and all transaction expenses incurred by [Electron Hydro] or any of its Affiliates in connection with this Agreement and the transactions contemplated hereby (collectively, the "**Assumed Liabilities**").

Asset Purchase Agreement, section 1.3 (emphasis added).

The Asset Purchase Agreement further obligates Electron Hydro to indemnify PSE from and against losses arising under certain circumstances, including but not limited to losses that PSE may suffer arising out of any of these Assumed Liabilities:

- [Electron Hydro] agrees to indemnify the Seller Indemnified Parties [which include PSE] from and against the entirety of any Losses the Seller Indemnified Parties may suffer resulting or caused by:
- (i) [Electron Hydro's] failure to pay the Taxes or costs that are the obligation of [Electron Hydro] under Section 5.1 and 5.2; (ii) any nonfulfillment or breach of any covenant, agreement or other provision by [Electron Hydro] under the [Asset Purchase] Agreement or any of the agreements or instruments executed by [Electron Hydro] in relation hereto; or (iii) any Assumed Liabilities.

Asset Purchase Agreement, section 10.3 (emphasis added).

In addition, PSE and Electron Hydro are entering into an Electron Facility Operation Agreement (the "Operations Agreement"), pursuant to which Electron Hydro will be contractually obligated to operate the Electron Facility in a manner consistent with PSE's obligations under the Resource Enhancement Agreement, dated March 21, 1997, between PSE and the Puyallup Tribe of Indians (the "Tribe").

The Operations Agreement is an agreement executed by Electron Hydro in relation to the Asset Purchase Agreement. Therefore, section 10.3(ii) of the Asset Purchase Agreement requires Electron Hydro to indemnify PSE for losses for nonfulfillment or breach of any covenant, agreement or other provision by Electron Hydro under the Operations Agreement.

Section 1 of the Operations Agreement states that the purpose of the Operations Agreement is to ensure that Electron Hydro's operations of the Electron Facility are in a manner consistent with PSE's obligations under the Resource Enhancement Agreement:

The Parties have agreed to complete the sale of the Electron Facility under the [Asset Purchase Agreement] to [Electron Hydro] while PSE maintains the [Resource Enhancement Agreement], and have agreed to enter into this [Operations] Agreement to set forth [Electron Hydro's] obligations regarding the operation of the Electron Facility in a manner consistent with PSE's obligations under the [Resource Enhancement Agreement] after Closing. Except as otherwise defined herein, defined terms shall have the meaning ascribed to them in the [Resource Enhancement Agreement].

Operations Agreement, section 1.

Section 3 of the Operations Agreement states that Electron Hydro will operate the Electron Facility at all times in a manner consistent with PSE's obligations under the Resource Enhancement Agreement:

[Electron Hydro] will operate the Electron Facility at all times in a manner consistent with PSE's obligations under the [Resource Enhancement Agreement], as if [Electron Hydro] were substituted for "Puget"

Operations Agreement, section 3.

Section 5 of the Operations Agreement obligates Electron Hydro to comply with the notice provisions of the Resource Enhancement Agreement with respect to any decision to retire or upgrade the Electron Facility:

So long as the [Resource Enhancement Agreement] is in effect and [Electron Hydro] is operating the Electron Facility, [Electron Hydro] must provide written notice to PSE, no later than the [sic] October 31, 2018, of [Electron Hydro's] decision to Upgrade or Retire the Electron Facility. Following consultation with [Electron Hydro], PSE will exercise PSE's rights pursuant to Section 11 of the [Resource Enhancement Agreement] pursuant to, and in a manner consistent

with, [Electron Hydro's] written notice and plans for the Electron Facility. Any such Upgrade or Retirement of the Electron facility by [Electron Hydro] must be done in compliance with the terms of the [Resource Enhancement Agreement]. Failure of [Electron Hydro] to provide notice by the deadline described herein shall be deemed [Electron Hydro's] election to Retire the Electron Facility.

Operations Agreement, section 5.

If Electron Hydro were to fail to comply with its operations under the Operations Agreement, Electron Hydro must indemnify PSE from and against any losses PSE may suffer arising out of any such failure pursuant to section 10.3 of the Asset Purchase Agreement, quoted above, and section 7.3 of the Operations Agreement:

The provisions of this [Operation] Agreement are in addition to, and are not intended to replace, the Parties' obligations for indemnification under the [Asset Purchase Agreement] or the [Power Purchase Agreement], specifically:

...

(iii) [Electron Hydro's] indemnification obligations in Section 10.3 of the [Asset Purchase Agreement] shall govern for any Losses suffered by PSE (and the Seller Indemnified Parties as defined in the [Asset Purchase Agreement] resulting from or caused by the operation or ownership of the Transferred Assets after the Closing Date.

Operations Agreement, section 7(a)(iii).

If Electron Hydro were to fail to provide such indemnification, section 4(c) of Operations Agreement permits PSE to set off any amounts due to PSE under the Operations Agreement against any other payments due to Electron Hydro, including payments under the Power Purchase Agreement between the parties relating to the Electron Facility:

Any amount not paid by [Electron Hydro] when due hereunder shall bear interest at the rate of four percent (4%) per annum, calculated on a daily basis from the date due until the date paid. PSE shall be entitled to set off any amounts due PSE under this Agreement against any payments due [Electron Hydro] under any other agreement, including, without limitation, that certain Power Purchase Agreement ("**PPA**") between the Parties, of even date herewith.

Operations Agreement, section 4(c).

Furthermore, section 3.10.1 of the Power Purchase Agreement between PSE and Electron Hydro requires Electron Hydro to hold commercial general liability insurance:

Commercial general liability insurance on an occurrence form and providing coverage for bodily injury (including death), personal and advertising injury, and property damage arising out of or in connection with the Construction Activities, the delivery of the net electrical output from the [Electron Facility] to the Point of Delivery, or the ownership, operation, use or maintenance of the [Electron Facility]. Such insurance coverages shall include the following: Premises/Operations Liability, Products/Completed Operations Liability, Contractual Liability, Owners and Contractors Protective coverage (in all cases where subcontractors are retained to perform the work), and Broad Form Property Damage coverage. Such insurance coverages shall provide, at a minimum, the following limits (or such higher limits as may be customary in the electric generation industry): bodily injury (including death), \$2,000,000 per occurrence; property damage, \$2,000,000 per occurrence; personal and advertising injury, \$2,000,000 per occurrence.

Power Purchase Agreement, section 3.10.1. This commercial general liability insurance should be available should Electron Hydro fail its indemnification obligations under the Asset Purchase Agreement and Operations Agreement.

Finally, PSE is familiar with Electron Hydro and its principals, and has closed similar transactions with affiliates of Electron Hydro (e.g., Black Creek Hydro, Inc.). PSE conducted due diligence on Electron Hydro and its principals in connection with its decision to enter into the Asset Purchase Agreement and believes that Electron Hydro has the financial backing and technical expertise to operate the Electron Facility successfully and in a manner consistent with PSE's obligations under the Resource Enhancement Agreement.

2. There is no change in the obligation of Electron Hydro to shoulder the costs of the removal and reclamation of the Electron Facility after the closing of the Asset Purchase Agreement. On the Closing Date, all obligations and liabilities associated with the operation and ownership of the Electron Facility will pass from PSE to Electron Hydro LLC. See Asset Purchase Agreement, section 1.3(3) quoted above. Removal and reclamation of the Electron Facility post-closing would be included in this assumption of liabilities.
3. Please see PSE's response to 1. above.