

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	DOCKET UE-130583
	)	<i>(Consolidated)</i>
PUGET SOUND ENERGY)	
)	
For an Accounting Order Authorizing)	
Accounting Treatment Related to)	
Payments for Major Maintenance)	
Activities)	
)	
-----)	
WASHINGTON UTILITIES AND	)	DOCKET UE-130617
TRANSPORTATION COMMISSION,	)	<i>(Consolidated)</i>
)	
Complainant,)	
v.)	
)	
PUGET SOUND ENERGY)	
)	
Respondent.)	
)	
-----)	
In the Matter of the Petition of	)	DOCKET UE-131099
	)	<i>(Consolidated)</i>
PUGET SOUND ENERGY)	
)	
For an Accounting Order Authorizing)	
Accounting the Sale of the Water Rights)	
and Associated Assets of the Electron)	
Hydroelectric Project in Accordance)	
with WAC 480-143 and RCW 80.12.)	
)	
-----)	
In the Matter of the Application of	)	DOCKET UE-131230
	)	<i>(Consolidated)</i>
PUGET SOUND ENERGY, INC.,)	
)	
For an Order Authorizing the Sale of	)	CONFIDENTIAL PER
Interests in the Development Assets	)	PROTECTIVE ORDER IN WUTC
Required for the Construction and	)	DOCKET UE-130617 –
Operation of Phase II of the Lower	)	INTERVENER’S BRIEF IN
Snake River Wind Facility.)	OPPOSITION TO PUGET SOUND
)	ENERGY’S PROPOSED SALE OF
)	THE ELECTRON
)	HYDROELECTRIC PROJECT
)	
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NOTE: THIS DOCUMENT CONTAINS INFORMATION DESIGNATED CONFIDENTIAL IN
THIS DOCKET PER PROTECTIVE ORDER IN WUTC DOCKET UE-130617

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I. INTRODUCTION

1 The Puyallup Tribe of Indians (“Puyallup Tribe”)¹ files this brief and supporting exhibits with Administrative Law Judge Marguerite E. Freidlander (“ALJ”) pursuant to the ALJ’s authorization at the July 29, 2014 prehearing conference. Puget Sound Energy’s (“PSE”) proposed sale of the Electron Hydroelectric project (“Electron Dam”) fails to satisfy PSE’s burden under controlling law.

2 In violation of WAC 480-142-172, the proposed transaction does not result in “no harm” to the public interest.² The Puyallup Tribe requests that the Commission deny PSE’s proposed sale.

3 Throughout this proceeding PSE has improperly assumed that the 110-year-old Electron Dam will continue to generate power and that Electron Hydro LLC (“Electron LLC”) will remain solvent. The attached EES Report concludes the best case scenario for Electron LLC is a net present value of [REDACTED] while the worst case scenario for Electron LLC is a net present value of [REDACTED].³ The EES Report also concludes that the proposed transaction will have “**substantial rate impacts and risks**” resulting from a failed project and PSE’s remaining obligations under the Resource Enhancement Agreement with the Puyallup Tribe.⁴ Thus, the Commission should deny the proposed transaction because it will harm the public interest.

¹ Pursuant to WAC 480-07-395(1)(c)(ii), the Law Office of the Puyallup Indian Tribe’s address is 900 East Portland Avenue, Tacoma, WA 98404. Foster Pepper’s address is 1111 3rd Avenue, Suite 3400, Seattle, WA 98101.

² Pursuant to WAC 480-07-395(1)(c)(ii), the following statutes and rules are at issue: RCW 80.01.040; RCW 80.01.020; WAC 480-143-120; WAC 480-143-180; and WAC 480-142-170.

³ The EES Report is attached to Gary Saleba’s testimony. EES Report, pp. 6-7. The projected losses are based on PSE’s cost and power generation numbers, although both are highly questionable. EES Report, *passim*.

⁴ EES Report, p. 7.

4 The Puyallup Tribe relies upon the materials previously filed with UTC for this
consolidated docket, the attached declaration of Gary Seleba, which includes the EES
Report, and the attached declaration of Russ Ladley.

II. FACTS

5 Prior to the submittal of this brief, the Commission has received a total of three
paragraphs from UTC Staff analyzing the proposed Amended Asset Purchase Agreement
for the Electron Dam, dated June 2014 (“Amended Agreement”) and the associated
Electron Facility Operation Agreement, also prepared in 2014 (“Amended Agreement”).⁵
PSE’s attorney is the only other party to provide any analysis of the proposed Amended
Asset Purchase Agreement for the Electron Dam.⁶ All of the testimony and financial
analysis prepared for this petition occurred in 2013, almost a year before PSE and
Electron Hydro LLC (“Electron LLC”) executed the Amended Agreement and prepared
the Operating Agreement.⁷

6 Thus, the analysis prepared for this petition analyzes a transaction that is not currently
before the Commission, because the Amended Agreement and the Operating Agreement

⁵ Staff Response to Commission Notice, dated July 18, 2014, pp. 5-6, ¶¶ 16-18. This response argues that additional analysis is not necessary because a public utility cannot include negligent or wasteful losses among its operating charges. Response, p. 5, f.n. 9. This analysis misstates the relevant standard of review for this petition. It also fails to address the impacts to PSE’s customers and the general public if Electron LLC becomes insolvent, which is not a “negligent” or “wasteful” loss.

⁶ PSE’s response to Bench Request No. 2 dated, July 18, 2014; PSE’s response to Bench Request No. 3, dated July 21, 2014. The responses were not accompanied by any testimony of any individual with technical knowledge of the Electron Dam, the financing of the Electron Dam acquisition, or the impact to ratepayers if Electron Hydro files for bankruptcy or dissolves.

⁷ For example, UTC Staff Testimony from David Gomez and Joanna Huang are dated August 14, 2013. Public Counsel Testimony from Sebastian Coppola is dated August 14, 2013. PSE’s rebuttal testimony dates to 2013.

materially alter the proposed transaction's structure. One significant material alteration creates continued and significant financial obligations for PSE.⁸

7 The only information before the Commission that analyzes the proposed transaction is as follows: UTC Staff Response to Commission Notice (prepared by a UTC Staff attorney), PSE's Response to Bench Requests Nos. 2 and 3 (prepared by PSE's attorney), this brief, the declaration of Lisa Brautigam, the declaration of Russ Ladley (attached), and the declaration of Gary Saleba (attached), which includes the EES Report.

8 To assist the Commission with the review of the proposed transaction, the Puyallup Tribe addresses the documents relevant to PSE's proposed regulated sale of the Electron Dam. Then, the Puyallup Tribe analyzes the risk that the proposed transaction poses to the public interest.

2.1 Electron Dam – Asset Purchase Agreement and Amended Agreement.

9 On May 30, 2013 PSE entered into an Asset Purchase and Sale Agreement to sell the Electron Dam to Electron LLC. The Initial Asset Purchase Agreement recognized the Puyallup Tribe's interest in the Electron Dam pursuant to a Resource Enhancement Agreement ("REA," analyzed in section 2.2) between PSE and the Puyallup Tribe, dated March 21, 1997.⁹ More specifically, the Initial Asset Purchase Agreement included a condition precedent that required Electron LLC to enter into a separate agreement with the Puyallup Tribe to replace the Resource Enhancement Agreement.¹⁰ This condition

⁸ UTC Staff Response to Commission Notice, dated July 18, 2014, ¶ 16.

⁹ Agreement, p. 1, second recital. The REA is available at Exh. No. ___ PKW-9C.

¹⁰ Initial Asset Purchase Agreement, Section 4.2.2. This provision include the following condition to closing: "Seller has received the consent of the tribe to the termination of the current Resource Enhancement Agreement between Seller and the Tribe ..."

precedent protected the Puyallup Tribe's interest as a rate-payer and its long-standing interest in the ecology of this region.¹¹ Because PSE cannot assign the REA without the Puyallup Tribe's approval, the Puyallup Tribe had contractual assurances that PSE would remain the operator of the Dam unless the Puyallup Tribe agreed to a new operator.

10 On October 23, 2013, the Commission approved the sale of Electron Dam so long as there were no material changes to the Asset Purchase Agreement as filed, and an agreement with the Tribe.¹² Then, on June 25, 2014, PSE filed an Amended Application that included material changes to the Asset Purchase Agreement (the "Amended Agreement").¹³ The Amended Agreement waives the REA-related agreement between Electron LLC and the Puyallup Tribe. Instead, the Amended Agreement requires PSE and Electron LLC to enter into the Electron Facility Operation Agreement ("Operation Agreement") whereby PSE effectively assigns its rights to Electron LLC without the Puyallup Tribe's consent.¹⁴

¹¹ Among other requirements, the REA requires PSE to either upgrade and license the Dam or retire it by 2026. Docket UE-130617 et al. Order 08 p. 3 f.n. 3.

¹² *In the Matter of the Petition of Puget Sound Energy, Inc., for an Accounting Order Authorizing Accounting Treatment Related to Payments for Major Maintenance Activities*, Docket UE-130583, Order 02; *WUTC, Complainant, v. Puget Sound Energy, Respondent*, Docket UE-130617, Order 06, ¶ 25; *In the Matter of the Petition of Puget Sound Energy, 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*, Docket UE-131099, Order 02; and *In the Matter of the Petition of Puget Sound Energy, for an Order Authorizing the Sale of Interests in the Development Assets Required for the Construction and Operation of Phase II of the Lower Snake River Wind Facility*, Docket UE-131230, Order 02, Final Order Approving and Adopting Settlement Agreement (October 23, 2013).

¹³ Order 06, ¶ 25.

¹⁴ Amendment No. 4 to Asset Purchase Agreement and Waiver of Certain Closing Conditions, Exhibit F-5 to PSE's Amended Application.

2.2 Resource Enhancement Agreement.

11 On March 21, 1997, PSE and the Puyallup Tribe executed the REA to settle certain legal
claims by the Puyallup Tribe concerning the Electron Dam.¹⁵ The REA establishes
numerous requirements for the operation of the Electron Dam, all of which have the
potential to impact the public and Washington's ratepayers:

12 Upgrade or Retire Electron Dam. PSE must notify the Puyallup Tribe no later than 2018
of PSE's decision to either upgrade or retire the Electron Dam by 2026.¹⁶

13 Resource Enhancements. PSE is obligated to make annual payment to the Puyallup for
certain resource enhancements.¹⁷ In 2013, PSE's resource enhancement payments
exceeded \$274,000.¹⁸ In his attached declaration, Puyallup Tribe Resource Protection
Manager, Russ Ladley, explains that the operation and maintenance costs regularly occur,
and often exceed the cost estimates identified in the REA. The increased costs are a
result of the site-specific conditions including significant flood risk with large wood and
rock debris, high silt bed load, and the presence of three listed salmon species under the
Endangered Species Act.¹⁹

¹⁵ Exh. No. ___ PKW-9C.

¹⁶ Exh. No. ___ PKW-9C, § 11.1

¹⁷ Payments for the operation and maintenance of resource enhancements, contributions for T&H facilities, and additional costs associated with fish ladders. Exh. No. ___ PKW-9C, §§ 3.4; 5.2.2, 16.1.3.2 to .2.A.

¹⁸ Declaration of Russell Ladley, ¶ 16.

¹⁹ Declaration of Russell Ladley.

14 Insurance. PSE is obligated to maintain not less than \$5 million in commercial general liability insurance, and, at the request of the Puyallup Tribe, name the Puyallup Tribe as an Additional Insured on the liability insurance policy.²⁰

15 Assignment Requires Consent. The REA also contains a provision that prohibits the assignment of “all or any part of this REA or any of its rights hereunder without the prior written consent of the other Party.”²¹ The Puyallup Tribe has not and does not consent to any attempt by PSE to assign its obligations to Electron LLC. As demonstrated in the EES Report (analyzed below), Electron LLC has provided no assurances that it has the financial or technical capacity to operate the outdated Electron Dam under the current regulatory regime that is further regulated by the REA.²²

2.3 The Operation Agreement.

16 In response to Bench Request No. 2 PSE outlines the Operation Agreement. The Operation Agreement generally requires PSE to perform under the REA. PSE is then to be reimbursed by Electron LLC’s sale of power generated at the Electron Dam. However, PSE’s response to Bench Request No. 2 did not answer the ALJ’s question regarding potential insolvency of Electron LLC:

17 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.

²⁰ Exh. No. ___ PKW-9C, § 16.2.

²¹ Exh. No. ___ PKW-9C, § 18.1.

²² The Operation Agreement is a concession that PSE is breaching the assignment provision of the REA: “[Electron LLC] will operation the Electron Facility ... **as if [Electron LLC] were substituted for ‘Puget’ ...**” Operation Agreement, § 3.

18 PSE stated only that Electron LLC must provide \$2 million (\$2,000,000) in general liability insurance (which is \$3 million less than the amount required by the REA) (and no mention of contract performance bonding). It also stated that PSE is “familiar” with Electron LLC. Contrary to the ALJ’s request, PSE did not cite any “testimony, exhibits, [or] contractual provisions” to assure the Commission that PSE’s customers will be held harmless. To date, PSE has not answered the Commission’s questions. What happens if Electron LLC fails to generate power? What happens if Electron LLC fails to pay PSE under the Operation Agreement? There is no protection for the ratepayers for Electron LLC’s failure.

19 UTC Staff also fail to answer the Commission’s question. Curiously, UTC Staff concede that PSE has continued financial obligations under the Operation Agreement (“it seems to Staff that PSE remains bound by the REA, and therefore, the Company retains all of its obligations to the Tribe.”).²³ Then, UTC Staff incorrectly conclude that the ratepayers will not be impacted by PSE’s continued financial obligation because “a public utility will not be permitted to include negligent or wasteful losses in its operating charge.”²⁴ The failure of Electron LLC to generate power or the insolvency of Electron LLC is not a negligent or wasteful act of PSE.²⁵ The UTC Staff Report, or law, does not address either of these significant issues. There is also no analysis of the economic structure of the proposed transaction that is before the Commission.

²³ Staff Response to Commission Notice, p. 5.

²⁴ *Id.* f.n. 9.

²⁵ *Id.* p. 5, ¶¶ 16 and 17.

20 Financial issues notwithstanding, PSE and UTC Staff also fail to explain that the Operation Agreement creates new barriers for the effective operation of the Electron Dam and the REA. Under the Operation Agreement, PSE remains responsible for the following obligations as set forth in the REA: rearing ponds, downstream passages, upstream passages, installation and maintenance of T & H facilities, obtaining permits to implement fishery enhancements, release of claims, its indemnification of the Puyallup Tribe, and its obligation to implement the REA in “good faith,” which includes certain communication and dispute resolution procedures.²⁶ In other words, the REA was designed to manage power generation and ecological resources through cooperation and communication between PSE and the Tribe. Frustrating the purpose of the REA, the Operation Agreement obligates PSE to obtain Electron LLC’s approval before communicating with the Puyallup Tribe. Thus, the Operation Agreement restricts PSE and the Puyallup Tribe’s ability to address significant issues at this century old dam located in a complex ecological system.²⁷

2.4 Electron LLC Due Diligence.

2.4.1 Electron LLC - Finance

21 Electron LLC is Delaware limited liability company, and PSE has provided no information to demonstrate that the principals behind these entities are financially responsible for Electron LLC’s contractual obligations. There is no showing of capital support for the LLC’s obligations, securitized or otherwise.

²⁶ Operation Agreement, section 3.

²⁷ Operation Agreement, section 2 (“PSE ... will not ... otherwise communicate with the Tribe in any material respect related to the Electron Facility or the REA , in each case without EH’s prior written consent or deemed approval as described in Section 6 hereof.”).

22 Electron LLC is a joint venture that is 75 percent owned by Electron Holdings, Inc. and
25 percent owned by Electron Management LLC.

23 • Electron Holdings, Inc. is a wholly owned subsidiary of JAVA Hydro Electric,
Inc., which in turn is a wholly owned subsidiary of JAVA Holdings Ltd. JAVA
Holdings Ltd is wholly owned by 1428802 Alberta Ltd, which, in turn, is wholly
owned by Victor Budzinski. Thus, any financial responsibility for Victor
Budzinski, who PSE proposes to make a 75% owner of Electron Dam, is
shielded by at least five separate entities.

24 • Electron Management LLC is 90 percent owned by Thom Fischer, and the
remaining 10 percent is owned by Steve Marmon. Thus, any financial
responsibility for these individuals is shielded by at least two LLC entities.²⁸

25 To date, PSE has not disclosed any guarantees or other financial commitments, personal
or otherwise, from Thom Fischer, Steve Marmon, or Victor Budzinski.

2.4.2 Electron LLC – Experience

26 No testimony or exhibit analyzes Electron LLC's ability to perform under the Amended
Agreement or the Operation Agreement. Thus, PSE provides no data or analysis to
support its unfounded conclusion that "PSE believes that Electron Hydro has the financial
backing and technical expertise to operate the Electron Facility successfully and in a

²⁸ PSE's Response to Bench Request No. 3, p.3.

manner consistent with PSE's obligations under the Resource Enhancement Agreement.²⁹

27 A thorough analysis of the history of Electron LLC's members shows no experience with hydro projects with substantial fisheries issues. For example, the preliminary permit issued for White River Hydro, LLC, was cancelled by FERC in September 2013 for failure to submit the progress reports required under the permit. Black Canyon Hydro's preliminary permit is still in the approval process which typically requires significant studies being performed as to feasibility and impacts and mitigation requirements. Black Creek Hydro, which PSE identifies to show Electron Hydro's experience, is a small, 3.8 megawatt facility that lacks any of the challenges of the Electron Dam, as set forth in Russ Ladley's testimony.³⁰ PSE has not demonstrated that Electron LLC has the experience necessary to operate or renovate the Electron Dam.

2.5 The EES Report - Analysis of the Proposed Transaction.

28 The EES Report analyzes the financial implications of the Amended Agreement and the Operation Agreement. To date, the EES is the only analysis that was prepared by technical professionals with dam operation and power sale expertise. The EES Report concludes the best case scenario for Electron LLC is a net present value of [REDACTED] while the worst case scenario for Electron LLC is a net present value of [REDACTED]

[REDACTED]³¹ The EES Report also concludes that the proposed transaction will

²⁹ PSE's Response to Bench Request No. 2, p. 5. No documents provided by PSE to the Puyallup Tribe analyze this issue.

³⁰ PSE's Response to Bench Request No. 3, p. 4. Information regarding Electron LLC-related hydropower projects is located in the declaration of Russ Ladley, ¶ 15.

³¹ EES Report, pp. 6-7.

have “**substantial rate impacts and risks**” resulting from a failed project and PSE’s remaining obligations under the REA.³²

29 To reach this conclusion, the EES Report projected annual costs and revenues associated with owning and operating the Electron Dam (again, using PSE’s cost and power generation numbers, which are highly questionable, see EES Report, *passim*). The EES Report assumes that Electron LLC would pay all of the costs associated with purchasing and operating the plant, and receive revenue from the output from Electron Dam to PSE at the price included in the transaction’s Power Purchase Agreement.³³ The EES Report includes two scenarios to examine how Electron LLC will perform financially:

30 **Scenario 1:** Electron LLC sells power output to PSE in 2015 through 2026, and pursuant to the REA, pays decommissioning costs at the end of the term of the Power Purchase Agreement.³⁴

31 **Scenario 1 Conclusion:** The project will lose money during every year of operation, with a net present value loss of [REDACTED] over the term of the Power Purchase Agreement.³⁵

32 **Scenario 2:** Electron LLC sells power output to PSE in 2015 through 2064 and pays decommissioning cost at the end of the term of the power Purchase Scenario.

33 **Scenario 2 Conclusion:** The project will lose money through 2020, but may become positive once Electron LLC completes upgrades to Electron Dam and

³² EES Report, p. 7.

³³ EES Report, p. 1.

³⁴ EES Report, pp. 2, 3-4.

³⁵ EES Report, p. 4.

power output increases to 184,000 MWh.³⁶ However, the combination of negative revenues during the first six years of the Power Purchase Agreement and the decommissioning costs at the end of Electron Dam's life in 2065 results in negative net income over a 50-year Power Purchase Agreement.³⁷

34 Financial failure is a likely event under either scenario for the proposed sale of the Electron Facility.

35 The EES Report also identifies three areas of significant risk not analyzed by PSE:

36 Expiration of the REA / Environmental Compliance Post 2026. New environmental regulations, such as the listing of three salmonid species, present significant challenges to permitting any dam upgrades.³⁸ If the project is possible, upgrading the dam will undoubtedly trigger numerous environmental laws and regulations, all of which likely include costly compliance requirements.³⁹

37 FERC Jurisdiction. Project upgrades will likely trigger FERC jurisdiction, thereby creating \$5 to \$10 million in licensing costs.⁴⁰

38 Capital Cost Estimation Errors. PSE's capital cost estimate to refurbish Electron Dam of [REDACTED] is low by a factor of two.⁴¹

³⁶ This figure presumes that this 184,000 MWh power generation is possible, although the REA places strict limitations by imposing minimum instream flows. Increased minimum instream flows required by an ESA-required Incidental Take Permit or FERC jurisdiction would decrease power output and further compromise the project's financial viability. EES Report, p. 7. *See also* Prefiled Direct Testimony of Michael Mullally, p. 66.

³⁷ EES Report, p. 6.

³⁸ EES Report, p. 7-8.

³⁹ Even now the project lacks an Incidental Take Permit, required by the ESA, which is expected to be conditioned on costly environmental requirements.

⁴⁰ EES Report, p. 7-8.

⁴¹ EES Report, p. 7-8.

39 The Commission has received no information regarding the impact to the public interest if Electron LLC encounters operating losses. Contractually, all losses must be covered by Electron LLC, but, PSE has not demonstrated that Electron LLC is capable of sustaining [REDACTED]. The EES Report concludes that insolvency is predictable for Electron LLC:

40 Nowhere in the documentation available to EES does it indicate that the LLC is capable of sustaining [REDACTED]. As such, it seems possible that operating [REDACTED] may cause the LLC to walk away from the Project and not pay PSE the costs associated with the REA. Under this scenario, PSE would be forced to recover the costs associated with the REA and take over control of the Project with the condition of the Project not known. Without assurances that the LLC can sustain [REDACTED] and hold PSE's ratepayers harmless from Project-related risks and cost exposures, the prudence of the WUTC approving this proposed transaction is questionable in my view.⁴²

41 Besides the EES Report, the Commission has no information regarding the impact to the ratepayers and the general public if Electron LLC fails to generate adequate electricity or if Electron LLC is insolvent.

III. LEGAL STANDARD

42 All parties agree that the UTC has the authority to regulate the PSE's proposed sale of the Dam to Electron LLC. PSE's Initial Application for Docket UE-131099, dated June 6, 2013 at ¶ 34; *also see*, RCW 80.01.040(3);⁴³ RCW 80.01.020;⁴⁴ WAC 480-143-120.

⁴² EES Report, p. 7-8.

⁴³ RCW 80.01.040(3) provides: "The utilities and transportation commission shall: ... Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation."

⁴⁴ RCW 80.12.020(1) provides: "No public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public, and no public service company shall, by any means whatsoever, directly or indirectly, merge or consolidate any of its franchises,

3.1 Useful and Necessary Items - The Net Benefit Standard.

43 If the Dam is necessary or useful, state law explicitly states that the Commission may not approve a proposed sale “without a finding that the transaction would provide a **net benefit** to the customers of the company.”⁴⁵ WAC 480-143-180 explains that all items are necessary or useful except items that (1) are substituted with or replaced by items of equal or greater value of usefulness; (2) are surplus and unneeded assets for which full value is received; (3) are obsolete, or (4) excluded from the public service company’s rate base by commission order, or otherwise. If the Commission determines that the Dam is useful and necessary, PSE must demonstrate a “net benefit” to its customers before the Commission can approve the transaction.

3.2 All Equipment – The “No Harm” Test

44 For the sale of any property (regardless of its usefulness), UTC rules demand that the Commission analyze the broader public’s interest, in addition to the interest of the utility’s ratepayers. WAC 480-142-170 provides:

45 If, upon examination of any application and accompanying exhibits, or upon a hearing concerning the same, the commission finds that the proposed transaction is not consistent with the **public interest**, it shall deny the application.

46 Previous Commission Orders have determined that WAC 480-142-170 establishes a “no harm” public interest test, *i.e.*, the Commission will “deny the application if the

properties or facilities with any other public service company, without having secured from the commission an order authorizing it to do so. The commission shall not approve any transaction under this section that would result in a person, directly or indirectly, acquiring a controlling interest in a gas or electrical company without a finding that the transaction would provide a **net benefit** to the customers of the company.”

⁴⁵ RCW 80.12.020(1).

transaction is not consistent with the public interest, but will approve it, if the applicant demonstrates that the transaction, on balance, at least does not harm.”⁴⁶

47 The Commission considers the following four factors to determine whether a proposed transaction satisfies the “no harm” public interest test:

- 48 1. The transaction should not harm customers by causing **rates or risks** to increase, or by causing service quality and reliability to decline, compared to with what could reasonably be expected to have occurred in the absence of the transaction.
- 49 2. The transaction, with conditions required for its approval, should strike a balance among the interests of customers, shareholders, **and the broader public** that is fair and that preserves affordable, efficient, reliable and available service.
- 50 3. The transaction, with conditions required for its approval should not distort or impair the development of competitive markets where such markets can effectively deliver affordable, efficient, reliable and available service.
- 51 4. The jurisdictional effect of the transaction should be consistent with the Commission’s role and responsibility to protect the interests of Washington . . . customers.⁴⁷

3.2.1 Rates and Risks.

52 This test protects the ratepayers by requiring the Commission to deny the application if it causes **rates or risks** to increase. The Commission cannot conclude whether the regulated utility has satisfied its burden without a thorough understanding of the regulated entity’s operational history, organizational structure, the financial resources and

⁴⁶ *In re the Matter of the Application of Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. for approval of the sale of their interest in Centralia Power Plant*, Docket Nos. UE-991255, 991262, 991409, p. 11, ¶ 29.

⁴⁷ *In the Matter of the Joint Application of Pacificorp and Pacificorp Washington, Inc.*, Docket No. UE-001878, Fourth Supplemental Order, p. 4 ¶ 15. *Also see, In re the Matter of the Application of Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. for approval of the sale of their interest in Centralia Power Plant*, Docket Nos. UE-991255, 991262, 991409, p. 11, fn.6.

financial commitment of the entity itself, and the binding commitments, if any, of its principals. The Commission analyzes the ownership structure of regulated entities and the structure and financial data of each entity's subsidiaries. *In the Matter of the Application of Pacificorp*, Docket No. UE-010594. This structural and financial analysis is necessary to determine whether there is a financial "backstop" to the proposed transaction, or whether the ratepayers will provide the "backstop." Here, PSE and its ratepayers, through no negligence of PSE, will be the backstop for the predictable failure of Electron LLC.

53 Electron LLC's commercial general liability insurance and PSE's commercial general insurance do not provide a "backstop" for breach of contract claims, such as the claim that the Puyallup Tribe could bring against PSE for its breach of the REA. Commercial General Liability policies provide coverage for claims of "bodily injury," "property damage," and "personal and advertising injury." Standard breach of contract claims do not fall within any of those categories.⁴⁸ There is no securitized commitment of capital, bond, letter of credit or other documented financial support for Electron LLC's commitment to pay PSE. PSE remains responsible for REA obligations, even if the sale is approved. But there is no foundation for PSE's assertion that the ratepayers are protected from the predicted failure of Electron LLC.

3.2.2 Balancing the Interests of Ratepayers, the Regulated Business, and the Broader Public.

54 The Commission's analysis also protects the broader public's interest in the transaction:

⁴⁸ See e.g., *Sauter v. Houston Casualty Co.*, 168 Wn. App. 348, 276 P.3d 358 (2012).

55 2. The transaction, with conditions required for its approval, should strike a
balance among the interests of customers, shareholders, **and the broader public**
that is fair and that preserves affordable, efficient, reliable and available service.⁴⁹

56 Factor two leaves no doubt that the Commission must balance the interest of the
ratepayers (customers), the regulated business, and **“the broader public.”**⁵⁰ As argued
by PSE in Docket UE-991255, the Commission’s analysis must extend beyond the cost of
replacement power.⁵¹ For example, previously, PSE has successfully argued that the
Commission must consider “potential environmental costs” when evaluating a proposed
transaction.⁵² In a separate docket, the Commission analyzed whether the shared plant
operation, such as the Operation Agreement proposed here, “will interfere with timely
decisions to make capital investment necessary to maintain efficient and environmentally
compliant plan operation.”⁵³ The Commission’s analysis must weigh these issues when
reviewing this proposed transaction. In doing so, the Commission will find that PSE has
not met the standard for the asset sale.

⁴⁹ *In the Matter of the Joint Application of PacifiCorp and PacifiCorp Washington, Inc.*, Docket No. UE-001878, Fourth Supplemental Order, p. 4 ¶ 15. *Also see, In re the Matter of the Application of Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. for approval of the sale of their interest in Centralia Power Plant*, Docket Nos. UE-991255, 991262, 991409, p. 11, fn.6.

⁵⁰ UTC Staff’s Response to the Puyallup Tribe’s Petition misstates the relevant analysis. Response , p. 3 ¶ 13, f.n. 4. While a public utility cannot include negligent or wasteful losses among its operating charges, the purpose of this petition process is to protect the ratepayers and the broader public interest. Under controlling Commission standards, the Commission must deny the application if it causes rates or risks to increase, or if it does not strike a balance among the interests of customers, shareholders, and the “broader public.”

⁵¹ *Id.*

⁵² *In re the Matter of the Application of Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. for approval of the sale of their interest in Centralia Power Plant*, Docket Nos. UE-991255, 991262, 991409, p. 7, ¶ 19.

⁵³ *In the Matter of the Application of Avista Corp.*, Consolidated Docket UE-991255, Second Supplemental Order Approving Sale With Conditions, ¶ 35.

IV. ARGUMENT

4.1 Harm to PSE's Customers: PSE Remains Financially Obligated Under the Amended Agreement and the Operation Agreement.

57 The proposed transaction will harm the public interest because it lacks sound economic fundamentals, thereby increasing rates and increasing risk for PSE's customers.⁵⁴ UTC Staff admit that PSE remains financially obligated under the REA.⁵⁵ Although PSE argues that Electron LLC will reimburse PSE for its ongoing financial obligations, the EES Report concludes that Electron LLC is projected to [REDACTED] [REDACTED] during its operation of the Electron Dam. There will be no money to reimburse PSE. Because Electron LLC's projected losses are not "negligent" or "wasteful losses" of PSE (after all, the Commission would have approved the sale to Electron LLC), there is nothing to preclude PSE from passing these costs of compliance (with the legitimate REA) onto its customers.

58 It is unclear why Electron LLC is entering into this "upside down" transaction. Electron LLC lacks relevant hydropower experience, so it is possible that Electron LLC is unaware of the underestimated operation, maintenance, and upgrade costs for Electron Dam.

59 Another explanation is that the members of Electron LLC have shielded themselves from financial liability through numerous limited liability entities. Therefore, the members of

⁵⁴ This is factor #1 in the Commission's no harm test. *In the Matter of the Joint Application of PacifiCorp and PacifiCorp Washington, Inc.*, Docket No. UE-001878, Fourth Supplemental Order, p. 4 ¶ 15. *Also see, In re the Matter of the Application of Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. for approval of the sale of their interest in Centralia Power Plant*, Docket Nos. UE-991255, 991262, 991409, p. 11, fn.6; EES Report, p. 7 ("there will be substantial rate impacts and risk").

⁵⁵ Staff Response to Commission Notice, ¶ 15.

Electron LLC remain interested in this transaction because the entity can become insolvent and its underlying membership will not be responsible for any future financial obligation associated with Electron Dam if the dam fails to operate at an acceptable profit margin. For example, any financial responsibility for Victor Budzinski, who PSE proposes to make a 75% owner of Electron Dam, is shielded by at least five separate entities.⁵⁶

60 PSE has provided no evidence of Electron LLC providing any guarantee, personal or otherwise, to cover up to the identified [REDACTED]. As documented by UTC Staff, that risk lies with PSE.

61 It is likely that the projected losses will become a reality. PSE's reimbursement from Electron LLC is solely dependent upon Electron LLC's sale of power generated at Electron Dam. Even PSE questions the Electron Dam's ability to consistently generate power. *See e.g.*, the pre-filed testimony of PSE's Paul Wetherbee ("The historical trend of the plant production indicates that generation after 2012 without the flume box rebuild may not be feasible.").⁵⁷ As a single purpose entity, Electron LLC has no other mechanism to generate revenue to pay its obligations. Based upon the condition of Electron Dam, it is unclear whether Electron LLC can generate power throughout the duration of the REA's term. Thus, PSE's reimbursement mechanism is risky, at best.

62 The EES Report identifies three other significant risk factors: (1) the unknown cost of environmental compliance at the conclusion of the REA (or through the conditions of the

⁵⁶ PSE's Response to Bench Request No. 3, p.3.

⁵⁷ Wetherbee, Exhibit No. PKW-11C, 9, section 4.5 – Generation Outlook.

overdue Incidental Take Permit required by the ESA); (2) the \$5 to \$10 million cost associated with FERC licensing proceedings; and (3) PSE's capital cost estimation errors.⁵⁸ None of these risks have been analyzed by PSE or UTC Staff.

63 General commercial insurance, without contractual performance bonding, does not provide a satisfactory answer to the identified losses or risks. And even Electron LLC's insurance requirement is \$3 million less than the amount required under the REA. More importantly, liability insurance coverage would not apply to cover the projected [REDACTED]

[REDACTED] The public interest is harmed because PSE becomes Electron LLC's insurer and guarantor under the proposed transaction.

Furthermore, general commercial insurance will *not* cover a PSE breach of contract claim against Electron Hydro LLC, or the Puyallup Tribe's breach of contract claim against PSE.⁵⁹

64 The transaction causes harm to PSE's customers by increasing rates and increasing risk. Thus, the Commission should deny the proposed transaction.

4.2 Harm to the Broader Public: The Proposed Transaction Fails to Strike a Balance Between the Interests of Customers, Shareholders, and the Broader Public.

65 The Commission should also deny the proposed transaction because it fails to strike a balance between the interests of customers, shareholders, and the broader public.⁶⁰ Based

⁵⁸ EES Report, p. 7-8.

⁵⁹ See *e.g.*, *Sauter v. Houston Casualty Co.*, 168 Wn. App. 348, 276 P.3d 358 (2012).

⁶⁰ This is factor #2 in the Commission's no harm test. *In the Matter of the Joint Application of PacifiCorp and PacifiCorp Washington, Inc.*, Docket No. UE-001878, Fourth Supplemental Order, p. 4 ¶ 15. Also see, *In re the Matter of the Application of Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. for approval of the sale of their interest in Centralia Power Plant*,

upon the analysis above, the Commission should deny the petition after weighing just the interests of the PSE's customers against the interests of the shareholders. The scale tips even further when the Commission analyzes the public interest. The public interest includes environmental costs⁶¹ and it includes whether the shared plant operation will result in an "efficient and environmentally compliant" operation.⁶²

66 The declaration of Russ Ladley, the Puyallup Tribe' Resource Protection Manger, identifies the challenges associated with operating and maintaining the Electron Dam with the presence of three listed salmonid species at the project site.⁶³ For example, the fish ladder is regularly filled with debris during high flows or significant floods. When the fish ladder is not functioning, it requires regular cleaning because of sediment and debris load. The Electron Dam operator must also maintain the downstream trap and haul operations. Maintenance at the Electron Dam includes cleaning off the net that isolates the forebay and prevents listed salmonid species from entering the penstocks where they would be "pulverized." The net require cleaning every few days or more, depending upon the sediment and debris delivery rates. Failure to maintain the net results in fish entering the penstocks and the resulting take of endangered species. Based upon

Docket Nos. UE-991255, 991262, 991409, p. 11, fn.6; EES Report, p. 7 ("there will be substantial rate impacts and **risk**").

⁶¹ *In re the Matter of the Application of Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. for approval of the sale of their interest in Centralia Power Plant*, Docket Nos. UE-991255, 991262, 991409, p. 7, ¶ 19.

⁶² *In the Matter of the Application of Avista Corp.*, Consolidated Docket UE-991255, Second Supplemental Order Approving Sale With Conditions, ¶ 35.

⁶³ The federal government has not issued any take permit for the Electron Dam's operations.

his 26 years of experience, Russ Ladley concludes that operations at the downstream trap require skilled and trained staff.⁶⁴

67 To address these issues, the REA establishes a Joint Technical Committee that includes PSE staff and the Puyallup Tribe staff. PSE and Tribal staff monitor the ecological issues described above. This communication and cooperation is essential to maintain an “efficient and environmentally compliant” operation. This process cannot be effective without “biological training.”⁶⁵

68 Nothing in the record demonstrates that Electron LLC has the ecological or biological expertise required to operate an outdated dam within this ecologically sensitive area.

69 Perhaps more significantly, the Operation Agreement requires PSE to obtain Electron LLC’s approval before communicating with the Puyallup Tribe (“PSE ... will not ... otherwise communicate with the Tribe in any material respect related to the Electron Facility or the REA , in each case without EH’s prior written consent or deemed approval as described in Section 6 hereof.”).⁶⁶ Thus, the Operation Agreement restricts PSE and the Puyallup Tribe’s ability to timely confer regarding sensitive operations, such as cleaning the forebay net, to prevent listed species from being pulverized in penstocks. Endangered Species Act violations will undoubtedly multiply without constant care, communication, and maintenance. Thus, in addition to increasing rates and risk, the proposed transaction further undermines the public interest in an “efficient and environmental compliant” operation.

⁶⁴ Declaration of Russell C. Ladley, ¶¶ 4-13.

⁶⁵ *Id.*, at ¶ 13.

⁶⁶ Operation Agreement, section 2.

4.3 If the Dam is Useful and Necessary, PSE Must Demonstrate a Net Benefit to its Ratepayers.

70 PSE has failed to meet its burden if we presume that the Electron Dam is *not* useful and necessary. However, if the Dam is useful and necessary, the Commission may not approve the transaction unless PSE satisfies the “no harm” standard and PSE demonstrates that there is a “**net benefit**” to PSE’s ratepayers.⁶⁷ PSE’s application requests, in the alternative, that the Commission approve the sale of useful and necessary items because, according to PSE, the proposed transaction is “consistent with the public interest.”⁶⁸ PSE fundamentally misstates the relevant legal standard. For the sale of useful and necessary items, state law requires a “net benefit” to PSE’s ratepayers:

71 The commission shall not approve any transaction under this section that would result in a person, directly or indirectly, acquiring a controlling interest in a gas or electrical company without a finding that the transaction would provide a **net benefit** to the customers of the company.

72 RCW 80.12.020(1) (emphasis added). Here, the characterization of the property will determine whether the “net benefit” standard is applicable to PSE’s proposed transaction.

73 Relying upon WAC 480-143-180(1),⁶⁹ PSE incorrectly states that the Electron Dam is not useful or necessary because PSE intends to purchase the net electrical output of the

⁶⁷ RCW 80.12.020(1).

⁶⁸ PSE’s Amended Application for Docket UE-131099, dated June 25, 2014 at ¶ 22.

⁶⁹ WAC 480-143-180(1) provides: “A public service company must not dispose of any property necessary or useful to perform its public duties unless it first applies for, and obtains, written authority from the commission. Necessary or useful includes all property except items that: (1) Are substituted with or replaced by items of equal or greater value or usefulness; ...”

Electron Dam.⁷⁰ As described throughout this brief, PSE's representation regarding power production is an assumption based upon unsupported foundations.⁷¹

74 In contrast to PSE's argument, the facts demonstrate that the Electron Dam is obsolete under WAC 480-143-180(3). Ample evidence supports this finding, including the pre-filed testimony of PSE's Paul Wetherbee ("The historical trend of the plant production indicates that generation after 2012 without the flume box rebuild may not be feasible.").⁷² The EES Report⁷³ and UTC Staff testimony⁷⁴ also prove that Electron Dam is obsolete.

75 The Dam is either obsolete, or the dam is necessary and useful. If the dam is necessary and useful, PSE is required to demonstrate that there is a "net benefit" to PSE's customers. Because PSE misstates the relevant legal standard, the material provided by PSE does not provide adequate information for the Commission to determine whether PSE has satisfied the "net benefit" standard. In fact, the EES Report clearly proves that there is no "net benefit" to PSE's customers because of PSE's ongoing financial obligations and increased risk under the transaction.

4.4 Alternatively, the Commission Should Affirm the October 2013 Order.

76 The Commission properly understood this transaction's complex issues when it initially approved the sale of Electron Dam in the October 2013 Order. This Order approved the

⁷⁰ PSE's Amended Application for Docket UE-131099, dated June 25, 2014 at ¶ 20.

⁷¹ DCG-1CT 14:12-13 ("it is unknown how much power (if any all) the Electron Project can produce in its current condition.").

⁷² Wetherbee, Exhibit No. PKW-11C, 9, section 4.5 – Generation Outlook.

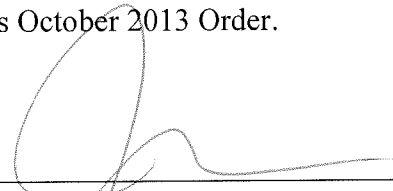
⁷³ EES Report, p. 7-8.

⁷⁴ Gomez, Exhibit No. DCG-1CT 14:12-13; ("The historical trend of the plan production indicates that generation after 2012 without the flume box rebuild may not be feasible.")

transaction, subject to the condition precedent that required Electron LLC to enter into a separate agreement with the Puyallup Tribe to replace the Resource Enhancement Agreement. As an alternative to denying the proposed transaction, the Commission should affirm the October 2013 Order, including the REA-related condition precedent. This alternative approach would remove PSE (and the ratepayers) from any ongoing financial obligation under the REA once PSE and Electron LLC satisfies all REA-related obligations.

V. CONCLUSION

77 For the reasons set forth in this brief and its supporting materials, the Puyallup Tribe respectfully requests that the Commission either deny the proposed transaction between PSE and Electron LLC or affirm the Commission's October 2013 Order.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the persons and entities listed on the Service List below via electronic mail and by depositing a copy of said document in the United States mail, addressed as shown on said Service List, with first class postage prepaid in accordance with the provisions of WAC 480-07-150.

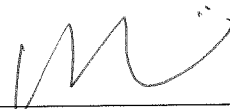
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DATED this 28th day of August, 2014 at Seattle, Washington.



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