

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of  
PUGET HOLDINGS LLC AND PUGET  
SOUND ENERGY, INC.,  
  
For an Order Authorizing Proposed  
Transaction

DOCKET U-072375

MOTION TO STRIKE PORTIONS  
OF PUBLIC COUNSEL REPLY  
BRIEF

1 Commission Staff moves to strike the material contained in Public Counsel's Reply Brief that is outside the record in this case. Commission rules at issue are WAC 480-07-495 (official notice) and WAC 480-07-375(1)(d) (motions to strike).

**Background**

2 In its Reply Brief filed on October 24, 2008, Public Counsel includes six new items as evidence in support of its arguments. Each of these items is not currently in the record. These six new items are:

1. An excerpt from Federal Reserve Chairman Bernanke's testimony before Congress on October 20, 2008 (Public Counsel Reply Brief at 11, ¶ 22, including footnote 40);
2. A stock price quote for Macquarie Group Ltd as of October 23, 2008 (Public Counsel Reply Brief at 12, ¶ 25, including footnote 46);
3. A stock price quote for Macquarie Infrastructure Corporation as of October 22, 2008 (Public Counsel Reply Brief at 12, ¶ 25, including footnote 47);
4. A reference to a Moody's rating action dated October 16, 2008 (Public Counsel Reply Brief at 13, ¶ 26, including footnote 48);

5. A PSE SEC filing dated October 2, 2008 (Public Counsel Reply Brief at 14, ¶ 29, including footnote 51); and
6. An excerpt from an editorial in the October 2008 edition of Public Utilities Fortnightly (Public Counsel Reply Brief at 15, ¶ 32, including footnote 56).

3 For Items 1 – 5 above, Public Counsel provides a quote and a corresponding web site source, and asks the Commission to take official notice of that material, under the Commission’s rule on official notice, WAC 480-07-495.<sup>1</sup> Public Counsel does not request official notice for the editorial, Item 6 above. Again, none of the material in Items 1 – 6 is in the record.

4 For the reasons stated below, the Commission should deny Public Counsel’s request for official notice and strike Paragraphs 21-23, 25, 29 and 32 of Public Counsel’s Reply Brief. We alternatively suggest the Commission could treat Public Counsel’s requests for official notice as a motion to reopen the record. In any event, should the Commission decide either to take official notice or reopen the record, the Commission needs to provide the other parties an opportunity to respond.

#### Discussion

5 **Paragraphs 21-23, 25 and 29 (Items 1 – 5 above).** The Commission should strike Paragraphs 21-23, 25 and 29 of Public Counsel’s Reply Brief because none of this new material is in the record, and none of it qualifies for official notice under WAC 480-07-495.

6 WAC 480-07-495(2) provides specific examples of the material for which the Commission will take official notice: “rules, regulations, administrative rulings and orders, exclusive of findings of fact,” “contents of certificates, permits and licenses issued by the Commission,” “tariffs, classifications and schedules regularly established by or filed with

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<sup>1</sup> Public Counsel’s official notice requests are contained in the footnotes referenced in ¶ 2 above for Items 1– 5. Public Counsel does not request official notice for Item 6 above, which is the editorial quoted in ¶ 32 of Public Counsel’s Reply Brief.

the Commission as required or authorized by law,” “technical or scientific facts within the Commission’s specialized knowledge,” and “codes or standards” established by and agency, state or national association.

7           The new material for which Public Counsel asks the Commission to take official notice is unlike any of these examples, and therefore none of it qualifies for official notice. Indeed, it is readily apparent that WAC 480-07-495 limits materials eligible for official notice to matters that have been officially recognized by the Commission or similar entity, and it does not extend to new circumstances and events in the Commission’s determination of facts.

8           By contrast, for example, Public Counsel apparently thinks Mr. Bernanke’s testimony meets WAC 480-07-495’s standard of “technical or scientific facts within the Commission’s specialized knowledge,”<sup>2</sup> but this rule language clearly refers to the sorts of facts an agency would have in its own collective expertise, *e.g.*, the rate base/rate of return formula or how electricity is transmitted. Testimony given before Congress last week by the Chairman of the Federal Reserve addressing current financial conditions is clearly outside the plain meaning of this language in the rule.

9           Public Counsel knows the appropriate procedures. Indeed, Public Counsel used those procedures earlier when it moved to reopen the record to include information similar to what it now asks the Commission to take official notice. If Public Counsel is allowed to include this sort of information in the record under the guise of official notice, the carefully circumscribed scope of WAC 480-07-495 will no longer have a limit.

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<sup>2</sup> This is the language contained in the section of the rule (WAC 480-07-495(2)(a)(ii)) that Public Counsel relies on for the Commission to take official notice of the Bernanke testimony. *Public Counsel Reply Brief at 11, footnote 40.* Notably, Public Counsel does not refer to any language in WAC 480-07-495 to justify the Commission taking official notice of the other new material Public Counsel included in its reply brief.

10 Public Counsel appears to treat the Commission's Order 05 in this docket as a license to use WAC 480-07-495 as the vehicle to include this information in the record. According to Public Counsel, Order 05 "noted that the Commission can take official notice of matters relating to the financial crisis."<sup>3</sup> In fact, in Order 05 the Commission did not refer to "official notice," or WAC 480-07-495, for that matter. Rather, the Commission made a passing reference to "administrative notice," but only in the context of the issue of the cumulative evidence already in the record, and the general issue of market volatility.<sup>4</sup>

11 In any event, Public Counsel is responsible for complying with WAC 480-07-495 in the first instance; Public Counsel has provided the Commission no argument that this new material qualifies for official notice under the language of that rule.

12 **Paragraph 32 (The editorial; Item 6 above).** The editorial Public Counsel quotes in Paragraph 32 of its Reply Brief is not in the record, and Public Counsel is not asking the Commission to take official notice of this material. It is improper to include extra-record material in a brief without Commission permission. Therefore, the Commission should strike Paragraph 32.

### Conclusion

13 The Commission should deny Public Counsel's requests for official notice and strike Paragraphs 21-23, 25, 29 and 32 of Public Counsel's Reply Brief, because this material is outside the record and it does not qualify for official notice under WAC 480-07-495. Alternatively, the Commission could give Public Counsel yet another "procedural courtesy"<sup>5</sup> and treat its requests for official notice for the material in Paragraphs 21-23, 25, 29 as a

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<sup>3</sup> Public Counsel Reply Brief at 10, ¶ 20.

<sup>4</sup> Order 05, Granting Public Counsel's Motion to Reopen the Record (September 22, 2008).

<sup>5</sup> Order 05, *supra*, at 3, ¶ 6.

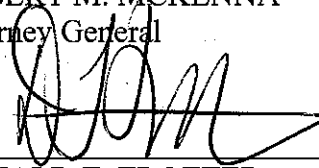
motion to reopen the record, and permit other parties to respond to this new material. Staff is prepared to respond by Friday, October 31, 2008.<sup>6</sup>

14           However, the Commission should strike Paragraph 32 of Public Counsel's Reply Brief because it contains material outside the record, and Public Counsel does not seek any method for including it in the record.

DATED this 28<sup>th</sup> day of October, 2008.

Respectfully submitted,

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<sup>6</sup> Even if the Commission decides to take official notice of the new evidence Public Counsel has included in its brief and for which it requests official notice, WAC 480-07-480(2)(c) requires the presiding office to give the parties an opportunity to "contest facts and material so noticed."