BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, Respondent.	DOCKETS UE-151871 and UG-151872 (*consolidated*) MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION

1 Staff of the Washington Utilities and Transportation Commission (Commission) submits this Motion for Summary Determination under WAC 480-07-375 and WAC 480-07-380. The Commission should grant Staff's Motion for two reasons: (1) the proposed leasing service does not qualify as a utility service under Washington law, and (2) Puget Sound Energy failed to present sufficient evidence to establish a prima facie case that its proposed rates are just and reasonable. Each reason provides independent cause for the Commission to reject the Company's proposed tariff Schedule 75.

II. RELIEF REQUESTED

2 Commission Staff respectfully requests that the Commission reject the proposed tariff and affirm, as a general principle, that the regulated utility service Puget Sound Energy (PSE or Company) provides ends at the customer meter unless the overreaching service is narrowly tailored to provide compelling net-benefits to all customers by making the utility system more efficient or otherwise fulfills some statutory purpose articulated in the public service laws.

III. STATEMENT OF FACTS

3 On September 18, 2015, PSE filed proposed tariff sheets to launch a new optional, tariff-based service for acquiring and maintaining end-use equipment powered by electricity or natural gas (proposed leasing service). The proposed tariff contained terms, but not rates.[1] PSE did not provide any pre-filed testimony to substantiate its proposed leasing service; only a cover letter that broadly described the proposal accompanied the tariff sheets. At the November 13, 2015 Open Meeting, the tariff was characterized as a deficient "naked tariff" because it lacked rates.[2] In accordance with Staff's recommendation, the Commission issued a complaint and order suspending the tariff.[3]

4 On February 17, 2016, PSE filed substitute tariff sheets to replace those originally filed. The express purpose of the substitute tariff sheets was to "add monthly lease rates to the tariffs" and to "update various other terms."[4] PSE developed the rates based on "estimates of all costs borne by the Company in installing, operating and maintaining the equipment over the life of the lease term [10-18 years]."[5] These estimates included equipment costs developed by averaging sample costs from a wide range of products because the Company had not identified the specific equipment it hoped to offer.[6] PSE proposed that the rates be fixed for the entire 10-18 year lease term. If the rates are ever updated with actual costs, the new, cost-based rates would apply only to new customers.[7]

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[1] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Dockets*, UE-151871 & UG-151872, Advice No. 2015-23 (Sept. 18, 2015).
[2] Wash. Utils. & Transp. Comm'n Nov. 13, 2015 Open Meeting recording.
[3] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Dockets*, UE-151871 & UG-151872, Order 01 (Nov. 13, 2015).
[4] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Dockets*, UE-151871 & UG-151872, Advice No. 2015-23, at 2 (Feb. 17, 2016).
[5] McCulloch, Exh. No. MBM-1T at 18:12-14.
[6] *See* O'Connell, Exh. No. ECO-1THC at 16:10-17:13.
[7] McCulloch, Exh. No. MBM-1T at 11:1-9.

5 On February 25, 2016, PSE filed direct testimony and exhibits of four Company witnesses to support the proposed leasing service.[8] On March 25, 2016, PSE filed revisions to its direct testimony and exhibits.[9] The revisions contained both major changes, such as reducing by more than half the prediction of electric energy conservation that the proposed program could potentially yield,[10] and minor changes, such as striking the word "selling" from a witness's list of responsibilities related to PSE's legacy rental program.[11] The Company's direct testimony also paradoxically established that the proposed service is *not* a conservation program, but it could yield conservation savings as an ancillary effect of *some* of the equipment offered.[12] The core purpose of PSE's proposal is to offer an "optional service" that customers can elect to participate in "if [they] view the lease service as beneficial and reasonably priced for the benefits they receive."[13]

6 On June 7, 2016, Commission Staff, Public Counsel, and Intervenors each filed Responsive Testimony. No party supported PSE's proposed leasing service.

7 On July 1, 2016, PSE filed voluminous rebuttal testimony that included material changes to the proposed leasing service. The rebuttal testimony, excluding exhibits, more than doubled in length its direct testimony.[14] In its rebuttal case, PSE also proposed to add a

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[8] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Dockets*, UE-151871 & UG-151872, Direct Testimony and Exhibits of Jason E. Teller, Malcom B. McCulloch, Eric E. Englert, and Dr. Ahmad Faruqui, on behalf of Puget Sound Energy from Sheree S. Carson (Feb. 25, 2016).
[9] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Dockets*, UE-151871 & UG-151872, Corrections to pre-filed Direct Testimony and Exhibits originally filed on February 25, of Malcom B. McCulloch, Eric E. Englert, and Dr. Ahmad Faruqui, on behalf of Puget Sound Energy from Sheree S. Carson (Mar. 25, 2016).
[10] Faruqui, Exh. No. AF-1T at 2:14.
[11] McCulloch, Exh. No. MBM-1T at 1:19.
[12] *See* Englert, Exh. No. EEE-1T at 8:19-22.
[13] Teller, Exh. No. JET-1T at 6:5-7.
[14] The direct testimony contained 72 pages of testimony from four witnesses. The rebuttal testimony contained 150 pages of testimony from six witnesses, three of whom had not previously testified.

plethora of new features to the leasing service "upon approval of Schedule 75," including:

- Annual conservation savings tracking and reporting;
- Transition of approximately 33,000 customers from its legacy rental program to its new, proposed leasing service;
- Biennial conservation savings target-setting;
- The opportunity for 100% of leasing customers to participate in a demand response technology demonstration project;
- A test of the viability of leasing customer generation and storage equipment, both independently and in combination, through the leasing platform;
- In five years, to report additional value of the leasing platform and its contributions to policy priorities; and
- Within 60 days of approval, to finalize pricing and product selection—to include additional product offerings—and to update its proposed rates based on the known costs of the products it selects.[15]

Critically, PSE did not flesh out or substantiate with evidence the critical details of these newly proposed features. PSE promises to do so only after the Commission approves its proposed Schedule 75. Due to the lack of evidentiary support and because these new features were first presented on rebuttal, no party will have an adequate opportunity to conduct discovery or to analyze their impact on PSE's customers.

[15] Norton, Exh. No. LYN-1T at 8:1-9:7; Exh. No. LYN-3.

IV. STATEMENT OF ISSUES

8 Commission Staff's Motion for Summary Determination raises three issues:

1) Whether granting Staff an exemption to the rule establishing the time for filing a motion for summary determination is in the public interest in this instance;
2) Whether the Commission should reject the proposed tariff sheets because PSE's proposed leasing service does not qualify as a utility service under Washington law; and
3) Whether the Commission should reject the proposed tariff sheets because PSE failed to present sufficient evidence to meet its minimum burden of proof that the proposed rates are just and reasonable.

V. EVIDENCE RELIED UPON

9 Commission Staff relies on all documents filed in Dockets UE-151871 and UG-151872 by the parties to date.

VI. STANDARD FOR SUMMARY DETERMINATION

10 A party may make a dispositive motion for summary determination pursuant to WAC 480-07-375(1) and WAC 480-07-380(2). Under WAC 480-07-380(2)(a), a party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion made under this subsection, the Commission considers the standards applicable to a motion made under CR 56 of the Washington superior court civil rules.

11 Under CR 56, summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "A material fact is one upon which the outcome of the litigation depends." *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

12 The burden is on the moving party to demonstrate there is no genuine issue of material fact and, as a matter of law, summary judgment is proper. *Jacobsen*, 89 Wn.2d at 108. If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The non-moving party must "set forth specific facts showing there is a genuine issue for trial." *LaPlante*, 85 Wn.2d at 158.

VII. ARGUMENT

13 PSE failed to meet the most basic requirements for establishing a regulated tariff-based service. The Company seeks permission to offer a new service that, as currently proposed, does not qualify as a utility service under Washington law. In addition, the Company has failed to present sufficient evidence to meet its burden to prove that the proposed rates are just and reasonable. The Company also inappropriately expanded its proposal on rebuttal by promising to implement significant new features that lack necessary detail or evidentiary support. Consequently, a hearing and multiple rounds of briefing on all the issues is not necessary—such additional process would serve only to waste the time and resources of all involved. Staff respectfully requests that the Commission reject the proposed tariff and affirm, as a general principle, that the utility service that PSE provides ends at the

customer meter unless the overreaching service is tailored to provide compelling net-benefits to all customers by making the utility system more efficient or otherwise fulfills some statutory purpose articulated in the public service laws.

A. Granting an Exemption to the Rule Establishing Timing for Motions for Summary Determination is in the Public Interest in this Instance

14 Under WAC 480-07-380(2)(b), a party must file any motion for summary determination at least thirty days before the next applicable hearing session. However, the Commission may grant an exemption from or modify the application of its rules in individual cases if consistent with the public interest, the purposes underlying regulation, and applicable statutes pursuant to WAC 480-07-110(1).

15 Staff appreciates the timing issues that its motion raises, but found that summary determination offers a resolution of this case most consistent with the public interest. If the Commission finds a full hearing on all of the details of the Company's proposal would facilitate its review of PSE's deficient filing, then it should dismiss Staff's motion as untimely.

16 Staff believes that summary determination is the resolution of this case most consistent with the public interest for three reasons. First, if PSE's proposed service is not a utility service as a matter of law or if PSE failed to present sufficient evidence to establish its proposed rates are just and reasonable, then multiple days of hearing and rounds of briefing are a tremendous waste of time and resources for all involved.[16] For example, if

[16] *See Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Inc.; In the Matter of the Petition of Puget Sound Energy, Inc. for an Order Authorizing Deferral of Certain Electric Energy Supply Costs*, Dockets UE-011163 and UE-011170 (*consolidated*), Sixth Supplemental Order, ¶ 12 (Oct. 4, 2001) ("If, taking the allegations of the initiating documents, as defined in the prefiled evidence supporting the filing, in the light most favorable to the Company, the Commission would not grant the relief, there is no point in wasting the parties' and the Commission's time, energies, and financial resources pursuing that relief.").

PSE has not provided sufficient evidence to establish that the proposed rates can meet the minimum standard required by law, then there is no need for cross-examination of numerous witnesses about whether or not there is a market gap or if comparable services to the proposed bundled service currently exist and are appropriate for filling that gap. Ultimately, if either of the two issues raised by this motion are dispositive then summary determination is the best, most-efficient resolution of this case.

17 Second, the existing procedural schedule precluded Staff from complying with the timing requirement because PSE's rebuttal testimony was due thirty days prior to the hearing. Summary determination was not warranted prior to receipt of the Company's rebuttal testimony. Once filed, Staff worked immediately to process the Company's voluminous rebuttal testimony and evaluate a best path forward.

18 Finally, granting Staff an exception to the timing rule for motions for summary determination is not unfair to PSE. Rather, PSE has supported its proposed leasing service in a manner that compromises review. The Company had every opportunity to develop and fully support its case. Despite initially filing a tariff that lacked rates, the Commission did not reject, but rather suspended the "naked tariff," consistent with Staff's recommendation. The parties participated in multiple settlement conferences that informed the Company's position prior to the filing of direct testimony. One month after filing direct testimony, the Company materially revised its direct testimony. Then in rebuttal, the Company materially expanded its proposal by promising to add a plethora of new features to the leasing service "upon approval of Schedule 75." PSE's failure to propose a new service that qualifies as a utility service as a matter of law or to present sufficient evidence to meet its minimum burden of proof with regard to rates is no one's fault but its own. Consequently, granting an

exemption to the rule establishing timing for summary determination motions is most consistent with the public interest.

B. PSE's Proposed Leasing Service is Not a Utility Service as a Matter of Law.

19 No genuine issue of material fact exists because even if the Commission accepted all facts as asserted by PSE, its proposed leasing service would still not qualify as a utility service under Washington law. As evidenced by a recent Commission decision, the proposed leasing service is not a utility service simply because it is proposed by PSE. On May 16, 2016, PSE filed an application for Commission approval of a special contract that would allow a particular customer to inject biomethane into PSE's system for distribution to that customer's end users. The Commission found that the contract did not involve the retail sale of regulated utility services and, therefore, did not require Commission approval.[17]

20 In its decision, the Commission reiterated that it "considers three factors to determine whether a company provides a utility service to the public: 1) whether the company offers the service to the general public or only to specific individuals or entities; 2) whether the company has a monopoly; and 3) whether regulation is necessary to protect customers from abuse by the Company's monopoly power."[18] With regard to the special contract, the Commission found the first factor dispositive because PSE offered the service to a specific entity to which it had no obligation to serve, not the general public.[19] Thus, as the Commission reaffirmed less than a week ago in regard to another service proposed by PSE, not all services offered by a public service company are a utility service under Washington law.

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[17] *In the Matter of Puget Sound Energy's Application for Approval of a Special Contract under WAC 480-80-143*, UG-160748, Order 01, ¶¶ 6-11 (July 7, 2016).
[18] *Id.* at ¶ 4 (citing *In re Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies-Interconnection With Electric Generators*, Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third-Party Owners of Net Metering Facilities, Docket UE-112133, at 26-28 (July 30, 2014)).
[19] *Id.* at ¶ 5.

21 Similarly here, PSE's proposed leasing service is not a utility service, albeit for different reasons. First, PSE does not have a monopoly on the service it seeks to provide. It is beyond dispute that a robust competitive market not subject to Commission regulation exists for end-use equipment powered by electricity or natural gas. This robust competitive market includes any HVAC equipment the Company would offer as part of its leasing service. Therefore, leasing end-use equipment—*in and of itself*—is not a utility service.

22 Commission precedent establishes, as a general principle, that utility service appropriately ends at the customer meter unless the overreaching service is narrowly tailored to provide compelling net-benefits to all customers by making the utility system more efficient or otherwise fulfills some statutory purpose articulated in the public service laws.[20] While the Commission has not concisely articulated this general principle, it is fully consistent with Commission precedent, as further explained below. The Commission should use this opportunity to affirm this general principle to provide guidance for future proposals for new regulated services.

23 Second, PSE's proposed service is not narrowly tailored to provide compelling net-benefits to all customers by making the system more efficient. PSE (including its predecessor companies) has a long and controversial history of offering end-use appliance rental services.[21] The Commission, however, has justified each of the past services as a utility service based on the services' ability to deliver benefits to the Company's entire customer base.[22] As the Company acknowledged on rebuttal in this case, "the purpose [of its legacy rental program was] to build load and gain gas customers . . . ."[23] The Commission

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[20] Cebulko, Exh. No. BTC-1THC at 10:1-13.
[21] *Id.* at 11:7-15.
[22] *Id.* at 11:7-15.
[23] Englert, Exh. No. EEE-3T (citing *Cole v. Wash. Natural Gas Co.*, No U-9621, at 17 (1968)).

found that fuel switching had the "beneficial effect of gas load building with resulting benefits to other ratepayers."[24] Indeed, the service led to voluntary rate reductions from 1961 – 1966 of $1.69 million annually.[25] But, the initial success of the program did not last—the program eventually became heavily subsidized by the Company's general customers.[26]

24 Here, PSE's proposed program has no comparable public purpose. Instead, the Company has paradoxically established that the proposed service is *not* a conservation program; nevertheless it may yield conservation savings as an ancillary effect of *some* of the equipment offered.[27] According to the Company, the core purpose of the proposal is to offer an "optional service" that customers can elect to participate in "if [they] view the lease service as beneficial and reasonably priced for the benefits they receive."[28] However, an optional HVAC equipment leasing service that lacks a core purpose tailored to provide compelling net-benefits to all customers is not a utility service under Washington law absent some statutory purpose articulated in the public service laws.

25 Third, PSE's proposed service does not fulfill any statutory purpose articulated in the public service laws. The lone example PSE provided of an end-use equipment utility service, other than its legacy rental program, is electric vehicle supply equipment service.[29] However, the legislature expressly found that "utilities, who [that] are traditionally responsible for understanding and engineering the electrical grid for safety and reliability, must be fully empowered and incentivized to be engaged in electrification of our

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[24] Cebulko, Exh. No. BTC-1THC at 13:1-7 (citing *Cole v. Wash. Natural Gas Co.*, No U-9621, at 45 (1968)).
[25] *Id.*
[26] *Id.* at 13:9-14:5.
[27] *See* Englert, Exh. No. EEE-1T at 8:19-22.
[28] Teller, Exh. No. JET-1T at 6:5-7.
[29] Englert, Exh. No. EEE-3T at 13:12-14:2.

transportation system."[30] The legislature passed a law expressly allowing for electric vehicle supply equipment located on the customer-side of the meter to be included as electric plant in service and included in rate base.[31] In contrast, PSE can cite no public service law that expressly allows it to rate base HVAC equipment. PSE's proposed leasing service is not a regulated utility service under Washington law.

C. PSE Failed to Present Sufficient Evidence to Establish a Prima Facie Case that its Proposed Rates are Just and Reasonable.

26 The Commission regulates in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of any public service companies supplying a utility service to the public for compensation.[32] The rates for utility service must be just and reasonable.[33] Pursuant to RCW 80.04.130(4), the public service company carries the burden of proof to show that proposed rates are just and reasonable. PSE failed to carry its minimum burden of proof to establish that its proposed rates are just and reasonable.

27 PSE case suffers from two critical defects: 1) the Company failed to present rates based on known costs of chosen products, and 2) the Company materially altered its proposal on rebuttal by promising to add new features via a compliance filing only after the Commission approves its proposed tariff. PSE's request is tantamount to a request for preapproval, which the Commission does not grant.[34] Further process is not necessary because PSE failed to comply with these basic requirements for a regulated tariff-based service.

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[30] RCW 80.28.360, findings—Intent—2015 c 220 (3).
[31] RCW 80.28.360.
[32] RCW 80.01.040(3).
[33] RCW 80.28.010(1).
[34] *Re Regulation of Electric Utilities in the Face of Change in the Electric Industry*, Docket No. UE-940932, at 27 (April 22, 1998) ("[T]he Commission does not support any recommendation that would constitute any form of preapproval of utility expenditures . . . .").

28 First, PSE failed to present sufficient evidence to meet its burden of proof that the proposed rates are just and reasonable because the rates are based on cost estimates predicted to occur over the life of the 10-18 year lease term. These estimates include equipment costs developed by averaging sample costs from a wide range of products because the Company has not yet identified the specific equipment it would offer. Exacerbating the problem of cost estimates is the fact that the proposed rates would be fixed for the entire 10-18 year lease term. Consequently, PSE's proposed rates are not tied to the actual bundled products and services that the customer would receive. This critical defect ensures the proposed rates are unjust and unreasonable.

29 Second, PSE failed to present sufficient evidence to meet its burden of proof that the proposed rates are just and reasonable because the Company materially altered its proposal on rebuttal by promising to add new features only after the Commission approves its proposed tariff. The Commission requires that the Company present the full scope of its evidentiary case in its pre-filed direct testimony.[35] Rebuttal is appropriately constrained to addressing the responses of the parties to that prefiled testimony.

30 The new service features offered in rebuttal may inch closer to a complete proposal, but PSE's case remains deficient. Even if its expanded proposal were to be entertained, PSE did not flesh out or substantiate with evidence any details of its newly proposed features—PSE promised to do so only after the Commission approves its proposed Schedule 75. Due to the lack of evidentiary support and because these new features were first presented on

[35] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Inc.; In the Matter of the Petition of Puget Sound Energy, Inc. for an Order Authorizing Deferral of Certain Electric Energy Supply Costs*, Dockets UE-011163 and UE-011170 (*consolidated*), Sixth Supplemental Order, ¶ 15 (Oct. 4, 2001).

rebuttal, no party can adequately conduct discovery or analyze whether the new features benefit customers.

31 Moreover, the details of these new features are likely to warrant an entirely new case given the breadth and scope of the newly proposed features and the lack of detail about them, which an opportunity for sur-rebuttal will not obviate. The primary example is PSE's promise to submit a compliance filing within 60 days after the Commission approves the proposed leasing service that updates the proposed rates based on the known costs of the products it will by then select, and which will include additional product offerings.[36] Reviewing the revised product offering and the revised costs will almost certainly necessitate suspension of the filing simply to work through the details. In addition, such a compliance filing renders the rates in this filing void—we would be back to a "naked tariff." PSE's expanded rebuttal proposal attempts to punt until after the Commission's decision its burden of proof to establish just and reasonable rates. This attempt should fail.

32 PSE's proposal lacks all features of a regulated utility service. In essence, PSE's rebuttal proposal is tantamount to a request for preapproval, which the Commission does not grant.[37] PSE seeks approval to vastly expand what constitutes regulated utility service so that it can rate base entire new categories of electric and gas "plant." The impact on customers, however, remains unknown because PSE has not fleshed out the critical details of its expanded proposal. It merely hints at vast possibilities. Here, the Commission has an opportunity to provide PSE with the guidance it seeks by addressing the bounds of the Company's utility service and the basic requirements of establishing new rates. If warranted,

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[36] Norton, Exh. No. LYN-1T at 8:1-9:7; Exh. No. LYN-3.

[37] *Re Regulation of Electric Utilities in the Face of Change in the Electric Industry*, Docket No. UE-940932, at 27 (April 22, 1998) ("[T]he Commission does not support any recommendation that would constitute any form of preapproval of utility expenditures . . . .").

the Company can use that guidance to develop future proposals for new utility services. Otherwise the Company can embark on its proposal as an unregulated, competitive service.

VII. CONCLUSION

33 Commission Staff respectfully requests that the Commission grant its motion and issue an order rejecting the tariff filings and closing the dockets. Staff further requests the Commission affirm, as a general principle, that regulated utility service ends at the customer meter unless the overreaching service is narrowly tailored to provide compelling net-benefits to all customers by making the utility system more efficient or otherwise fulfills some statutory purpose articulated in the public service laws.

Dated this 13th day of July 2016.

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