

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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
(Consolidated)

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.

Respondent.

DOCKET UE-130617
(Consolidated)

In the Matter of the Petition of
PUGET SOUND ENERGY, INC.

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.

DOCKET UE-131099
(Consolidated)

In the Matter of the Petition of
PUGET SOUND ENERGY, Inc.

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
(Consolidated)

**REPLY BRIEF OF PUGET SOUND ENERGY, INC. TO THE
PUYALLUP TRIBE OF INDIANS' BRIEF IN OPPOSITION TO THE
PROPOSED SALE OF THE ELECTRON HYDROELECTRIC PROJECT**

**REDACTED
VERSION**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	1
	A. The Electron Project, the Resource Enhancement Agreement, the Incidental Take Permit Process, and the Habitat Conservation Plan.....	1
	1. The Electron Project	1
	2. The Resource Enhancement Agreement.....	3
	B. Alternatives Considered by PSE with Respect to the Redevelopment, Retirement, or Sale of the Electron Project	4
	1. Alternative 1: Extension of the Life of the Electron Project	4
	2. Alternative 2: Retirement of the Electron Project.....	6
	3. Alternative 3: Sale of the Electron Project	8
	C. Commission’s Conditional Approval of the Asset Purchase Agreement	9
	D. The Amended Asset Purchase Agreement and Electron PPA	10
III.	ARGUMENT	14
	A. The Proposed Transaction Is Consistent With the Public Interest.....	14
	1. The Proposed Transaction Does Not Harm Customers by Causing Rates or Risks to Increase, or by Causing Service Quality and Reliability to Decline	16
	2. The Proposed Transaction Strikes a Balance Among the Interests of Customers, Shareholders, and the Broader Public	25
	B. The Puyallup Tribe Wrongly Suggests that the Proposed Transaction Must Meet Both the “No Harm” and the “Net Benefit” Standards.....	32
	C. The Commission Cannot Affirm the October 2013 Order Because the Amended Asset Purchase Agreement (and Not the Asset Purchase Agreement Reviewed in Order 06) is Now Before the Commission for Approval	35
IV.	CONCLUSION.....	36

TABLE OF AUTHORITIES

Statutes

RCW 80.12.020	passim
---------------------	--------

Regulations

WAC 480-07-395.....	1
WAC 480-143-120.....	1
WAC 480-143-170.....	passim

Cases

<i>Jenkins v. Bellingham Mun. Court</i> , 95 Wn.2d 574 (1981).....	35
<i>Kucana v. Holder</i> , 558 U.S. 233, 130 S.Ct. 827, 175 L.Ed.2d 694 (2010).....	35
<i>State v. Beaver</i> , 148 Wn.2d 338 (2002).....	35
<i>State v. Moses</i> , 145 Wn.2d 370 (2002).....	35
<i>State v. Roggenkamp</i> , 153 Wn.2d 614 (2005).....	35

Commission Orders

<i>In re Application of Avista Corp.</i> , Docket UE-991255, 4th Supp. Order (Mar. 6, 2000).....	16
<i>In re Application of Basin Water Sources, Inc.</i> , Docket No. UW-121842, Order 01 (Dec. 27, 2012).....	15, 33
<i>In re Application of Dungeness Heights Water Sys. Inc.</i> , Docket UW-120132, Order 01 (Feb. 10, 2012).....	15, 33
<i>In re Application of Evergreen Exch. Inc. d/b/a Lochaven Water Co.</i> , Docket UW-120855, Order 01 (Sept. 27, 2012).....	15, 33
<i>In re Application of PacifiCorp</i> , Docket UE-991262, 4th Supp. Order (Mar. 6, 2000).....	16

TABLE OF AUTHORITIES (contd.)

In re Application of Puget Sound Energy, Inc.,
Docket UE-990267, 3rd Supp. Order (Sept. 30, 1999).....17

In re Application of Puget Sound Energy, Inc.,
Docket UE-991409, 4th Supp. Order (Mar. 6, 2000)16

In re Application of Rosario Utils., LLC,
Docket UW-071357, Order 01 (Sept. 28, 2007).....15, 33

In re Application of Solmar Water Sys., Inc.,
Docket UW-111573, Order 01 (Sept. 28, 2011).....15, 33

In re Application of Soren Pedersen Water Co.,
Docket UW-131046, Order 01 (Sept. 12, 2013).....15, 33

In re Application of Sylvia Lake Water Supply, Inc.,
Docket UW-071855, Order 01 (Oct. 24, 2007)15, 33

In re Application of Wash. Water Supply, Inc.,
Docket UW-141307, Order 01 (July 24, 2014)15, 33

In re Avista Corp.,
Dockets UE-991255 & UE-991262, 2nd & 3rd Suppl. Order (Mar. 6, 2000).....15, 17

In re Joint Application of Embarq Corp. & CenturyTel, Inc.,
Docket UT-082119, Order 05 (May 28, 2009).....15

In re Joint Application of MDU Res. Group, Inc. & Cascade Natural Gas Corp.,
Docket UG-061721, Order 06 (June 27, 2007).....15, 33, 35

In re Joint Application of MidAmerican Energy Holdings Co. & PacifiCorp, d/b/a Pacific Power & Light Co.,
Docket UE-051090, Order 07 (Feb. 21, 2006)15, 35

In re Joint Application of PacifiCorp & PacifiCorp Washington, Inc.,
Docket UE-001878, 4th Suppl. Order (Jan. 2002).....16

In re Joint Application of PacifiCorp & Scottish Power, LLC,
Docket UE-981627, 3rd Supp. Order (Apr. 2, 1999)14, 33, 35, 36

In re Joint Application of Puget Holdings LLC & Puget Sound Energy, Inc.,
Docket U-072375, Order 08 (Dec. 30, 2008)15, 16, 35

In re Joint Application of Qwest Commc’ns Int’l Inc. & CenturyTel, Inc.,
Docket UT-100820, Order 14 (Mar. 14, 2011).....15

In re Joint Application of Verizon Commc’ns, Inc., & Frontier Commc’ns Corp.,
Docket UT-090842, Order 06 (Apr. 16, 2010).....15

TABLE OF AUTHORITIES (contd.)

In re PacifiCorp,
Docket UE-981627, 5th Suppl. Order (Oct. 14, 1999)15

In re Puget Sound Energy, Inc.,
Docket UE-990267, 3rd Suppl. Order (Sept. 30, 1999)15

Wash. Utils. & Transportation Commn. v. Puget Sound Energy, Inc.,
Dockets UE-131099, *et al.*, Notice of Consolidation (Aug. 9, 2013).....10

Wash. Utils. & Transportation Commn. v. Puget Sound Energy, Inc.,
Dockets UE-131099, *et al.*, Order 05 (Aug. 8, 2013).....10

Wash. Utils. & Transportation Commn. v. Puget Sound Energy, Inc.,
Dockets UE-131099, *et al.*, Order 06 (Oct. 23, 2013).....9, 10, 36

I. INTRODUCTION

1. Puget Sound Energy, Inc. (“PSE”) respectfully requests that the Commission approve the Amended Asset Purchase Agreement with Electron Hydro, LLC (“Electron Hydro”) for sale of the Electron Hydroelectric Project (the “Electron Project”) without condition, all pursuant to RCW 80.12.020 and WAC 480-143-170. Intervener’s Brief in Opposition to Puget Sound Energy’s Proposed Sale of the Electron Hydroelectric Project filed by the Puyallup Tribe of Indians (the “Puyallup Tribe”) raises issues that are beyond the jurisdiction of this Commission. Additionally, the Puyallup Tribe applies a “net benefit” standard to the proposed transaction, which is inconsistent with Washington law. As demonstrated below, the proposed transaction is in the public interest; reduces risks to PSE and its customers; and strikes an appropriate balance among the interests of customers, shareholders, and the broader public. Therefore, the Commission should approve the Amended Asset Purchase Agreement without condition.

2. Pursuant to WAC 480-07-395(1)(c)(ii), the following statutes and rules are at issue: RCW 80.01.040; RCW 80.12.020; WAC 480-143-120; and WAC 480-143-170.

II. BACKGROUND

A. **The Electron Project, the Resource Enhancement Agreement, the Incidental Take Permit Process, and the Habitat Conservation Plan**

1. **The Electron Project**

3. The Electron Project was built by a predecessor of PSE and began generating electricity on April 12, 1904. The Electron Project is located on the Puyallup River in Pierce County, Washington, approximately 23 miles southeast of Tacoma.¹

¹ Wetherbee, Exh. No. ___(PKW-1CT) at 22:4-6.

4. Drainage from 91 square miles of the Puyallup and Mowich glaciers on the western slopes of Mount Rainier provide water to a diversion dam near Orting. Water is there diverted into a ten-mile long wooden flume that feeds a man-made reservoir. Four steel penstocks supply water from the reservoir down to the powerhouse. Inside the powerhouse, eight Pelton impulse-type horizontal turbines are connected in pairs to four generators—three rated at 6 megawatts (“MW”) and one at 7.5 MW, for a total plant nameplate rating of 25.5 MW. PSE added downstream fish passage in 1998 in the form of a trap-and-haul facility and barrier net. PSE and the Puyallup Tribe added upstream fish passage in 2000 in the form of a fish ladder.²

5. The ten-mile wooden flume is a unique feature of the Electron Project. It includes 281 curves and a topside railroad for crew access due to limited roads along the steep river valleys of the area. Because the flume is made of wood, it has required periodic replacement. The flume was first replaced in 1938 and then replaced again in 1984-1985. In 1998, PSE installed a new plywood liner on the entire flume.³

6. The wood flume of the Electron Project needs to be replaced. Energy production at the Electron Project is restricted by the amount of water that can be channeled through the flume to the powerhouse. PSE has limited the amount of water allowed to enter the flume to prevent more frequent failures, but this, in turn, has limited plant output to less than 8 MW, or one-third of full operating capacity. In addition to the flume, the original 1904 penstocks are

² *Id.* at 22:7-16.

³ *Id.* at 22:17-22.

also in need of repair or replacement. Due to the condition of the flume and penstocks, the Electron Project will not be able to continue to operate without significant capital investment.⁴

2. The Resource Enhancement Agreement

7. The Electron Project is not a hydroelectric project licensed by the Federal Energy Regulatory Commission under Part 1 of the Federal Power Act. Fish passage at the plant is subject to an agreement with the Puyallup Tribe.⁵ In 1997, PSE and the Puyallup Tribe agreed to settle a long-standing dispute over the Electron Project and formalized the terms of this settlement in the Resource Enhancement Agreement between PSE and the Puyallup Tribe.⁶

8. The Resource Enhancement Agreement provides for a series of resource enhancement measures to benefit fisheries resources. Specifically, the Resource Enhancement Agreement includes provisions for:

- Minimum in-stream flows below the Electron Project dam;
- Ramping rate targets below the Electron Project powerhouse and sediment management measures;
- Construction and operation of a downstream trap and haul fish passage facility
- Construction and operation of a fish ladder as an upstream fish passage facility
- Capital contributions toward the Puyallup Tribe's construction of rearing ponds and a fish ladder;
- Annual O&M contributions related to the rearing ponds, the fish ladder, the downstream trap and haul facilities, and activities performed by the Puyallup Tribe related to fish passage; and

⁴ *Id.* at 23:2-15. Please see Wetherbee, Exh. No. ___(PKW-8C), for a copy of the 2009 condition assessment indicating that the penstocks should be repaired or replaced as soon as feasible to reduce the risk of failure.

⁵ Wetherbee, Exh. No. ___(PKW-1CT) at 23:18-21.

⁶ *Id.* at 24:9-13. Please see Wetherbee, Exh. No. ___(PKW-9C), for a copy of the Resource Enhancement Agreement between PSE and the Puyallup Tribe.

- A release of claims attributable to PSE’s ownership, use, operation and maintenance of the Electron Project.

The Resource Enhancement Agreement expires on December 31, 2026.⁷

B. Alternatives Considered by PSE with Respect to the Redevelopment, Retirement, or Sale of the Electron Project

9. At an Energy Management Committee (“EMC”) meeting, dated April 20, 2012,

PSE presented an evaluation of three alternatives for the future of the Electron Project:

- (i) PSE could make capital expenditures necessary to extend the life of the Electron Project;
- (ii) PSE could retire the Electron Project including demolition and removal of the flume and other project infrastructure; or
- (iii) PSE could sell the Electron Project.⁸

1. Alternative 1: Extension of the Life of the Electron Project

10. An evaluation team representing various PSE departments developed alternatives for redeveloping and extending the life of the Electron Project. The team analyzed variations of redevelopment options for both a short-term life extension (retirement in 2026) and a long-term life extension (retirement in 2062). All of the alternatives considered included investments to repair, replace, or upgrade each of four key project features:

- (i) the flume;
- (ii) the penstocks;
- (iii) downstream fish passage at the diversion dam; and
- (iv) the Pelton turbines.⁹

⁷ Wetherbee, Exh. No. ___(PKW-1CT) at 24:14 – 25:5; *see also* Wetherbee, Exh. No. ___(PKW-9C).

⁸ Wetherbee, Exh. No. ___(PKW-1CT) at 27:4-10. Please see Exhibit No. ___(PKW-10C) for a copy of the presentation made to the EMC on April 20, 2012, and Exhibit No. ___(PKW-11C) for a copy of the memorandum presented to the EMC on April 20, 2012.

⁹ Wetherbee, Exh. No. ___(PKW-1CT) at 27:20 – 28:6.

a. Short-Term Life Extension Alternative

11. PSE defined short-term life extension as extending the life of the Electron Project through 2026 (the end of the term of the current Resource Enhancement Agreement). Based on the costs and risks associated with each of the four key features described above, PSE determined that the most likely option for short-term life extension would include

- (i) replacing the wood flume liner with Alaska yellow cedar,
- (ii) replacing the penstocks,
- (iii) installing an engineered, in-river screen (Coanda screen) at the diversion dam, and
- (iv) upgrading the wheels and nozzles of the Pelton turbines.

PSE estimated the cost of this short-term redevelopment option to be approximately \$69 million.

PSE modeled the costs and benefits of the short-term life extension with varying minimum in-stream flow requirements of 100 CFS, 130 CFS, and 160 CFS.¹⁰

b. Long-Term Life Extension Alternative

12. PSE defined long-term life extension as extending the life of the Electron Project through 2062. An approximately 50 year life extension was assumed for long-term redevelopment because this period corresponds with the anticipated life of a flume liner rebuilt with Alaska yellow cedar. The primary scope of work associated with the most likely long-term redevelopment option is the same as short-term redevelopment with the addition of improvements to the flume's support structure. It includes

- (i) replacing the wood flume liner with Alaska yellow cedar and replacing components of the support structure to improve stability,
- (ii) replacing the penstocks,

¹⁰ *Id.* at 30:7-21.

- (iii) installing an engineered, in-river screen (Coanda screen) at the diversion dam, and
- (iv) upgrading the wheels and nozzles of the Pelton turbines.

PSE estimated the cost of this long-term redevelopment option to be approximately \$75 million. PSE modeled the costs and benefits of the long-term life extension with varying minimum in-stream flow requirements of 100 CFS, 130 CFS, and 160 CFS. Under the Resource Enhancement Agreement, extension of the life of the Electron Project beyond 2026 may be pursued as a matter of right if the improvements are made as part of an upgrade that “increases the [Electron] Project’s head, generating capacity, or otherwise significantly modifies the [Electron] Project’s pre-1935 design and operation.” Extension of the life of the Electron Project beyond 2026 under any other circumstances would require an agreement with the Puyallup Tribe that extends beyond the term of the existing Resource Enhancement Agreement. It is uncertain whether such an agreement is feasible.¹¹

2. **Alternative 2: Retirement of the Electron Project**

13. The Resource Enhancement Agreement requires PSE to notify the Puyallup Tribe by 2018 of PSE’s intent to either upgrade or retire the Electron Project at the end of the agreement term in 2026. The Resource Enhancement Agreement defines “Retire the Project” as “such actions as Puget shall deem necessary for purposes of permanently discontinuing the generation of electricity at the project and, for such purposes, the removal of the Electron dam from the channel of the Puyallup River.”¹² Upon completion of dam removal and subsequent

¹¹ *Id.* at 31:3-24.

¹² Wetherbee, Exh. No. ___(PKW-9) at 24.

notice to the Puyallup Tribe, the Resource Enhancement Agreement and PSE's associated obligations terminate.¹³

14. Apart from the requirements of the Resource Enhancement Agreement, PSE identified four areas for retirement and decommissioning activities:

- demolition and removal of the flume and settling basin;¹⁴
- removal of the forebay dike and gate structures;¹⁵
- isolation and securing of the penstocks;¹⁶ and
- securing and mothballing the powerhouse.¹⁷

15. PSE projected total costs associated with retirement of the Electron Project of approximately \$28.9 million, as shown in the following Table 1:¹⁸

¹³ Wetherbee, Exh. No. ___ (PKW-1CT) at 32:5-16.

¹⁴ *Id.* at 34:14-22.

¹⁵ *Id.* at 35:12 – 36:4.

¹⁶ *Id.* at 36:6-12.

¹⁷ *Id.* at 36:21 – 37:12.

¹⁸ *Id.* at 38:16-17.

Table 1. Electron Project Retirement Cost Estimate*¹⁹

Remove diversion dam and headworks	\$845,000
Remove flume and settling basin	\$19,195,000
Remove forebay dike and gate structures	\$1,536,000
Isolate and secure penstocks	\$307,000
Secure and mothball powerhouse	\$384,000
Direct demolition/removal cost	\$22,226,000
Project management/engineering	\$2,227,000
Permitting and related studies/mitigation	\$490,000
Legal, real estate, and environmental	\$557,000
PSE overheads	\$223,000
AFUDC	\$3,160,000
Total cost of plant shut-down	\$28,922,000

* Cost estimates shown above include Washington state sales tax

3. Alternative 3: Sale of the Electron Project

16. Under the sale alternative, PSE would sell the Electron Project on an “as-is, where is” basis and purchase the power through a power purchase agreement (“PPA”) at competitive market prices. Additionally, PSE evaluated retaining title and/or rights to certain parcels of the Electron Project. PSE assumed that the existing obligations arising under the Resource Enhancement Agreement would transfer to the buyer.²⁰ PSE identified several benefits of a sale of the Electron Project, including the following:

- sale avoids operational risks and retirement costs;
- sale mitigates potential economic loss of retirement;
- sale transfers Resource Enhancement Agreement obligations to buyer;

¹⁹ *Id.* at 39:Table 1.

²⁰ *Id.* at 39:5-10.

- sale transfers debris removal obligations to buyer; and
- if a sale is unsuccessful, other options remain available.²¹

C. Commission’s Conditional Approval of the Asset Purchase Agreement

17. In the spring of 2012, PSE decided to pursue a sale of the Electron Project and instituted as Request for Proposal (“RFP”) process. PSE received bids from four bidders in response to the RFP process and selected the bid submitted by Valtec Power, LLC (an entity with an interest in Electron Hydro).²² PSE and Electron Hydro began negotiations in November 2012 for the potential sale and purchase of the Electron Project.²³ On May 30, 2013, PSE and Electron Hydro reached agreement on the main commercial terms for PSE’s sale of the Electron Project for \$13.7 million.²⁴ Each party expected that the Asset Purchase Agreement would close in the second quarter of 2013.²⁵

18. In addition to the Asset Purchase Agreement, PSE and Electron Hydro entered into a purchase power agreement (the “Electron PPA”), pursuant to which PSE would purchase the entire net electrical output of the Electron Project during the operating period.²⁶

19. On June 6, 2013, PSE filed an application with the Commission in Docket UE-131099 for approval of the sale of the Electron Project to Electron Hydro, or in the alternative, a finding that the Electron Project is not necessary or useful.²⁷ On August 8, 2013, the Commission consolidated Docket UE-131099 with Dockets UE-130583 and UE-130617.²⁸ By

²¹ *Id.* at 39:12 – 40:7.

²² *Id.* at 41:2 – 44:6.

²³ *Id.* at 44:11-12.

²⁴ *Id.* at 44:20-21.

²⁵ *Id.* at 44:12-15.

²⁶ *Id.* at 45:4-8.

²⁷ *Wash. Utils. & Transportation Commn. v. Puget Sound Energy, Inc.*, Dockets UE-131099, *et al.*, Order 06 at ¶ 7 (Oct. 23, 2013) (“Order 06”).

²⁸ *Wash. Utils. & Transportation Commn. v. Puget Sound Energy, Inc.*, Dockets UE-131099, *et al.*, Order 05 (Aug. 8, 2013).

notice on August 9, 2013, the Commission consolidated Docket UE-131230 with Dockets UE-130583, UE-130617, and UE-131099.²⁹

20. On September 16, 2013, PSE, along with Commission Staff, the Office of Public Counsel (“Public Counsel”), and the Industrial Customers of Northwest Utilities (“ICNU”), filed a Settlement Stipulation for Commission approval that, in part, recommended that the Commission conditionally grant PSE’s application for approval of the sale of the Electron Project to Electron Hydro by finding that the sale is in the public interest, so long as there are no material changes to the Asset Purchase Agreement from the original filing made on June 6, 2013.³⁰ On October 23, 2013, the Commission issued a final order in Dockets UE-131099, *et al.*, conditionally approving the sale of the Electron Project to Electron Hydro, consistent with the recommendation in the Settlement Stipulation:

The Commission finds the sale of the Electron Project to Electron Hydro LLC is in the public interest provided there are no material changes to the Asset Purchase Agreement as filed. If material changes occur, the Company must re-file its application for approval of the sale.³¹

D. The Amended Asset Purchase Agreement and Electron PPA

21. Concurrent with and subsequent to the Commission process that resulted in conditional approval of the sale of the Electron Project to Electron Hydro in Docket UE-131099, Electron Hydro continued to negotiate with the Puyallup Tribe for an agreement to replace the Resource Enhancement Agreement (a condition precedent to the Asset Purchase Agreement), and PSE and Electron Hydro anticipated that such a replacement agreement could be

²⁹ *Wash. Utils. & Transportation Commn. v. Puget Sound Energy, Inc.*, Dockets UE-131099, *et al.*, Notice of Consolidation (Aug. 9, 2013).

³⁰ Order 06 at ¶ 19.

³¹ *Id.* at ¶ 25; *see also id.* at ¶¶ 63, 77.

consummated before the end of calendar year 2013.³² In that regard, PSE and Electron entered into Amendment No. 1 to the Asset Purchase Agreement, dated August 5, 2013, which extended the date by which parties must satisfy the conditions precedent in the Asset Purchase Agreement from October 31, 2013, to December 31, 2013.³³

22. By the end of December in 2013, it became apparent to Electron Hydro that the Puyallup Tribe was not interested in negotiating an agreement to replace the Resource Enhancement Agreement. PSE and Electron entered into Amendment No. 2 to the Asset Purchase Agreement, dated December 31, 2013, which extended the date by which parties must satisfy the conditions precedent in the Asset Purchase Agreement from December 31, 2013, to March 31, 2014.³⁴ Subsequently, PSE and Electron entered into Amendment No. 3 to the Asset Purchase Agreement, dated March 31, 2014, which extended the date by which parties must satisfy the conditions precedent in the Asset Purchase Agreement from March 31, 2014, to May 31, 2014.³⁵

23. In early spring of 2014, PSE and Electron Hydro began considering alternative arrangements that would not require Electron Hydro and the Puyallup Tribe to enter into an agreement to replace the Resource Enhancement Agreement.³⁶ Electron Hydro proposed that the parties agree to waive the condition precedent in the Asset Purchase Agreement that would

³² Amended Appl. at ¶ 8.

³³ *Id.* at ¶ 8; *see also* Amended Appl., Exh. F-2, for a copy of Amendment No. 1 to the Asset Purchase Agreement, dated August 5, 2013.

³⁴ *Id.* at ¶ 9; *see also* Amended Appl., Exh. F-3, for a copy of Amendment No. 2 to the Asset Purchase Agreement, dated December 31, 2013.

³⁵ Amended Appl. at ¶ 9; *see also* Amended Appl., Exh. F-4, for a copy of Amendment No. 3 to the Asset Purchase Agreement, dated March 31, 2014.

³⁶ Amended Appl. at ¶ 10.

require Electron Hydro and the Puyallup Tribe to enter into an agreement to replace the Resource Enhancement Agreement.³⁷

24. Under the alternative proposed by Electron Hydro, PSE would not assign its interest under the Resource Enhancement Agreement and remain primarily obligated and responsible to the Puyallup Tribe under that agreement.³⁸ In turn, PSE and Electron Hydro would enter into a Facility Operation Agreement that would require Electron Hydro to operate the Electron Project in compliance with Resource Enhancement Agreement requirements and to make required payments to the Puyallup Tribe (through PSE).³⁹ Late payments may be offset against amounts owed by PSE under the Electron PPA.⁴⁰

25. The proposed alternative introduces risks that the Electron Project may be unable to continue operations after expiration of the Resource Enhancement Agreement on December 31, 2026.⁴¹ To reflect the increased risk to Electron Hydro that the Electron Project cannot continue operations after December 31, 2026, PSE and Electron Hydro agreed to reduce the sales price for the sale of the Electron Project from \$13.7 million to \$8.4 million.⁴² To reflect the increased risk to PSE that the Electron Project cannot continue operations after December 31, 2026, PSE and Electron Hydro agreed to shorten the term of the Electron PPA (originally, a twenty-year term) so that it expires on December 31, 2026, concurrent with the expiration of the Resource Enhancement Agreement.⁴³

³⁷ *Id.* at ¶ 10.

³⁸ *Id.* at ¶ 11.

³⁹ *Id.* at ¶ 11.

⁴⁰ *Id.* at ¶ 11.

⁴¹ *Id.* at ¶ 12.

⁴² *Id.* at ¶ 12.

⁴³ *Id.* at ¶ 12.

26. PSE analyzed the Electron Hydro proposal for a reduced purchase price and Electron PPA term with the Portfolio Screening Model.⁴⁴ Although the purchase price decreased by \$5.3 million, the Portfolio Screening Model projected net portfolio cost savings under the proposed alternative as compared to the original terms of the Asset Purchase Agreement and Electron PPA.⁴⁵

27. On May 15, 2014, the EMC authorized PSE staff to enter into a fourth amendment to the Asset Purchase Agreement that

- reduces the purchase price in the Asset Purchase Agreement from \$13.7 million to \$8.4 million;
- extends the date by which the parties must satisfy conditions precedent in the Asset Purchase Agreement from May 31, 2014 to July 31, 2014;
- shortens the term of the Electron PPA from a 20-year term to a term expiring on December 31, 2026; and
- establishes a Facility Operation Agreement that requires Electron Hydro to operate the Electron Project in compliance with the Resource Enhancement Agreement through December 31, 2026.⁴⁶

28. PSE and Electron Hydro entered into Amendment No. 4 to the Asset Purchase Agreement, dated June 4, 2014, that reflects the changes authorized by the EMC on May 15, 2014.⁴⁷

⁴⁴ *Id.* at ¶ 13.

⁴⁵ *Id.* at ¶ 13; *see also* Amended Appl., Exhibit C, for a summary of PSE's quantitative analysis of the Electron Hydro proposal for a reduced purchase price and Electron PPA term with the Portfolio Screening Model.

⁴⁶ Amended Appl. at ¶ 14; *see also* Amended Appl., Exhibit D, for a copy of the presentation made to the EMC on May 15, 2014.

⁴⁷ Amended Appl. at ¶ 15; *see also* Amended Appl., Exhibit F-4, for a copy of Amendment No. 4 to the Asset Purchase Agreement, dated June 4, 2014, and Exhibit 2 thereto.

III. ARGUMENT

A. The Proposed Transaction Is Consistent With the Public Interest

29. RCW 80.12.020 requires approval by the Commission for any sale, lease, assignment, or other disposal by a public service company of any of its franchises, properties, or facilities that are necessary or useful in the performance of its duties to the public:

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 . . . without having secured from the commission an order authorizing it so to do⁴⁸

The Commission may deny an application for a proposed transaction that is not consistent with the public interest:

If, upon the examination of any application and accompanying exhibits, or upon a hearing concerning the same, the commission finds the proposed transaction is not consistent with the public interest, it shall deny the application.⁴⁹

Under RCW 80.12.020 and WAC 480-143-170, this Commission has repeatedly determined that applicants in a transaction of this sort must “at least demonstrate no harm to the public interest.”⁵⁰ This standard is sometimes referred to as the “no harm” standard because the transaction must not harm the public interest in order to be approved.⁵¹

⁴⁸ RCW 80.12.020.

⁴⁹ WAC 480-143-170.

⁵⁰ *In re Joint Application of PacifiCorp & Scottish Power, LLC*, Docket UE-981627, 3rd Supp. Order at 2-3 (Apr. 2, 1999); *see also In re Application of Wash. Water Supply, Inc.*, Docket UW-141307, Order 01 (July 24, 2014); *In re Application of Soren Pedersen Water Co.*, Docket UW-131046, Order 01 (Sept. 12, 2013); *In re Application of Basin Water Sources, Inc.*, Docket No. UW-121842, Order 01 (Dec. 27, 2012); *In re Application of Evergreen Exch. Inc. d/b/a Lochaven Water Co.*, Docket UW-120855, Order 01 (Sept. 27, 2012); *In re Application of Dungeness Heights Water Sys. Inc.*, Docket UW-120132, Order 01 (Feb. 10, 2012); *In re Application of Solmar Water Sys., Inc.*, Docket UW-111573, Order 01 (Sept. 28, 2011); *In re Joint Application of Qwest Commc’ns Int’l Inc. & CenturyTel, Inc.*, Docket UT-100820, Order 14 (Mar. 14, 2011); *In re Joint Application of Verizon Commc’ns, Inc., & Frontier Commc’ns Corp.*, Docket UT-090842, Order 06 (Apr. 16, 2010); *In re Joint Application of Embarq Corp. & CenturyTel, Inc.*, Docket UT-082119, Order 05 (May 28, 2009); *In re Joint Application of Puget Holdings LLC & Puget Sound Energy, Inc.*, Docket U-072375, Order 08 (Dec. 30, 2008); *In re Application of Sylvia*

30. The Puyallup Tribe asserts that the Commission considers the following four factors to determine whether a proposed transaction satisfies the “no harm” standard for approval:

1. The transaction should not harm customers by causing rates or risks to increase, or by causing service quality and reliability to decline, compared with what could reasonably be expected to have occurred in the absence of the transaction.
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.
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.
4. The jurisdictional effect of the transaction should be consistent with the Commission’s role and responsibility to protect the interests of Washington . . . customers.⁵²

The Puyallup Tribe, however, overstates the import of these factors to the “no harm” standard for approval. Indeed, the Commission has previously recognized that “[t]hese four principles do not constitute a checklist or a definitive set of minimum requirements.”⁵³ The Commission has

Lake Water Supply, Inc., Docket UW-071855, Order 01 (Oct. 24, 2007); *In re Application of Rosario Utils., LLC*, Docket UW-071357, Order 01 (Sept. 28, 2007); *In re Joint Application of MDU Res. Group, Inc. & Cascade Natural Gas Corp.*, Docket UG-061721, Order 06 (June 27, 2007); *In re Joint Application of MidAmerican Energy Holdings Co. & PacifiCorp, d/b/a Pacific Power & Light Co.*, Docket UE-051090, Order 07 (Feb. 21, 2006); *In re Avista Corp.*, Dockets UE-991255 & UE-991262, 2nd & 3rd Suppl. Order (Mar. 6, 2000); *In re PacifiCorp*, Docket UE-981627, 5th Suppl. Order (Oct. 14, 1999); *In re Puget Sound Energy, Inc.*, Docket UE-990267, 3rd Suppl. Order (Sept. 30, 1999).

⁵¹ *In re Joint Application of Puget Holdings LLC & Puget Sound Energy, Inc.*, Docket U-072375, Order 08 (Dec. 30, 2008).

⁵² Puyallup Tribe Br. at ¶¶ 47-51 (citing *In re Joint Application of PacifiCorp & PacifiCorp Washington, Inc.*, Docket UE-001878, 4th Suppl. Order at ¶ 15 (Jan. 2002); *In re Application of Avista Corp.*, Docket UE-991255, 4th Suppl. Order at p. 11, fn.6 (Mar. 6, 2000); *In re Application of PacifiCorp*, Docket UE-991262, 4th Suppl. Order at p. 11, fn.6 (Mar. 6, 2000); and *In re Application of Puget Sound Energy, Inc.*, Docket UE-991409, 4th Suppl. Order at p. 11, fn.6 (Mar. 6, 2000)).

⁵³ *In re Avista Corp.*, Dockets UE-991255 & UE-991262, 2nd & 3rd Suppl. Order at ¶ 29 (Mar. 6, 2000).

further recognized that these four principles serve as guidelines and that differing considerations may prove relevant to determining the public interest:

Over time, and across different industries and transactions, different considerations may prove relevant to determining the public interest. . . . These principles are not minimum standards; rather they are guidelines that, when taken together, can be used to determine whether there is, at least, no harm to the public interest.⁵⁴

Nonetheless, PSE, following the lead of the Puyallup Tribe, uses the first and second of the four factors (i.e., potential harm to customers and striking a balance among the interests of customers, shareholders, and the broader public, respectively) for purposes of this brief, and demonstrates that the proposed transaction is in the public interest.

1. The Proposed Transaction Does Not Harm Customers by Causing Rates or Risks to Increase, or by Causing Service Quality and Reliability to Decline

a. The Proposed Transaction Will Reduce Rates for PSE Customers by Over \$2 Million Almost Immediately

31. On May 23, 2014, PSE filed a power cost only rate case in Docket UE-141141 (the “2014 PCORC”).⁵⁵ On September 5, 2014, PSE, along with Commission Staff, Public Counsel, and ICNU, filed a proposed Settlement Stipulation for Commission approval that includes a proposed revenue reduction of \$14,893,316 (an average decrease of approximately 0.711 percent over the rates set in the 2013 PCORC).⁵⁶

32. Included within the revenue decrease of \$14,893,316 proposed in the Settlement Stipulation is a net reduction of \$2,271,793 expressly identified as the impact of the sale of the Electron Project and power purchases under the Electron PPA.⁵⁷ The proposed Settlement

⁵⁴ *In re Application of Puget Sound Energy, Inc.*, Docket UE-990267, 3rd Supp. Order at 5 (Sept. 30, 1999).

⁵⁵ Declaration of Katherine J. Barnard at ¶ 4.

⁵⁶ *Id.* at ¶ 6.

⁵⁷ *Id.* at ¶ 7.

Stipulation attributes to the sale of the Electron Project a decrease in revenue requirement of \$5,086,563 for the December 1, 2014, through November 30, 2015 period (the “2014 PCORC Rate Period”).⁵⁸ This decrease in revenue requirement is somewhat offset by \$2,814,770 in projected power purchases from Electron Hydro pursuant to the Electron PPA during the 2014 PCORC Rate Period.⁵⁹ These adjustments in revenue requirement in the proposed Settlement Stipulation provide a net reduction in revenue requirement of \$2,271,793 over the 2014 PCORC Rate Period attributable to the sale of the Electron Project and power purchases under the Electron PPA.⁶⁰

33. This rate reduction of \$2,271,793 would be almost immediate (beginning December 1, 2014) if the Commission were to approve the sale of the Electron Project.⁶¹ Indeed, the proposed Settlement Stipulation proposes an increase of \$2,271,793 in the proposed net reduction in revenue requirement if the Commission were not to approve the sale of the Electron Project or the proposed transaction were not to close for any reason.⁶² This adjustment, if implemented, would result in a net revenue reduction of \$12,621,523 for the 2014 PCORC rate period. Thus, the sale of the Electron Project will provide substantial and almost immediate financial benefits to PSE’s customers.⁶³

b. The Proposed Transaction Provided the Most Long-Term Customer Benefits of Any of the Electron Project Alternatives Considered by PSE

34. The proposed sale of the Electron Project benefits customers more than any of the other redevelopment alternatives PSE evaluated for the project. PSE evaluated the transaction

⁵⁸ *Id.* at ¶ 8.

⁵⁹ *Id.* at ¶ 8.

⁶⁰ *Id.* at ¶ 8.

⁶¹ *Id.* at ¶ 9.

⁶² *Id.* at ¶ 10.

⁶³ *Id.* at ¶ 10.

contemplated by the Asset Purchase Agreement and the Electron PPA as part of the 2011 Request for Proposals (the “2011 RFP”) process, along with three short-term redevelopment alternatives at various flows, and three long-term redevelopment alternatives at various flows:

- (i) Electron Sale and PPA;
- (ii) Long-Term Redevelopment (100 CFS);
- (iii) Long-Term Redevelopment (130 CFS);
- (iv) Long-Term Redevelopment (160 CFS);
- (v) Short-Term Redevelopment (100 CFS);
- (vi) Short-Term Redevelopment (130 CFS); and
- (vii) Short-Term Redevelopment (160 CFS).⁶⁴

35. Among these seven alternatives, the sale of the Electron Project and associated Electron PPA provided the best long-term benefits to PSE’s customers. Specifically, the sale of the Electron Project and associated Electron PPA had the best quantitative results of all of the alternatives in each of the categories considered. The sale of the Electron Project and associated Electron PPA produced the lowest 20-year levelized cost, the lowest net cost per kilowatt-year, the smallest portfolio benefit, the highest benefit ratio, and the highest portfolio benefit per kilowatt-year.⁶⁵

⁶⁴ Mullally, Exh. No. ____ (MM-1HCT) at 65:3 – 67:4.

⁶⁵ *Id.* at 66:Table 5.

Table 2. Screening Model Results with Electron Project Alternatives

Alternative	20-Year Levelized Cost	Net Cost/ kW-yr	Portfolio Benefit	Benefit Ratio	Portfolio Benefit/ kW-year
Electron Sale and PPA	██████	\$(16)	\$24,999	0.49	██████
Long-Term Redevelopment (100 CFS MIF)	██████	\$11	\$42,617	0.32	██████
Long-Term Redevelopment (130 CFS MIF)	██████	\$32	\$36,707	0.27	██████
Long-Term Redevelopment (160 CFS MIF)	██████	\$59	\$29,583	0.22	██████
Short-Term Redevelopment (100 CFS MIF)	██████	\$261	\$(8,707)	(0.09)	██████
Short-Term Redevelopment (130 CFS MIF)	██████	\$286	\$(11,814)	(0.12)	██████
Short-Term Redevelopment (160 CFS MIF)	██████	\$319	\$(15,552)	(0.15)	██████

These quantitative results unequivocally demonstrate that the Electron Project sale and the Electron PPA was the best alternative that PSE considered for the Electron Project.

36. PSE conducted the quantitative evaluation summarized above prior to the amendments entered between PSE and Electron Hydro in 2014. Therefore, the quantitative analysis in the table above evaluated an Asset Purchase Agreement with a sales price of \$13.7 million and an Electron PPA with a term through 2033. Prior to entering into the Amended Asset Purchase Agreement and shortening the term of the Electron PPA, PSE conducted further quantitative analyses to evaluate whether such revisions materially altered the financial benefits provided by the proposed transaction. Although the purchase price decreased

by \$5.3 million, the Portfolio Screening Model projected net portfolio cost savings under the proposed alternative as compared to the original terms of the Asset Purchase Agreement and Electron PPA:⁶⁶

Table 3. Reevaluation of Screening Model Results of Electron Project Alternatives

Options	Purchase Price/ (Retirement Cost)	PPA Price \$/MWh	Portfolio Screening Model Portfolio Costs (Capacity)	Net Costs w/ Stranded Costs (Energy)
Retirement	\$(28.6M)	Market	\$11,934	\$111
Asset Purchase Agreement and Electron PPA through 2033	\$13.7M	■	\$11,877	■
Amended Asset Purchase Agreement and Electron PPA through 2026	\$8.4M	■	\$11,872	■

Thus, the proposed transaction presented in the Amended Asset Purchase Agreement and Electron PPA produce additional long-term financial benefits to PSE customers when compared to the original arrangement.



c. The Puyallup Tribe Wrongly Concludes that the Proposed Transaction Harms PSE’s Customers and Ignores the Substantial Customer Benefits Provided

z37. The Puyallup Tribe wrongly concludes that the proposed transaction harms PSE’s customers and ignores the substantial customer benefits provided. Indeed, the proposed transaction will produce financial benefits to PSE and its customers. The nearly immediate financial benefits include an overall net reduction in PSE’s revenue requirement of \$2,271,793 beginning December 1, 2014, assuming the transaction closes before such date. The proposed

⁶⁶ Amended Application, Exh. C.

transaction provided the most long-term benefits to PSE customers of all alternatives considered, including several short- and long-term refurbishment alternatives and retirement of the Electron Project. The Puyallup Tribe does not—and cannot—challenge these benefits and instead alleges speculative losses that Electron Hydro may incur in the futures and erroneously suggests that PSE could somehow become responsible for these speculative Electron Hydro losses.

38. The Puyallup Tribe rests on the fatal premise that PSE will somehow be responsible for all liabilities of Electron Hydro after the proposed transaction closes.⁶⁷ The Puyallup Tribe variously (and erroneously) suggests that

- (i) Electron Hydro will “ during its operation of the Electron Dam”,⁶⁸
- (ii) “PSE has provided no evidence of Electron [Hydro] providing any guarantee, personal or otherwise, to cover up to the identified ”,⁶⁹ and
- (iii) the proposed transaction “causes harm to PSE's customers by increasing rates and increasing risk.”⁷⁰

The Puyallup Tribe, however, fails to suggest how PSE could be responsible for Electron Hydro losses of the magnitude suggested, even in the unlikely event that such significant losses were to materialize. PSE is not an affiliate of, and has no interest in Electron Hydro and will not be responsible for any losses by Electron Hydro after closing of the proposed transaction. After closing of the proposed transaction, PSE will remain a party to the Resource Enhancement

⁶⁷ See Puyallup Tribe Br. at ¶¶ 57-64.

⁶⁸ *Id.* at ¶ 57.

⁶⁹ *Id.* at ¶ 60.

⁷⁰ *Id.* at ¶ 64.

Agreement and will be responsible for the obligations imposed by that agreement.⁷¹ Indeed, the proposed transaction neither increases nor decreases PSE's obligations imposed by the Resource Enhancement Agreement because PSE has those obligations regardless of the outcome of the proposed transaction.

39. The responsibilities contained in the Resource Enhancement Agreement are not as onerous as the Puyallup Tribe would suggest. As discussed above, PSE's \$28.9 million estimated total cost of plant shutdown exceeded the retirement obligations imposed by the Resource Enhancement Agreement. Of the post-closing obligations examined by PSE, the Resource Enhancement Agreement requires only the removal of the Electron Project dam's diversion dam and headworks from the channel of the Puyallup River.⁷² PSE estimated the costs of such removal at \$845,000⁷³—a small fraction of the \$28.9 million estimate relied upon extensively by the Puyallup Tribe. PSE will bear this obligation (if any) during the term of the Resource Enhancement Agreement, and Electron Hydro will be responsible for any and all other shutdown expenses (if any), which may be greater or less than the estimate provided by PSE, depending on how Electron Hydro decides to shut down the Electron Project (if at all).

40. The Resource Enhancement Agreement also requires PSE to make an annual payment to the Puyallup Tribe for

⁷¹ See Amended Appl., Exh. F-5, at 4 (recognizing that PSE and Electron Hydro “are entering into an Electron Facility Operation Agreement, pursuant to which [PSE] will maintain its rights and obligations under the [Resource Enhancement Agreement], and the [Electron Hydro] is agreeing to operate the Electron [Project] in a manner consistent with [PSE's] obligations under the [Resource Enhancement Agreement]”) and at 5 (including the Resource Enhancement Agreement among the “Excluded Assets” not to be transferred to Electron Hydro pursuant to the Amended Asset Purchase Agreement); see also Staff Response to Commission Notice, dated July 18, 2014, at ¶¶ 16-18.

⁷² Wetherbee, Exh. No. ___ (PKW-9) at 24.

⁷³ Wetherbee, Exh. No. ___ (PKW-1CT) at 39:Table 1.

- contributions for the “operation and maintenance of the Rearing Ponds;”⁷⁴
- contributions “to be used by the [Puyallup] Tribe for fishery-related activities incident to downstream passage;”⁷⁵
- contributions “towards the cost of operation and maintenance of the Fish Ladder;”⁷⁶ and
- if required, contributions for “fishery enhancement activities to be carried out by the Puyallup Tribe related to upstream passage.”⁷⁷

The Puyallup Tribe provides PSE’s total contributions for 2014 under these provisions as \$274,015.⁷⁸

41. PSE will continue to make these annual payments to the Puyallup Tribe under the Resource Enhancement Agreement, regardless of the outcome of this proceeding and whether the proposed transaction closes. If, however, the proposed transaction were to close, then Electron Hydro will reimburse PSE for these payments.⁷⁹ These are payments that otherwise would be covered by PSE and its customers; the proposed transaction therefore reduces the impact of such costs on PSE’s rates. Even if one were to assume that Electron Hydro were to default on its reimbursement obligations under the Facilities Operation Agreement (a speculative assumption at best), the purchase price of \$8.4 million exceeds all reasonable projections of payments required by PSE.

42. In addition to the payments identified above, the Resource Enhancement Agreement requires certain obligations with respect to the operations of the Electron Project.

⁷⁴ *Id.* at 8 (section 3.4).

⁷⁵ *Id.* at 9 (section 4.4).

⁷⁶ *Id.* at 12 (section 5.2.1).

⁷⁷ *Id.* at 13-14 (section 5.2.2).

⁷⁸ Declaration of Russell C. Ladley at ¶ 16.

⁷⁹ Amended Appl., Exh. F-5, Exh. 2 thereto (Form of Electron Facility Operation Agreement) at 2-3.

These operational obligations include minimum instream flows,⁸⁰ ramp rates,⁸¹ and sediment management measures.⁸² These operational obligations will continue under the proposed Facility Operation Agreement, and Electron Hydro “will operate the Electron Facility at all times consistent with PSE’s obligations under the [Resource Enhancement Agreement]”⁸³ PSE values its relationship with the Puyallup Tribe and looks forward to working with the Puyallup Tribe to ensure the obligations under the Resource Enhancement Agreement are fulfilled.

43. In short, the Puyallup Tribe has not demonstrated that the proposed transaction imposes any additional risk on customer rates. The vast majority of the losses that the Puyallup Tribe alleges that Electron Hydro will incur, such as costs of refurbishment, operations, and removal will be the responsibility of Electron Hydro (and not PSE) after closing. Although PSE will remain responsible under the Resource Enhancement Agreement for the cost of removal of the diversion dam and headworks from the Puyallup River and annual payments to the Puyallup Tribe, Electron Hydro will reimburse PSE for those costs under the Facilities Operation Agreement. Even in the unlikely event that Electron Hydro were to default under its obligations, PSE customers are in a better position than they currently are because PSE already has these financial obligations but will have an additional \$8.4 million in the purchase price to be paid by Electron Hydro. The Puyallup Tribe has simply failed to demonstrate any circumstance in which PSE customers will be harmed by the proposed transaction.

⁸⁰ Wetherbee, Exh. No. ___(PKW-9) at 6 (section 2).

⁸¹ *Id.* at 14 (section 6).

⁸² Wetherbee, Exh. No. ___(PKW-9) at 14 (section 7).

⁸³ Amended Appl., Exh. F-5, Exh. 2 thereto (Form of Electron Facility Operation Agreement) at 1.

2. **The Proposed Transaction Strikes a Balance Among the Interests of Customers, Shareholders, and the Broader Public**

a. **The Proposed Transaction Represents the Best Possible Outcome for the Electron Project and Strikes an Appropriate Balance Among the Interests of Customers, Shareholders, and the Broader Public**

44. The proposed transaction strikes a balance among the interests of customers, shareholders, and the broader public. As noted above, the Electron Project is an old project currently in need of much attention. The wood flume of the Electron Project needs to be replaced. Energy production at the Electron Project is restricted by the amount of water that can be channeled through the flume to the powerhouse. The original 1904 penstocks are also in need of repair or replacement.⁸⁴

45. Without significant capital investment, the Electron Project will not be able to continue to operate. PSE's ability to fund significant capital investments, however, is not unlimited, and PSE must choose among its portfolio of investments in how to deploy its capital. PSE has elected not to use its limited capital to refurbish the Electron Project, and has focused its efforts elsewhere. PSE has found a willing buyer in Electron Hydro, however, that will spend its capital on refurbishing the Electron Project and operate it in a manner consistent with PSE's remaining obligations under the Resource Enhancement Agreement. In turn, PSE will purchase the net output of the Electron Project pursuant to the Electron PPA, at least through 2026.

46. Electron Hydro has committed to provide the Electron Project the attention that it needs and provide the many upgrades and enhancement necessary. PSE will be able to deploy its limited capital to address other, higher priority concerns. PSE customers will continue to receive the output from a carbon-free generating resource for at least the next decade at a

⁸⁴ Wetherbee, Exh. No. ___(PKW-1HCT) at 23:2-15.

reasonable price without bearing significant risk. Electron Hydro will receive the benefit of a profitable project if it is successful in its endeavor but will also bear the costs if not, a fact reflected in the discounted purchase price paid for the resource. The Puyallup Tribe, in turn, will continue to receive the benefits of the Resource Enhancement Agreement and the commitment that PSE will remain the party responsible for the obligations thereunder. The proposed transaction represents the best possible outcome for the Electron Project and strikes an appropriate balance among the interests of customers, shareholders, and the broader public.

b. The Puyallup Tribe's Concern and Uncertainty Regarding Electron Hydro is Misplaced

47. A considerable portion of the Puyallup Tribe Brief is based on misplaced concern and uncertainty regarding Electron Hydro. As a special purpose entity created to acquire the Electron Project, it is true that Electron Hydro itself does not have a long financial and operating history.⁸⁵ The principals behind Electron Hydro, primarily Thom Fischer, Victor Budzinski, and Roland Bailey, have both the financial and technical resources and capabilities to be successful in upgrading and operating the Electron Project. These three individuals have a proven record with PSE⁸⁶ and have committed to operate the Electron Project in a manner consistent with PSE's obligations under the Resource Enhancement Agreement. Moreover, PSE will work with Electron Hydro to ensure that the Electron Project will be operated consistently with the Resource Enhancement Agreement, thereby assisting, as necessary, in the operation of a hydroelectric project that produces power without endangering fishery resources.

⁸⁵ The use of special purpose entities is very common in resource development projects and project finance. If the Commission were to prohibit public service companies from transacting with special purpose entities due to the lack of financial and operational history associated with special purpose entities, then such a decision would likely reduce the number of counterparties with which public service companies may transact.

⁸⁶ See PSE Response to Bench Request No. 3.

i. **Electron Hydro Has the Financial and Operational Expertise Necessary to Operate the Electron Project Successfully**

48. Although Electron Hydro is a special purpose corporate entity created specifically to acquire, finance, restore and operate the Electron Project, the Electron Hydro team assembled to carry out these actions is substantial and experienced.⁸⁷ Most of the expertise is found in the companies behind Electron Hydro—Tollhouse Energy Company (“Tollhouse”) and its subsidiary Whitewater Engineering Corporation (“Whitewater”), and Valtec Power, LLC (“Valtec”).⁸⁸

49. Tollhouse and its subsidiary Whitewater have been active in the development, engineering, licensing, commercial arrangements, and regulatory matters for hydroelectric projects since 1990. Tollhouse and Whitewater teams have worked on a variety of hydroelectric projects in Alaska, Washington and Montana. The Tollhouse and Whitewater teams are comprised of professional engineers, fish and environmental resource scientists, hydrologists and often collaborate with other professionals on an as-needed basis.⁸⁹

50. Electron Hydro recognizes that hydropower projects raise unique issues with respect to fisheries management. To ensure that its hydropower assets coexist with fish and other aquatic life and operate under appropriate requirements, Tollhouse brings numerous fish biologists to Electron Hydro. Chris Spens has a B.S. degree in Watershed Science. Chris Fairbanks has a B.S. degree in Biological Science and a M.S. degree in Marine and Estuarine Science. C. Mike Prewitt has a B.A. degree in Zoology, M.S. degree in Fishery Biology and Ph.D. Aquatic Biology. All three of these professionals have thirty years applied science, land

⁸⁷ Declaration of Michael Mullally, Exh. A, at 1.

⁸⁸ *Id.* at 1.

⁸⁹ *Id.* at 1-2; *see also* Mullally Decl., Exh. A, Attach. A.

use and regulatory experience.⁹⁰ In addition, Electron also collaborates with experts in environmental science such as Confluence Environmental Company.⁹¹

51. Valtec is the other key partner the Electron Hydro's efforts. Valtec is majority owned and managed through JAVA Holdings Ltd. by Victor Budzinski and Roland Bailey, two of the leading utility project construction executives in Canada. In addition to bringing to Electron Hydro the financial resources described below, Mr. Budzinski serves as the Chief Executive Officer of Valard Construction Limited, which he founded in 1978. Victor has been the driving force behind the growth and evolution of Valard Construction, which provides engineering, procurement, construction, and maintenance services in Canada, and is now one of leading utility contractors and the ninth largest construction group in Canada with over 1,200 employees. Mr. Bailey is Executive Vice President, Business Development and Aboriginal Partnerships of Valard Construction Limited and has served in financial and accounting roles as well as leading Valard's engagement with First Nations regarding energy projects throughout Canada.⁹²

52. In January 2010, PSE sold Black Creek Hydro, Inc. ("Black Creek") to Valtec Power, LLC ("Valtec Power"), an affiliate of Electron Hydro. Since that time, Valtec Power has improved the output of the Black Creek Hydroelectric Project beyond that which existed prior to such sale. PSE indirectly owned the Black Creek Hydroelectric Project (through Hydro Energy Development Corporation (HEDC), a former subsidiary of PSE) for the first sixteen years of the facility's existence, and the Black Creek Facility generated, on average, 6,086 megawatt-hours (MWh) annually. Since Valtec Power purchased the Black Creek Hydroelectric Project, the

⁹⁰ Mullally Decl., Exh. A, at 2.

⁹¹ *Id.* at 2; *see also* Mullally Decl., Exh. A, Attach. B.

⁹² Mullally Decl., Exh. A, at 2; *see also* Mullally Decl., Exh. A, Attach. C.

project has generated, on average, 12,363 MWh annually. Based on this experience, PSE believes that the Electron Hydro team, which is substantially similar to the Valtec Power team, has a proven track record to increase the output and reliability of the Electron Project.⁹³

53. Tollhouse is also developing two hydroelectric projects in Washington and Montana with a nameplate capacity of 25 and 15 MWs, respectively, and planned operation dates of 2018 and 2016, respectively. These are only a few examples of Electron Hydro's institutional knowledge of electric projects; companies controlled by or otherwise affiliated with the principals of Electron Hydro have constructed over \$1 billion in energy projects, including generation and transmission assets in the last few years.⁹⁴

54. Electron Hydro and its member companies have recognized that the mechanical, operational and legal improvements to the Electron Project will take both time and significant financial resources. Electron Hydro states that it expects to perform the major work on the Electron Project during the first two years following acquisition (with most work on the project being done in the late spring through late summer seasons). Electron Hydro has expressed an understanding that some of the fish passage enhancement work may need to wait for the environmental planning process to be completed as discussed below. Furthermore, Electron Hydro has developed full cost financial models with estimates of all work to be completed. Electron Hydro expects that the majority, if not all, of this work will be financed by Electron Hydro member JAVA Holdings Ltd. Electron Hydro also has three other parties interested in providing debt financing, two of which are large national banks.⁹⁵

⁹³ See PSE Response to Bench Request No. 3.

⁹⁴ Mullally Decl., Exh. A, at 2.

⁹⁵ *Id.* at 3.

ii. **Electron Hydro is Committed to Operating Within the Requirements of the Resource Enhancement Agreement for the Remainder of Its Term**

55. Electron Hydro is committed to fully performing the operational requirements of the Resource Enhancement Agreement for the remainder of its term, and intends always to operate and manage mindful of the fisheries' importance with the hope of improving the existing conditions. Electron Hydro has expressed an interest in working with the Puyallup Tribe for the responsible use of renewable generation to not only permit but to increase fish production and passage.⁹⁶

56. Electron Hydro plans to start repairs and maintenance to the Electron Project as soon as practicable after the sale is closed. Major work includes replacing failing wood flume supports with steel supports, replacing the flume liner to bring it back to full structural strength, and installing new turbine runners in the powerhouse. Operation of the Electron Project will be automated such that there will be flow level sensors in the Puyallup River above and below the diversion, every mile along and inside the flume, and in the forebay. Intake valves will also be automated. These automation improvements will give Electron Hydro the ability to control the plant and monitor environmental aspects of the project in real time, both locally and remotely, giving Electron Hydro the ability to respond quickly to any detected or potential issues.⁹⁷

57. In addition to these mechanical and operational improvements, Electron Hydro intends, as soon as practicable after close of the sale, to restart the process for negotiating a Habitat Conservation Plan ("HCP") pursuant to the Endangered Species Act. That National Marine Fisheries Service will be the lead agency, but Electron Hydro expects that U.S. Fish and Wildlife Service, the Puyallup Tribe and federal and state agencies will participate in this

⁹⁶ *Id.* at 3.

⁹⁷ *Id.* at 3.

process. Electron Hydro is committed to completing the HCP process and fisheries improvements as it believes it is in the best interest of the fish and its planned long-term operation of the Electron Project to be clearly compliant with the Endangered Species Act. Electron Hydro expects to restart the process immediately and try to resolve any issues over the coming few years.⁹⁸

58. Additionally, following the sale of the Electron Project to Electron Hydro, PSE will continue to work with the Puyallup Tribe to ensure all obligations under the Resource Enhancement Agreement are fulfilled. PSE resource sciences and operations staff will provide training to employees of Electron Hydro. Trained PSE biologists will continue to observe operations at the facility, provide guidance to crews performing maintenance activities, and monitor for compliance with the Resource Enhancement Agreement throughout the remaining term of the agreement.⁹⁹

c. **The Commission should reject the novel argument of the Puyallup Tribe that Would Require the Commission to Opine on the Financial and Managerial Fitness of an Acquirer that is Not and Will Not be Subject to the Commission’s Jurisdiction.**

59. Finally, it is important to note that the Commission has not, in the past, typically focused on the financial and operational capabilities of a purchaser that is not subject to the jurisdiction of the Commission. In prior cases, the Commission has considered an acquiring company’s “financial and managerial fitness to run the operations” pursuant to WAC 480-143-170 but has done so only where the transaction involves the acquisition of a public service company that will remain subject to the jurisdiction of the Commission or the acquisition of

⁹⁸ *Id.* at 3-4.

⁹⁹ Declaration of Irena Netik at ¶¶ 5-7.

assets that will subject the acquiring entity to the jurisdiction of the Commission.¹⁰⁰ Neither circumstance is present here. After closing of the proposed transaction, Electron Hydro would be an independent power producer and not subject to the jurisdiction of the Commission by virtue of its acquisition of the Electron Project. The Commission should reject the novel argument of the Puyallup Tribe that would otherwise require the Commission to opine on the financial and managerial fitness of an entity over which the Commission does not and will not have jurisdiction.

B. The Puyallup Tribe Wrongly Suggests that the Proposed Transaction Must Meet Both the “No Harm” and the “Net Benefit” Standards

60. The Puyallup Tribe wrongly suggests that the proposed transaction must meet both the “no harm” and the “net benefit” standards:

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.¹⁰¹

The Puyallup Tribe’s use of the “net benefit” standard demonstrates a fundamental misunderstanding of the applicable standard for approval. Indeed, the “net benefit” standard is inapplicable to the sale of assets by an electrical company to an independent power producer.

¹⁰⁰ *In re Joint Application of PacifiCorp & Scottish Power, LLC*, Docket UE-981627, 3rd Supp. Order at 2-3 (Apr. 2, 1999); *see also In re Application of Wash. Water Supply, Inc.*, Docket UW-141307, Order 01 (July 24, 2014); *In re Application of Soren Pedersen Water Co.*, Docket UW-131046, Order 01 (Sept. 12, 2013); *In re Application of Basin Water Sources, Inc.*, Docket No. UW-121842, Order 01 (Dec. 27, 2012); *In re Application of Evergreen Exch. Inc. d/b/a Lochaven Water Co.*, Docket UW-120855, Order 01 (Sept. 27, 2012); *In re Application of Dungeness Heights Water Sys. Inc.*, Docket UW-120132, Order 01 (Feb. 10, 2012); *In re Application of Solmar Water Sys., Inc.*, Docket UW-111573, Order 01 (Sept. 28, 2011); *In re Application of Sylvia Lake Water Supply, Inc.*, Docket UW-071855, Order 01 (Oct. 24, 2007); *In re Application of Rosario Utils., LLC*, Docket UW-071357, Order 01 (Sept. 28, 2007); *In re Joint Application of MDU Res. Group, Inc. & Cascade Natural Gas Corp.*, Docket UG-061721, Order 06 (June 27, 2007).

¹⁰¹ Puyallup Tribe Br. at ¶ 70 (citing RCW 80.12.020(1)); *see also id.* at ¶ 43 (“If the [Electron Project] 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.”) (citing RCW 80.12.020(1)).

61. The Puyallup Tribe acknowledges that RCW 80.12.020(1) enunciates the “net benefit” standard. Indeed, the Puyallup Tribe quotes RCW 80.12.020(1) and emphasizes the net benefit language of that statute:

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.¹⁰²

The Puyallup Tribe’s assertion that “the characterization of the property will determine whether the ‘net benefit’ standard is applicable to PSE’s proposed transaction”¹⁰³ is fundamentally incorrect. The plain language of RCW 80.12.020(1) applies the “net benefit” standard solely to any transaction that “would result in a person, directly or indirectly, acquiring a controlling interest in a gas or electrical company”¹⁰⁴ Thus, the effect of the transaction (i.e., the acquisition of a controlling interest in a gas or electrical company)—and not the characterization of the property—determined whether the “net benefit” standard is applicable to a proposed transaction. The proposed transaction in this proceeding does not result in the acquisition of a controlling interest in an electrical company. Therefore, the portion of RCW 80.12.020(1) cited by the Puyallup Tribe is wholly inapplicable to the proposed transaction, and the “net benefit” standard enunciated therein should not apply.

62. Moreover, the portion of RCW 80.12.020(1) cited by the Puyallup Tribe was enacted in 2009 after the Commission considered various acquisitions of controlling interests in electrical and gas companies under the “no harm” standard over the previous decade.¹⁰⁵ This

¹⁰² Puyallup Tribe Br. at ¶ 71 (quoting RCW 80.12.020(1)) (emphasis in original).

¹⁰³ *Id.* at ¶ 72.

¹⁰⁴ RCW 80.12.020(1).

¹⁰⁵ *See, e.g., In re Joint Application of Puget Holdings LLC & Puget Sound Energy, Inc.*, Docket U-072375, Order 08 (Dec. 30, 2008); *In re Joint Application of MDU Res. Group, Inc. & Cascade Natural Gas Corp.*,

change in legislation in 2009 evidences a legislative intent to direct the Commission to apply the “net benefits” standards to acquisitions of controlling interests of gas and electrical companies only. The amended legislation contains no similar directive to the Commission to apply the “net benefits” standard to any other form of transaction, and it can be inferred that the legislature affirmed the Commission’s use of the “no harm” standard for transactions not involving acquisitions of controlling interests. The Commission should not now extend the “net benefits” standard to transactions other than acquisitions of controlling interests.¹⁰⁶

63. Finally, Commission decisions prior to the legislative change in RCW 80.12.020(1) in 2009 have expressly rejected the “net benefit” standard for approval of sales of assets by public service companies pursuant to RCW 80.12.020 and WAC 480-143-170:

The standard in our rule does not require the Applicants to show that customers, or the public generally, will be made better off if the transaction is approved and goes forward. In our view, Applicants’ initial burden is satisfied if they at least demonstrate no harm to the public interest We recognize from a review of these Orders that the approach for determining what is in the public interest varies with the form of the transaction and the attending circumstances.¹⁰⁷

The proposed transaction provides no reason for the Commission to deviate from this precedent, and the Commission should expressly decline the invitation of the Puyallup Tribe to apply the “net benefits” standard to the proposed transaction.

Docket UG-061721, Order 06 (June 27, 2007); *In re Joint Application of MidAmerican Energy Holdings Co. & PacifiCorp, d/b/a Pacific Power & Light Co.*, Docket UE-051090, Order 07 (Feb. 21, 2006); *In re Joint Application of PacifiCorp & Scottish Power, LLC*, Docket UE-981627, 3rd Supp. Order at 2-3 (Apr. 2, 1999).

¹⁰⁶ “[T]he legislature is deemed to intend a different meaning when it uses different terms.” *State v. Roggenkamp*, 153 Wn.2d 614, 625 (2005) (citing *State v. Beaver*, 148 Wn.2d 338, 343 (2002)). A “court will not read into [a] statute the language that it believes was omitted.” *State v. Moses*, 145 Wn.2d 370, 374 (2002) (citing *Jenkins v. Bellingham Mun. Court*, 95 Wn.2d 574, 579 (1981)). In accordance with these rules, where the legislature includes particular language in one section of a statute but omits it in another, the exclusion is presumed intentional. *Kucana v. Holder*, 558 U.S. 233, 249, 130 S.Ct. 827, 838, 175 L.Ed.2d 694 (2010).

¹⁰⁷ *In re Joint Application of PacifiCorp & Scottish Power, LLC*, Docket UE-981627, 3rd Supp. Order at 2-3 (Apr. 2, 1999).

C. The Commission Cannot Affirm the October 2013 Order Because the Amended Asset Purchase Agreement (and Not the Asset Purchase Agreement Reviewed in Order 06) is Now Before the Commission for Approval

64. In Order 06 in this proceeding, the Commission conditionally approved the application for approval of the Asset Purchase Agreement filed by PSE in June 2013:

The Commission finds the sale of the Electron Project to Electron Hydro LLC is in the public interest provided there are no material changes to the Asset Purchase Agreement as filed. If material changes occur, [PSE] must re-file its application for approval of the sale.¹⁰⁸

The Puyallup Tribe now argues that the Commission, as an alternative to denying the proposed transaction, should “affirm the October 2013 Order [i.e., Order 06], including the REA-related condition precedent.”¹⁰⁹ Affirmation of Order 06—at least with regard to the approval of the Asset Purchase Agreement—is not an option because the Amended Asset Purchase Agreement (and not the Asset Purchase Agreement reviewed in Order 06) is now before the Commission for approval.

65. If Electron Hydro were successful in its attempts to get the Puyallup Tribe to negotiate a Renewable Resource Agreement as contemplated by the Asset Purchase Agreement, then there would have been no reason for PSE and Electron Hydro to enter into the Amended Asset Purchase Agreement or for PSE to file the Amended Asset Purchase Agreement for Commission approval. This, however, was not possible. Therefore, PSE and Electron Hydro had to modify the Asset Purchase Agreement by removing the condition precedent for a Renewable Resource Agreement and lower the purchase price to be paid by Electron Hydro to reflect the increased risks regarding operations of the Electron Project after 2026. This is the

¹⁰⁸ Order 06 at ¶ 25.

¹⁰⁹ Puyallup Tribe Br. at ¶ 76.

agreement now before the Commission, and it is not possible for the Commission to affirm Order 06 in this proceeding with respect to the Asset Purchase Agreement, unless the Puyallup Tribe is willing to enter into good faith negotiations and enter into a Renewable Resource Agreement with Electron Hydro.¹¹⁰

66. The Puyallup Tribe is incorrect in suggesting that Commission affirmation of Order 06 would “remove PSE (and the ratepayers) from any ongoing financial obligation under the REA once PSE and Electron LLC satisfy all REA-related obligations.”¹¹¹ If the Commission were to “affirm Order 06” as the Puyallup Tribe requests, the sale of the Electron Project would not close and PSE would still have obligations under the Resource Enhancement Agreement. Thus, as previously stated, it is the Resource Enhancement Agreement—and not the proposed transaction—that obligates PSE to remove the diversion dam and headworks from the Puyallup River upon retirement and make annual operations and maintenance contributions to the Puyallup Tribe. PSE currently has and will continue to have these contractual obligations, whether or not the proposed transaction closes. The proposed transaction neither increases nor decreases PSE’s potential liability under the Resource Enhancement Agreement.

IV. CONCLUSION

67. For the reasons set forth above, PSE respectfully requests that the Commission approve the Amended Asset Purchase Agreement with Electron Hydro for sale of the Electron Project without condition, all pursuant to RCW 80.12.020 and WAC 480-143-170. The proposed transaction meets the Commission standard and does not harm the public interest.

¹¹⁰ If the Puyallup Tribe were to enter into good faith negotiations and enter into a Renewable Resource Agreement with Electron Hydro and terminated the Resource Enhancement Agreement with PSE, then it may be possible for PSE and Electron Hydro to close the transaction contemplated by the Asset Purchase Agreement because that is the sole condition precedent outstanding. This would allow Order 06 to remain effective and negate the need for the Commission to approve the Amended Asset Purchase Agreement.

¹¹¹ Puyallup Tribe Br. at ¶ 76.

Indeed, the proposed transaction is the best possible outcome for the Electron Project, for PSE and its customers, for Electron Hydro, and the public at large.

Respectfully submitted this 11th day of September 2014,

PERKINS COIE LLP

A handwritten signature in black ink, reading "Jason T. Kuzma". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Jason Kuzma, WSBA #31830
Donna L. Barnett, WSBA #36794
Attorneys for Puget Sound Energy, Inc.