

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

KIMBERLY-CLARK TISSUE COMPANY,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

DOCKET NO. UG-990619

**[CONFIDENTIAL MATERIAL -
REDACTED]**

POST HEARING BRIEF OF PUGET SOUND ENERGY, INC.

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I. INTRODUCTION

This proceeding involves a complaint by an interruptible gas customer which followed a risky fuel strategy that resulted in consumption of penalty gas upon its failure to curtail its load in accordance with the applicable tariff. Rather than bear the consequences of its risky fuel strategy, the customer instead has challenged PSE's management of the curtailment by commencing this complaint proceeding.

Kimberly-Clark Tissue Company ("Kimberly-Clark") has a paper and pulp mill and a cogeneration facility located in Everett, Washington (the "Everett Facility").¹ In December 1998, Kimberly-Clark was taking firm and interruptible gas transportation service from PSE under Rate Schedule 57. Even though its Everett Facility is capable of consuming up to 239,000 therms of natural gas per day, Kimberly-Clark secured firm transportation for only 14,000 therms. As part of its fuel strategy, the remaining load was served under interruptible service, which provides transportation at significantly lower rates in exchange for less reliable service. Under Rate Schedule 57, PSE may curtail interruptible transportation customers under certain circumstances. Rate Schedule 57 customers have the lowest priority of service (along with Rate Schedule 87 customers) of PSE's interruptible gas customers, and Kimberly-Clark's rates reflect this standard of service.

During the curtailment that began on December 19, 1998, and ended on December 28, 1998 (the "December 1998 Curtailment"), Kimberly-Clark had in effect a policy to consume "penalty gas" during a curtailment, under certain conditions, in order to keep its mill running. When Kimberly-Clark did not have sufficient diesel fuel oil to fuel one of its boilers, and another boiler required natural gas to continue to operate, Kimberly-Clark, consistent with its

policy, made the decision to consume gas in excess of its contracted-for firm transportation amount in order to keep the mill running from December 24 to December 28, 1998.

According to Kimberly-Clark's witness, Mr. Armstrong, this was an economic decision based on the cost of "penalty gas" compared with the cost of shutting down the mill operations.

PSE assessed a penalty charge of \$346,000 for Kimberly-Clark's unauthorized consumption of penalty gas during the December 1998 Curtailment.

In April 1999, Kimberly-Clark filed a formal complaint with the Commission claiming that PSE's determination to continue a curtailment of interruptible gas sales and interruptible transportation customers from December 25 until December 28, 1998, was "arbitrary and not justified by the circumstances." Kimberly-Clark is not claiming that PSE has interpreted its tariff incorrectly. PSE has an obligation under its tariff to resume service to certain other customers (those served under Rate Schedules 85 and 86) prior to resuming service to Kimberly-Clark. In this respect, Kimberly-Clark's expert agrees with PSE. Kimberly-Clark is claiming that (1) PSE did not provide adequate service because it did not resume service to all interruptible customers before December 28, 1998, and (2) PSE's determination that there was insufficient distribution capacity to serve all customers until after the morning peak on December 28, 1998, was unreasonable.

As the complainant in this case, Kimberly-Clark has the burden to prove its claims with substantial evidence. Kimberly-Clark has failed to do so. Kimberly-Clark sponsored an "expert" to provide opinions on whether PSE reasonably determined that there was insufficient distribution capacity to serve all of its customers through the peak on December 28, 1998. However, the expert retained by Kimberly-Clark, Mr. Owens, does not have the background and experience to qualify him to provide expert opinions on these

matters.

- He has never worked for a gas distribution utility.
- He has never managed a gas distribution system.
- He is not a licensed professional engineer in the State of Washington, but previously was licensed as a nuclear engineer in the State of California.
- He does not have any experience with PSE's gas distribution system.
- He has never participated in the process and management of a curtailment of interruptible gas customers.
- He has never provided an opinion in a formal proceeding as to the acceptable level of interruptibility.
- His evaluation of certain data provided by PSE is based on his experience working on a nuclear ship in the Navy over 25 years ago.

Although Mr. Owens has experience working for an electric utility and procuring natural gas supply for combustion turbines, his utility background provides no experience whatsoever with the standards of service required to serve interruptible gas transportation customers. Mr. Owens' opinions cannot constitute substantial evidence to support a finding that PSE did not provide Kimberly-Clark with adequate service or that PSE's determination regarding insufficient distribution capacity was unreasonable.

Through its Complaint, Kimberly-Clark is seeking a higher standard of service than it is entitled to under the tariff, and is seeking to avoid paying the costs of penalty gas that it chose to consume to the detriment of PSE's firm gas sales customers. Its complaint is without merit, and should be rejected. PSE properly implemented its tariff, and the charges imposed upon Kimberly-Clark were appropriate and necessary under the tariff.

II.BACKGROUND

A. Statement of Facts

In December 1998, PSE had an emergency response process in place that could be initiated in the case of a major cold weather event, which could lead to actions such as systemwide curtailment to respond to insufficient distribution capacity. Ex. T-81, p. 4. As part of that process, the 24-Hour Operations group and the Operations Planning Department develop operational plans to respond to insufficient distribution capacity on the gas distribution system. Id. Senior management is involved in reviewing operational plans and authorizing key actions, and an emergency response planning supervisor ("ERPS") is designated as the focal point for executing key actions in the operational plan. Id.

During the week of December 14, 1998, Mr. Riley, PSE's Day System Manager-Gas, began to see weather forecasts that were of concern. Ex. T-101, p. 4. Mr. Riley testified that by Thursday, December 17, most of the weather services were predicting a cold front to arrive by the early hours of December 21, 1998. Id., p. 5. In response to the forecasted cold front, Mr. Riley, his supervisor in 24-Hour Operations, Virgil Hofkamp, and individuals in Operations Planning participated in the development of an initial curtailment plan. In order to develop that initial plan, Mr. Riley relied on Stoner models prepared by Operations Planning.

Ex. T-91, p. 12. These models simulate the effect of various events on distribution system capacity.

Ex. T-101, p. 5. The assumptions in the Stoner models include customer load, peak hour factors and forecasted temperatures. Id.; T-91, p. 7. Under the initial curtailment scenario, PSE believed that it

would need to curtail all interruptible customers beginning in the early hours of Monday, December 21, 1998, when the forecasted low was for 19 degrees Fahrenheit. Tr. 232; Ex. T-101, p. 5; Ex. 51, Ex. 103.

However, the cold front moved in more quickly than expected and had a "greater than expected impact" on PSE's gas distribution system. Ex. T-101, p. 5; T-91, pp. 12-13. Gas Dispatch was receiving

numerous customer service calls on Friday, December 18, when the low temperature at SeaTac was 30 degrees and the high temperature was 40 degrees. Ex. T-101, p. 3; Ex. 103. Customer service calls are an indicator of potential low pressure problems and are used to identify areas where distribution system capacity is constrained. Ex. T-91, p. 6. Mr. Riley and Ms. Caswell, Manager of Operations Planning, spoke on Saturday morning (December 19) and agreed that given the condition of the gas distribution system, the curtailment needed to be called earlier and should include all interruptible customers. Ex. T-101, p. 6. The curtailment was moved up to that Saturday (December 19) at 10:00 p.m. Id.; Tr. 232.

Over the next four days of sustained cold, PSE continued to have problems with the gas distribution system, even with all interruptible customers curtailed. In areas of the gas distribution system, firm customers were asked to reduce consumption, temporary gas mains were run above ground to help relieve constraints, and pressures were elevated. Tr. 241. There were significant numbers of customer service calls, which Mr. Riley described as "extreme." Tr. 319. There were two sizeable firm service outages on December 22, and many smaller outage and low pressure situations occurred throughout December 20 through December 24, 1998. On Sunday, December 20, an Emergency Center was opened at the Mercer Street PSE office to handle the mobilization and deployment of resources required to respond to the condition of the gas distribution system.² Tr. 236-38. During the curtailment, Mr. Riley was the ERPS. Ex. T-101, p. 3. As the ERPS, Mr. Riley was the focal point for execution of key actions authorized by senior management throughout the December 1998 Curtailment. Ex. T-81, p. 4.; Ex. T-101, p. 3.

On December 24, 1998, Mr. Riley participated in a meeting with his supervisor, Virgil Hofkamp, who was the Director of 24-Hour Operations; Carol Wallace; Elaine Kaspar and others regarding the parameters around which curtailment would be extended. Ex. T-101, page 8. The group called

Mr. Hogan, Vice President of System Operations for PSE, to discuss those parameters. Id. Mr. Hogan was part of the senior management group that was involved in the cold weather planning and curtailment action during the December 1998 Curtailment. Ex. T-81, p. 6. He was the senior manager responsible for the industrial and commercial customers that were being curtailed. Mr. Hogan also had extensive experience with the gas distribution system based on his prior employment by WNG, and had previously worked with Mr. Riley and Ms. Caswell at WNG. Id. During their telephone conference with Mr. Hogan, the condition of the distribution system was discussed, as were the weather forecasts, the past inaccuracy of the forecasts, and the Monday forecasted peak load. Exs. T-101, pp. 8-9; T-81; pp. 7-8.

According to Mr. Riley, on December 24, the condition of the gas distribution system was not significantly different than the condition of the system on the day before when the low temperature at SeaTac was 20 degrees Fahrenheit. There were still frozen meters, regulators, mains and service lines. Ex. 106 illustrates that on December 24, customer service calls were located throughout the system in concentrated groups. Ex. T-101, p. 8. There was snow on the ground. Mr. Riley discussed these system conditions, as well as the weather forecasts, with Mr. Hogan. Id. at pp. 8-9. In particular, Mr. Riley told Mr. Hogan that the weather forecasts were inconsistent, with some forecasting continued cold through the weekend and the following week, and others indicating a warming trend after Christmas Day. Ex. T-101, p. 9; Ex. 104. Mr. Riley also pointed out the inaccuracy of the past forecasts. Overall, forecasts for the past seven days had been colder than predicted. Ex. 109. Based on the forecasted temperatures, inconsistencies in the forecasts and the past inaccuracies in the forecasts, Mr. Riley planned for temperatures between 30-35 degrees Fahrenheit. Mr. Riley was aware from discussions with Operations Planning that Stoner model simulations verified that PSE would not be able to serve interruptible loads in this range of temperatures without risking service to firm customers. Ex. T-101,

pp. 9-10. Mr. Riley was also concerned that the system had not rebounded from the previous five days of cold weather. Based on his past experience, when distribution capacity has been stressed, it may take a significant period of time to rebound. Id. at 10. The Monday expected peak flows were also a concern. Curtailment plans are developed and implemented based on the peak flow conditions during any one gas day, and this factor was also considered. Tr. 289-90.

On December 24, 1998, Ms. Caswell provided input to Mr. Riley as to whether the curtailment should continue. Ex. T-91, p. 13. Ms. Caswell confirmed Mr. Riley's conclusions. Ms. Caswell based her confirmation on her experience and on the data contained in the Stoner models in Ex. C-94 (which were available to Ms. Caswell in December 1998), the forecasts for continued cold, the existing distribution problems and the Monday expected peak flows. Id.

Mr. Hogan considered Mr. Riley's recommendations. He was aware that Mr. Riley had conferred with Ms. Caswell, and that Mr. Riley had considered her input. Ex. T-81, p. 8. Mr. Hogan also reviewed the applicable tariff provisions with Mr. Heidell, who was in PSE's regulatory department at the time. Mr. Hogan made the determination that although keeping interruptible customers curtailed would result in reduced revenues to PSE, the Company's first priority was to ensure that firm service would be maintained. Id. Given the condition of the distribution system on December 24, 1998, PSE anticipated that the curtailment would continue through the peak on Monday morning (December 28).

On December 24, while PSE was reviewing the condition of the gas distribution system, Kimberly-Clark learned that its fuel supplier would be unable to deliver any additional diesel fuel oil after 6:30 p.m. that night until 12 p.m. on December 28, 1998. Kimberly-Clark's Power Asset Operations Leader, Mr. Walton, learned about this over the telephone from another Kimberly-Clark employee. On December 24, Mr. Walton was not on-site; he was "on Christmas holiday." Tr. 108. Mr. Walton did not attempt to contact any other diesel fuel suppliers to arrange for delivery of fuel

during the period from December 24 through December 28, 1998. Mr. Walton could have contacted Scott Andrews, the purchasing agent for Kimberly-Clark, to get authorization to use an alternate fuel supplier, but did not do so from December 24 through 28. Ex. 167, pp. 54-58; Ex. 158; Tr. 112. No one else at Kimberly-Clark attempted to get diesel fuel oil delivered to the Everett Facility, either. Although Mr. Walton believed that there was a low supply of hog fuel, he did not personally inspect the wood waste pile on December 24. Kimberly-Clark reduced the wood firing rate on the No. 14 boiler to reduce the risk of "running out" completely. This made it necessary to "co-fire" with fossil fuel (in this case, natural gas). Mr. Walton was under the impression that as of December 19, 1998, the fuel pile at the Everett facility was half full, containing approximately 3,000 wet tons. Ex. 153. As of December 24, 1998, however, there were actually 18,375 wet tons of wood waste available to fuel the No. 14 boiler at the Everett facility. Even though this would have been enough wood waste to fuel the No. 14 boiler for approximately nine days (Tr. 104), Kimberly-Clark continued to limit its consumption of wood waste. Ex. 139.

From December 24 through 27, 1998, Mr. Riley continued to monitor weather forecasts and was in contact with Gas Control, which monitors SCADA¹ information 24 hours a day, and Gas Dispatch, which keeps track of customer service orders. Ex. T-101, pp. 3, 6, 7 & 11. Mr. Riley came into the office on Christmas Day and over the holiday weekend. Tr. 315. Mr. Riley has approximately fourteen years' experience in curtailment planning and implementation. Ex. T-101, p. 12. He did not believe that the parameters over the weekend changed significantly, and did not believe that it was appropriate to initiate discussion to resume service to interruptible customers over the weekend. Id. The resumption plan was not adjusted. In accordance with the plan, meter readers began reading the meters of Rate

¹ SCADA refers to the System Control and Data Acquisition system that is used by PSE to monitor and manage its gas distribution system. Ex. T-91, pp. 4-5.

Schedule 86 customers on Monday, December 28. Tr. 215. From the period after peak use on the morning of December 28, 1998, service was restored in the priority of service provided for under Rule 23. Ex. 132. All interruptible customers were resumed by 5:00 p.m. on Monday. Ex. 132.

Prior to the merger between Washington Natural Gas Company ("WNG") and Puget Sound Power and Light Company in February 1997, WNG had a process in place to manage curtailments of customers taking interruptible gas sales and transportation service. The management of the curtailment process during the December 1998 Curtailment at PSE was consistent with management of the process that occurred at WNG. Ex. T-101, p. 12; Ex. T-91, p. 14.

B. Statement of Law

PSE is required to provide service to its customers under the terms and conditions established by its tariffs. In re Washington Natural Gas, Docket No. UG-950450, 1995 Wash. UTC LEXIS 33, *9 (1995) (law requires public utilities to charge at the tariffed rate and provides no exemption for varying circumstances). PSE's Natural Gas Tariff ("Tariff") contains the general rules under which PSE provides service to its gas sales and transportation customers, as well as the individual rate schedules under which customers take specific service. In addition, individual rate schedules may require that customers enter into service agreements with PSE.

1. The Tariff Establishes Priority of Service Among PSE's Customers

PSE provides firm gas sales service to its firm or core customers. It is these customers that PSE has designed its system to serve. These customers pay rates that are reflective of the quality of service--i.e., firm--that these customers receive. Rule 21 of the Tariff establishes that firm gas sales customers have priority of service over all interruptible classes of service. Rule 21 provides that

[n]o curtailment in firm gas service will be imposed by the Company until all interruptible service customers in the area affected have been ordered to curtail to one hundred percent of their interruptible requirements.

Rule 21, Section 1. PSE also has three rate schedules for interruptible gas sales service. Rate Schedule 86, 85 and 87 all provide that customers may be curtailed when their use interferes with customers that have a higher priority of service. PSE also offers interruptible transportation service under Rate Schedule 57. Under Rate Schedule 57, PSE may curtail interruptible transportation service customers when

[t]he Company's gas supply or distribution capacity is insufficient to meet the estimated requirements of all firm sales customers, interruptible sales customers, and transportation customers.

Schedule 57, Section 15(1) (emphasis added). Under Rate Schedule 57, curtailment periods may be declared at the sole judgment and discretion of PSE. Rule 23 addresses curtailment of interruptible customers and service priority of those customers. Under Rule 23, the Company

may curtail interruptible sales service if the company's . . . distribution capacity is insufficient to meet estimated requirements for all customers on uninterruptible sales and transportation service.

Rule 23, Section 1(1). And the Company

may curtail interruptible transportation service if the Company's distribution capacity is insufficient to meet estimated requirements for all customers on interruptible sales and transportation service.

Rule 23, Section 1(2). Rule 23 also establishes the order of service priority when curtailments are caused by insufficient Company distribution capacity. Rate Schedule 86 customers have the highest priority of service, followed by Rate Schedule 85 customers and finally by Rate Schedule 87 and 57 customers.

It is clear from the language of PSE's tariffs that firm service has a priority of service over all interruptible classes of service, and that there are established priorities of service within the interruptible rate schedules. Customers served under Rate Schedule 57--such as Kimberly-Clark--have the lowest priority of service, which means that when PSE is unable to meet the distribution capacity requirements of all firm and interruptible customers, service to Rate Schedule 57 customers is curtailed first and resumed last. Similarly, in a situation where PSE is unable to meet the requirements of all its

interruptible gas sales and transportation customers, service to Rate Schedule 57 customers (i.e., Kimberly-Clark) is curtailed first and resumed last. In a systemwide curtailment where all interruptible customers are curtailed, service is resumed by Rate Schedule, in the priority of service established under Rule 23.³ Rate Schedule 57 customers (along with Rate Schedule 87 customers) have the least priority and have service restored last. The rates for interruptible customers reflect this priority of service.

Ex. T-81, p. 3.

2. Interpretation of Tariff Provisions and Service Agreements

Rule 1 of PSE's Tariff describes how the rules, rate schedules and service agreements are interpreted within the Tariff. Rule 1 provides that

[r]ules and regulations shall govern all service except as specifically modified by the terms and conditions of the rate schedules, written contacts, or service agreements.

Tariff, Rule 1, Section 1. Rate Schedule 57 customers are required to enter into service agreements.

Paragraph 6 of the Rate Schedule 57 Service Agreement provides that the Company

reserves the right to declare these [constraint] periods at such time and for such duration as the Company deems necessary in order to manage its gas distribution system.

Ex. 111, p. 6. This Service Agreement language is consistent for all Rate Schedule 57 customers. Id.

III. ARGUMENT

A. PSE's Obligation to Serve Interruptible Customers Is Defined by Its Tariff and the Language of the Rate Schedule 57 Service Agreement

In its Complaint, Kimberly-Clark alleged that PSE failed to provide service consistent with its statutory duty under RCW 80.28.010(2). RCW 80.28.010(2) provides that

[e]very gas company, electrical company and water company shall furnish and supply such service, instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable.

RCW 80.28.010(2). However, the language of the statute does not exist in a vacuum. The service

requirements for interruptible customers with which PSE must comply are set forth in PSE's Tariff and service agreements. Bloom Township High School, et al. v. Commonwealth Edison Co., 1998 Ill. PUC LEXIS 1150 (1998) ("Bloom Township") (interruptible customers could not require greater service obligation than provided for in tariff).

Under PSE's Tariff, in a situation where there is insufficient distribution capacity, firm customers have first priority to that capacity. After firm customers, interruptible sales and transportation customers have the priority of service established under Rule 23. The Tariff does not establish the criteria PSE must use for determining whether distribution capacity is sufficient to serve all customers. Nor does it require a specific process for managing curtailments of interruptible customers. The Tariff and PSE's Rate Schedule 57 service agreement specifically provide PSE with the discretion to manage curtailments and to make determinations about distribution capacity. PSE does not dispute that these determinations should be made in a reasonable manner. PSE does dispute Kimberly-Clark's contention that PSE did not make these determinations in a reasonable manner.

To support its allegations, Kimberly-Clark hired an expert to provide his opinions on (1) whether PSE provided an acceptable quality of service from December 25 to 28, 1998, and (2) whether the condition of the system supported PSE's determination that there was insufficient distribution capacity to serve Rate Schedule 57 customers. However, the conclusions in Mr. Owens' testimony are based on his apparent misconception that the standard of service required to serve Rate Schedule 57 customers is the same standard of service required to serve firm gas customers. Furthermore, although Mr. Owens has no background or experience in managing any gas distribution system, and in fact was licensed only as a nuclear engineer, he has been offered by Kimberly-Clark as qualified to opine on the reasonableness of PSE's determination that there was insufficient distribution capacity to serve all customers from December 25 through 28, 1998. Mr. Owens' opinion testimony simply does not provide substantial

evidence that PSE was unreasonable in implementing its Tariff and the Rate Schedule 57 Service Agreement.

1. Mr. Owens' Opinion That PSE Did Not Provide an Acceptable Quality of Service Is Based on His Application of the Wrong Standard of Service

Mr. Owens testified that a public utility is required to provide service that is "safe, adequate, efficient, just, and reasonable" and that this obligation includes the "duty to provide adequate service to the extent possible during unusual weather conditions." When Mr. Owens was questioned in his deposition about the source of this standard, he recalled that some of these terms were drafted by Kimberly-Clark's counsel. Ex. 168, pp. 30-31. According to Mr. Owens, absent extreme circumstances, a public utility has the obligation to serve its customers 24 hours a day, 365 days a year. Ex. T-11, p. 8; Ex. 168, p. 49. Mr. Owens is relying on an inapplicable standard--one that applies for providing service to firm customers--as the basis for whether PSE provided adequate service to an interruptible transportation customer, Kimberly-Clark. Since Mr. Owens is applying the wrong standard of service, his opinion that PSE did not provide adequate service to Kimberly-Clark is fatally flawed.

Further evidence that Mr. Owens is applying the wrong standard of service is his opinion that restoration of service to firm customers and monitoring a curtailment of interruptible customers requires the same level of involvement of senior management.⁴ Ex. T-12, p. 10. In his deposition, Mr. Owens provided two examples from his experience to support his opinion. One of these examples was an outage at the Trojan nuclear power plant that involved the loss of 1,100 megawatts. Ex. 168, p. 39-41. PSE's Mr. Hogan testified, however, that this type of outage would potentially have affected thousands of firm customers. Ex. T-82, pp. 2-3. The other example involved Keyspan's response to forecasts of a hurricane on Long Island. Again, those that lost service would have included residential as well as other firm and interruptible customers. As Mr. Hogan testified, these situations are not analogous to the resumption of service to interruptible customers, because

the situation of residential customers depending on electricity for essential needs, such as light and heat, is vastly different than that of an interruptible industrial customer, which has made a conscious economic decision to contract for cheaper, less reliable service because a back-up fuel or its ability to alter its operations.

Id.

This Commission has recognized that different levels of service obligations can exist for different end use customers. In WUTC v. The Washington Water Power Company, Docket No. UG-901459, Third Supplemental Order, the Commission stated that:

[a] gas company should, to the extent possible, make transportation service available to end-use customers without otherwise prejudicing its obligation to provide service to its core group of sales customers. The extent of its obligation does not rise to the level of "common carrier" status whereby the company would be required, under any circumstances, to provide transportation service to all who request it.

Third Supplemental Order at 2 (1992) (emphasis added). PSE does not design its gas distribution system to serve interruptible customers under all conditions. Ex. T-91, p. 4.

Contrary to Mr. Owens' testimony, curtailment of interruptible customers is not limited to extreme conditions. Kimberly-Clark was on notice in 1995 that it could be curtailed at temperatures of 45 degrees Fahrenheit. Ex. 97. Moreover, firm customer growth affects the availability of distribution capacity to serve interruptible customers and may impact curtailment decisions, as does the addition of interruptible customers' load, which has a higher priority of service under PSE's Tariff. Id. As Ms. Caswell testified, the Everett/Marysville area has had an average growth rate of 10%. Ex. T-91, p. 16. Requiring PSE to provide service to interruptible customers except in extreme circumstances--the standard urged by Mr. Owens' testimony--is a higher standard of service than required by PSE's Tariff.² This level of service for interruptible customers would prejudice PSE's service to firm sales customers

² Even, Mr. Owens agreed that interruptible services are different from firm services and PSE's obligation to a firm customer is certainly "much higher" than for an interruptible customer. Ex. 168, pp. 32-33.

because the system is not designed to meet interruptible customers' loads under all but extreme circumstances. Id. Ex. T-91, pp. 15-17.

Bloom Township, like this proceeding, involved a situation where a customer demanded service levels that exceeded the utility's obligation under the tariff. In Bloom Township, interruptible electric customers were taking service under a tariff that provides that a customer may purchase energy during a curtailment at a cost of \$.15/kWh for all kilowatt-hours consumed during the curtailment period associated with 30-minute demands that exceed the customer's firm power level. The tariff also provided that

[t]he availability of such energy shall be at the discretion of the company, which shall notify the customer of its expected availability at the time the notice of curtailment is given. A reasonable effort to maintain that availability during a curtailment period will be made.

Id. at *4. When the utility, Commonwealth Edison (or ComEd), requested curtailment by customers without offering buy-through energy, interruptible customers disputed whether ComEd interpreted its tariff correctly. Although the main question was one of tariff interpretation in Bloom Township, the commission held that under the tariff, ComEd was not required to make efforts to source buy-through energy. In other words, no greater standard of service than that which was provided by the tariff was required of ComEd. Id. at 24.

The evidence presented in this case demonstrates that service to interruptible customers was resumed when PSE determined that resumption of service to these customers would not jeopardize firm service. A standard of service for interruptible customers higher than is provided for in PSE's Tariff and service agreements should not be imposed on PSE. Kimberly-Clark has not paid rates that reflect this higher standard of service.

2. PSE's Process for Managing the December 1998 Curtailment Was Consistent With the Tariff and the Rate Schedule 57 Service Agreement

The language of Rate Schedule 57 does not delineate a specific process that PSE is required to use to determine whether there is sufficient distribution capacity to serve all customers. Rather, it states that PSE may call constraint periods for insufficient distribution capacity in its sole judgment and discretion. The Rate Schedule 57 service agreement specifically states that PSE "reserves the right to declare these [constraint] periods at such time and for such duration as the Company deems necessary to manage its distribution system." Ex. 112, p. 1.

Mr. Hogan testified that PSE has a process in place to manage events such as a systemwide curtailment to respond to insufficient distribution capacity. Ex. T-81, p. 4. This process is described in Mr. Hogan's testimony and in the Statement of Facts, above.

The evidence demonstrates that PSE followed this process in both planning for curtailment of interruptible customers and in planning for the resumption of service to interruptible customers.

With respect to resumption of service, on December 23 and 24, Mr. Riley discussed resumption of interruptible customers with Ms. Caswell, Manager of the Operations Planning Department. On December 24, 1998, Ms. Caswell confirmed that given the forecasted temperatures, the existing distribution problems and the expected peak flows on Monday, December 28, 1998, continued curtailment of interruptible customers was necessary to ensure that firm service was maintained. Ex. T-91, p. 13. In addition, Mr. Riley met with the Director of 24-Hour Operations, Virgil Hofkamp, and others to discuss the parameters around which curtailment would be extended. Ex. T-101, p. 8. At this meeting, Mr. Hogan, an officer of PSE, was called to review these parameters. During this conference call, Mr. Hogan was informed of the parameters. Tr. 209-10.⁵ Mr. Hogan made the determination to continue the curtailment until interruptible service could be resumed without jeopardizing firm service. Ex. T-81, p. 8. Based on the condition of the system on December 24, 1998,

PSE anticipated that the curtailment would continue through peak on Monday morning (December 28).

Id.

Kimberly-Clark's expert witness, Mr. Owens, had no basis to compare PSE's management process with the process used at other gas distribution companies, given his lack of experience with gas distribution operations. Both Mr. Riley and Ms. Caswell testified that PSE's process was consistent with that used at WNG, and Ms. Caswell testified that this process appears to be substantially similar to that used at Northwest Pipeline. Ex. T-91, p. 14.

PSE's tariff and the Rate Schedule 57 Service Agreement provide PSE with discretion in calling curtailments for insufficient distribution system capacity and in the management of curtailments. PSE should be accorded some deference when operating its business on a day-to-day basis. See Bernstein & Bernstein PC v. Duquesne Light Co., Pa. PUC LEXIS 63, 1992 (without a provision for deference to a utility in emergency situations, one could conceivably argue a utility is bound to supply service in the most expeditious manner without regard to expense, safety or those myriad other factors a utility must take into consideration when operating its business on a day-to-day basis); State ex rel. Pac. T. & T. Co. v. D.P.S., 19 Wn.2d 200 (1943) (in the absence of any showing that officers have abused their discretion or acted arbitrarily, illegally or beyond their lawful authority, courts will seldom interfere in the methods of management of a business).

3. The PSE Employee With the Requisite Knowledge and Authority Monitored the Gas Distribution System During the Time Period From December 25 Through the Morning of December 28, 1998

Mr. Paul Riley was the individual responsible for managing the gas distribution system, monitoring the performance of the gas distribution system and implementing the curtailment. As Mr. Riley testified, he was in the office on December 23, 1998, reviewing SCADA data, and had continuing discussions with individuals in Operations Planning and with Virgil Hofkamp, among others. Tr. 313; Ex. T-101, pp. 7-8. Mr. Riley was also in the office on December 24, 1998. Tr. 315. During this time, Mr. Riley was aware from discussions with Operations Planning that the Stoner models verified that PSE would not be able to serve interruptible loads with temperatures in the 30- to 35-degree range. Mr. Riley was also in the office on December 25, 1998. Id. While Mr. Riley could not recall exactly when he was in the office over the holiday weekend (December 26 and 27), he did recall that he went into the office during that period. Id. In addition, Mr. Riley remained in contact with Gas Control and Gas Dispatch, and continued to review weather forecasts, information about customer service calls and SCADA readings over the holiday weekend. Ex. T-101, p. 11. He also testified that the 24-Hour Operations Group arranged for additional customer service personnel, who worked throughout the weekend to respond to service calls from firm customers. Id. Despite the curtailment, service calls continued to come in over the holiday weekend that indicated low pressure problems. Ex. C-106.

Mr. Riley made the determination that the parameters did not change sufficiently to resume service to interruptible customers over the weekend. Ex. T-101, p. 12. The factors that Mr. Riley took into consideration are more fully described below. The record does not support Mr. Owens' statements that "PSE management"⁶ did not review or monitor PSE's December 24, 1998 decision to continue the curtailment until interruptible service could be resumed without jeopardizing firm service, or that "[I]ittle (if any) review or analysis seems to have occurred after that time." Ex. T-11, p. 7; Ex. T-12, p. 10.

Kimberly-Clark has presented no evidence that Mr. Riley is not competent to perform his responsibilities or that he did not have the requisite knowledge to analyze and interpret the information that he had access to during the curtailment. In fact, Mr. Riley has significantly more experience than Mr. Owens in the management of a gas distribution system, the management of curtailments, and the evaluation of distribution capacity constraints on PSE's gas distribution system. Ex. 102. In the absence of any evidence that PSE or Mr. Riley did not comply with PSE's operating standards or accepted standards within the gas utility industry, PSE should be accorded deference in the way it manages curtailments. Bloom Township at *25-26.

B. PSE Reasonably Determined That There Was Insufficient Distribution Capacity to Serve All Firm and Interruptible Customers

The criteria that PSE uses to determine constraint periods includes the estimated loads of all customers, including adjustments for particular day and time of day, supply and transportation requirements of customers, actual and estimated temperatures, weather forecasts, recent and current weather conditions (including but not limited to snow cover, cloud cover, wind, and precipitation), condition of the distribution system, distribution system limitations, maintaining service to firm sales customers, past experience with distribution system and customer use, communications with customers, ability to communicate with customers, distribution system models and safety requirements. Ex. 133. Kimberly-Clark has provided no evidence that PSE's reliance on these criteria is unreasonable, and in fact, Mr. Owens acknowledged that customer complaints were a criterion that PSE should use to determine how the gas distribution system was doing. Ex. 168, p. 36. PSE also relies on the experience and background of its employees and in their observations in monitoring the gas distribution system to determine whether there is sufficient distribution capacity to serve all customers. The record demonstrates that PSE considered the relevant and appropriate criteria when it determined that there was insufficient distribution capacity to resume service to interruptible customers prior to December 28, 1998.

1. PSE's Determination to Continue the Curtailment Was Based on the Condition of the Distribution System

PSE's determination that there was insufficient distribution capacity to serve all customers during the December 1998 Curtailment relied on:

- Customer service orders that indicated potential low pressure problems and the locations of those service orders;
- Review of RTU data in the SCADA system throughout the gas distribution system;
- Stoner models based on the information available to PSE in December 1998;
- Forecasted temperatures and an analysis of the variation between actual and forecasted

temperatures to assess the reliability of forecasted temperatures;

- The effect of frozen meters, regulators, mains and service lines on the distribution capacity of the gas distribution system; and
- The effect of several days of cold weather on the ability of the gas distribution system to rebound.

Monitoring of Customer Service Orders. As Mr. Riley testified, customer service calls often indicate pressure problems and stress on areas at the distribution system.

Ex. T-101, p. 6. Customer Service calls are looked at in a different context during cold weather than during normal periods. Tr. 336. Analysis of the location and concentration of customer calls can identify areas where distribution system capacities are constrained. Id. Although the sheer volume of customer service orders decreased from December 25 through 27 as compared to the "extreme" numbers that were seen during the coldest period of the curtailment, Mr. Riley testified that the number of service calls on December 25, 26 and 27 were much higher levels that he would expect to have on a holiday weekend. Tr. 319. In addition, the customer calls PSE received on December 24 were located throughout the system in concentrated groups. Ex. Tr.-101, p. 8. Mr. Riley was concerned that customer service calls were concentrated in areas where there were high concentrations of rate schedule 86 customers. From a review of Ex. 106, which depicts the number and location of customer service calls from December 24 to 28, 1998, it is clear that PSE was receiving customer service calls in the area where Kimberly-Clark and a number of Rate Schedule 86 customers are located. Compare Ex. 106 to Ex. 108. Mr. Riley concluded that adding Rate Schedule 86 customers back on to a system that had not yet rebounded would likely lead to the loss of service to firm customers. Ex. T-101, p. 10. Additionally, he determined that if there was not sufficient distribution capacity to serve the smallest of interruptible customers (Rate Schedule 86), the large customers (Rate Schedules 85, 87 and 57) could have an even greater negative effect on the system. Id. at 11.

Review of RTU Data. Gas control was reviewing RTU data throughout the holiday weekend. At that time, Mr. Riley would have had access to SCADA data. Mr. Riley also testified that he was in contact with Gas Control throughout the weekend, and continued to review information about SCADA readings. Ex. T-101, p. 11.

Use of Stoner Models. The Stoner modeling information available at the time indicated that given temperatures in a range of 30 to 35 degrees Fahrenheit with peak hour factors ranging from 6 percent to 7.5 percent, PSE would not be able to serve all of its customers. Curtailment of interruptible customers would be necessary to ensure service to firm customers at these temperatures. As Ms. Caswell testified, not only does her staff run models on a daily basis, but any PSE personnel involved in cold weather planning would have access to Stoner information. Tr. 267-68. The modeling information that was available to Ms. Caswell and Mr. Riley demonstrated that at a temperature of 35 degrees Fahrenheit, PSE's gas distribution system had insufficient distribution capacity to serve all firm and interruptible customers from December 24 through December 28 during peak flow conditions. As Ms. Caswell pointed out during the hearing, PSE is using a temperature that is forecast for the time that peak usage hours or that peak flows will be occurring. Tr. 290. Ms. Caswell explained that for purposes of modeling distribution capacity, the critical issue is how the cold hits during the peak hour, not how "the cold has stacked up through [the] day." Tr. 289.

Analysis of Weather Forecasts. Mr. Riley was relying on Weather Net forecasted temperatures that indicated low temperatures would be around 35 degrees on December 26 and December 27, 1998. In addition, Mr. Riley had also received forecast information that showed there would be continued cold through the weekend and the following week, while others were indicating a warming trend after Christmas Day. Ex. T-101 p. 9; Ex. 104, PSE 1228. In addition, forecasted temperatures had been higher, rather than lower, than actual temperatures from December 17 until December 24, and Mr. Riley

knew that if this pattern held true, PSE's gas distribution system would experience greater distribution capacity constraints in the coming days. Ex. T-101, page 9.

Consideration of Frozen System Equipment. On December 24, Mr. Riley also considered that there were still frozen meters, regulators, mains and service lines and that system pressures had not rebounded from the last five days of cold weather. Ex. T-101, p. 10. The period that the system takes to return to its prestress behavior varies due to a number of factors including the duration and the severity of the event. Id. Both Mr. Riley and Ms. Caswell testified that Stoner models do not take into account the effect of a long cold period on distribution system capacity, and therefore the Stoner models may be viewed as optimistic. Ex. 91, p. 8; Ex. T-101, p. 10. Ms. Caswell further testified at the hearing that the distribution system also has a problem "catching up" after five days of extended cold. Tr. 300.

2. Subsequent Analysis Confirms the Correctness of PSE's Determination

Ms. Caswell reviewed all of the criteria on which PSE relied to make the decision to continue the curtailment through the peak usage period on December 28, 1998. She found that based on the criteria that PSE uses, there was insufficient distribution system capacity to meet the estimated requirements of all interruptible customers from December 24, 1998, through the peak usage period on December 28, 1998. Ex. T-91 at 9. In addition to the information identified above, Ms. Caswell developed a Stoner model plot to evaluate the actions that PSE took during the curtailment. Ex. T-91 at 10. Although this exhibit was prepared after December 1998, it reflects the customers that were on the system during that period. Tr. 270-71. Ms. Caswell plotted a Stoner model to demonstrate whether there were distribution system capacity constraints for a 380 Fahrenheit day (the 24-hour forecast for gas day December 27, 1998),⁷ with interruptibles in the appropriate priority of service and with a 6% peak hour factor. In addition, Ms. Caswell added the actual peak load that Kimberly-Clark and another large customer (identified in Ex. C-96) consumed while they were burning penalty gas during the December 1998 Curtailment.³ Ms. Caswell testified that this Stoner plot demonstrates that with resumption of interruptible customers at 380 Fahrenheit and a 6% peak factor and the levels of consumption that Kimberly-Clark and this other customer were using, system failures for firm customers would have existed and PSE would have forecasted insufficient distribution system capacity to serve all customers. Ex. T-91, p. 10. Under PSE's Tariff, since Kimberly-Clark has the lowest priority of all interruptible customers, its service clearly would not have been resumed on December 27, 1998, even if PSE had made the determination to attempt to add Rate Schedule 86 customers on that day.⁴

³ Ms. Caswell testified that these two customers were added in because they were very significant users of gas during the curtailment period, and they impact significantly on this supply system [PSE's high pressure distribution system]. Tr. 270.

⁴ And as Mr. Riley testified, Rate Schedule 86 customers remained curtailed based on an evaluation of the location of firm customer complaints in the area where Rate Schedule 86

In addition to concerns about the condition of the distribution system, there was also a concern about the peak hour on Monday morning, and that resumption of interruptible customers prior to the peak hour on Monday, December 28 would lead to additional loss of firm service.⁵ As Ms. Caswell testified, for purposes of modeling distribution capacity, PSE models what is happening when the peak is occurring, including temperatures at that time. PSE then uses that information as the degree day review. Tr. 290. PSE makes its curtailment decisions based on this information, in addition to the criteria identified in Exhibit 133, to determine whether interruptible customers will be curtailed for any particular gas day. Ms. Caswell, who has significantly more experience in managing a gas distribution system than Kimberly-Clark's expert Mr. Owens, and who has the appropriate engineering background to evaluate distribution system capacity constraints, has testified that the Stoner modeling system is a "standard tool for anybody in a local distribution system And without it, you cannot make guesses as to what's happening on the system." Tr. 262.

3. Mr. Owens Is Not Qualified to Give an Opinion as to the Reasonableness of PSE's Determination That There Was Insufficient Distribution Capacity to Serve All Customers From the Time Period From December 24 Through Peak Use on December 28, 1998

Mr. Owens does not have the experience and qualifications necessary to opine on whether PSE's determinations regarding distribution capacity were reasonable during the December 1998 Curtailment. This is illustrated by his reliance on selected data and his mischaracterization of what that data demonstrate.

Mr. Owens testified that his experience from more than 25 years ago in the U.S. Navy qualifies

customers were located. Ex. T-101, pp. 10-11.

⁵ Even with the curtailment through the Monday peak, PSE had 635 customer service calls, which potentially indicated low pressure problems. The number of customer service calls was comparable to the extreme number of customer service calls that PSE received during the week. Ex. T-101, p. 12.

him to provide his expert opinion on whether PSE had sufficient distribution capacity to serve all customers for the gas day December 25, 1998, through peak period on December 28, 1998.⁸ However, when questioned about the comparability of Mr. Owens' experience with the operation of high, medium and low-pressure steam, pressure reduction, steam turbines, high pressure water and other systems to PSE's gas distribution system, Mr. Owens testified that:

- The system to which he was referring is contained within one Navy vessel (Tr. 66);
- It has "much less" miles of distribution main than PSE's gas distribution system does (Tr. 65);
- It did not involve distribution of natural gas (Tr. 65); and
- It did not involve analysis of weather forecasts to anticipate demands on the system (Tr. 68).

While this experience demonstrates Mr. Owens' ability to read a pressure gauge, it does not demonstrate the capability to evaluate whether there was sufficient distribution capacity to serve all customers during the December 1998 Curtailment. His lack of experience is compounded by his reliance on only selected data and his limited "analysis" of this selected data.

Mr. Owens relied on only 9 RTU points out of 212 to evaluate the condition of the gas distribution system. Ex. C-21. In response to Kimberly-Clark's data request seeking documents that demonstrate there was insufficient distribution capacity to serve all customers from December 25, 1998, until December 29, 1998, PSE originally provided 54 data points. These included data points for the high-pressure system, particular customers, the intermediate pressure system and temperature data. Tr. 285. PSE supplemented its response to the data request and identified all RTU data from December 17, 1998, to December 29, 1998, as responsive.⁶ This data was made available to Kimberly-

⁶ Ms. Caswell testified that PSE was originally confused as to the exact information Kimberly-Clark was looking at to understand what factors led to that decision and subsequently supplemented the data request to identify that there are thousands of pieces of data actually supporting the decision. Tr. 284.

Clark. Ex. 132. Mr. Owens continued to rely only on the 9 data points to support his opinion that PSE did not reasonably determine that the curtailment should continue until December 28, 1998.

Ms. Caswell also testified that evaluation of the condition of PSE's gas distribution system would require evaluation of the information from all the RTU sites. Tr. 275. Ms. Caswell testified that one would not solely rely on information from the intermediate pressure system in order to evaluate the system as Mr. Owens did.⁷ Id. at 275-76.

In referring to Mr. Owens' Exhibit C-21, Ms. Caswell offered the following testimony:

Q. What does this graph tell you about PSE's distribution system?

A. Well, first off, let me characterize the information properly, at least to my understanding. This appears to be the low points at that these 9 RTU sites across a period of time. And it is not actually what one would see if one were looking at the SCADA data. . . .

Q. And is it your understanding that on the 18th . . . interruptible customers were taking service; is that correct?

A. That's correct.

Q. But on the 26th, interruptible customers, with the exception of those who violated the curtailment, were not taking service; is that correct?

A. That's correct.

Q. So this doesn't exactly compare apples to apples; would that be a fair assertion?

A. That would be a fair assertion.

Q. Okay. And in terms of the data points, how many data points were reviewed for this chart?

A. This chart portrays nine data points.

Q. So to the extent you're talking about the gas distribution system, you would want to have more information that just this information in order to make an evaluation of, for example, whether the

⁷ Mr. Owens relies on these 9 RTU points to determine that pressures had returned to pre-curtailment pressures by December 26, 1998. Ex. C-21. Therefore, even if the Commission considered Mr. Owens' evaluation of these 9 data points to be probative, based on Mr. Owens' evaluation PSE would not have attempted to resume the highest priority interruptible customers until December 27, 1998. Ex. T-12, p. 4.

system had rebounded sufficiently to put on interruptible customers; is that correct?

- A. That's correct. I think it's important to note, as well, that these are really small systems that are being measured. None of them has the capability of serving even 1/20th of the load that's consumed by Kimberly-Clark's meter set.

Tr. 276-78. Mr. Owens does not rely on the Stoner models to evaluate whether there was sufficient distribution capacity during the December 1998 Curtailment. Ex. T-12, p. 3. He attempts to dismiss the importance of the Stoner models in evaluating distribution capacity by stating that it is his understanding that they are primarily used by natural gas distribution companies systems for planning purposes. Tr. 13, p. 2. As Ms. Caswell testified, the Stoner model is a standard tool for managing the local distribution system and that it is required when forecasting what is happening on the system. Tr. 262. Northwest Pipeline uses the same modeling system. Id.

During cross-examination, counsel for Kimberly-Clark asked Ms. Caswell whether she saw any temperatures in Exhibit C-22 that were below 400. Ms. Caswell offered the following observation of the conclusions Mr. Owens is apparently drawing based on his exhibits C-22 and C-21:

Just because we see the same temperature after five days of extended cold that we saw at the beginning does not mean you have the same distribution system capacity. It actually has eroded significantly at the capacity.

So to make a correlation between volumes and temperatures prior to any sort of significant cold and trying to use that same analysis subsequently really shows a limited understanding of how a distribution system works.

Tr. 300.

Apart from using a very small selection of data to support his opinions, Mr. Owens also mischaracterizes the data to support his opinions; in so doing, he neglects to disclose important information, such as in Ex. C-21, that he is comparing pressures in a system with all customers on to one with interruptible customers curtailed. At the very least, it is misleading to compare RTU pressures with all customers on against pressures that occur with interruptible customers curtailed, and to present that

comparison to show that service to interruptible customers could be resumed because pressures have returned to pre-curtailement levels. According to Ms. Caswell, who is experienced in evaluating the data routinely for PSE, the data used by Mr. Owens to support his opinions is incomplete and his interpretation of the data is wrong.

4. Mr. Owens' Reliance on Actual Temperatures Demonstrates That He Does Not Understand How Gas Distribution Companies Manage Curtailments and That He Is Using Hindsight to Determine Whether PSE's Actions Were Reasonable

Mr. Owens testifies that in his opinion the continuation of the curtailment after December 24 was not well taken. Ex. T-11, p. 5. One of the bases for Mr. Owens' opinion is that the weather began to warm up on December 24, 1998, and that it remained warm through the holiday weekend. Id. The temperature data that Mr. Owens relies on for this statement are the SeaTac actual temperatures provided by PSE contained in Exhibit 103. However, as Mr. Owens admitted in his deposition, PSE would not have known what the actual temperature was going to be prior to the day on which the actual temperature occurred. Ex. 168, p. 43. Throughout Mr. Owens' testimony, he continually relies on actual temperatures, comparing temperatures that occurred at the beginning of the curtailment with those occurring at the end of the curtailment.⁹

In ascertaining whether a utility's decision-making is reasonable, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible. In WUTC v. Puget Sound Power & Light Co., 62 PUR 4th 557, 584 (1984), this Commission adopted the following standard:

[I]n evaluating prudence it is generally conceded that one cannot use the advantage of hindsight. The test this commission applies to measure prudence is what would a reasonable board of directors and company management have decided given what they knew or reasonably should have known to be true at the time they made a decision.

Id. (emphasis added). This standard is consistent with that used by other utility commissions when reviewing management decisions. See Re PNM Gas Services, 188 PUR 4th 448 (1998) (citations omitted) (prudence is that standard of care which a reasonable person would be expected to exercise

under the same circumstances encountered by the utility management at the time decisions had to be made); Re Mountain Fuel Supply Co., Docket No. 93-057-04, Utah Public Service Commission, Slip Op. (1994) (prudence of a settlement or any management decision must be based on information available at the time, not a hindsight review of what subsequently occurred); Weitbrecht Communications, Inc. v. Pacific Bell, 36 CPUC 2d 583 (1990) (in reviewing complaint against utility concerning manufacture, sale and distribution of telecommunication devices for the deaf, the Commission applied certain general principles by which it reviews the reasonableness of any utility action, that being whether the action was reasonable given the facts that are known or should have been known by utility management at the time of the decision in question). The facts available at the time the decision was made did not include actual temperatures.

The Weather Net forecasts available to Mr. Riley on December 24 showed that temperatures could be in the 380 to 410 range on December 25, 1998 (Weather Net 72-hour and 48-hour forecast for December 25, 1998) and drop back down to 350 on December 26, 1998 (Weather Net 72-hour forecast for 12/26/98). In addition to this information, Mr. Riley had weather forecast information that called for continued cold through the weekend and the following week. Ex. T-101, p. 9.

Mr. Riley testified that in order to predict temperatures, the 24-hour, 48-hour and 72-hour Weather Net forecasts needed to be taken as a group and looked at several days in advance. The way in which Mr. Riley evaluated the weather forecast is demonstrated in Exhibit 109, which shows that for the seven days prior to December 24, 1994, actual temperatures were generally colder than predicted. Mr. Riley testified that that trend did not change until the holiday weekend.⁸ Mr. Riley's concern that

⁸ Mr. Owens notes that the 24-hour forecast was the most accurate of the three forecasts that PSE receives from Weather Net; however, this forecast is received by PSE only about eight hours before the gas day begins, which means it would be unavailable for longer-range forecasts. Ex. T-101, p. 4, n.1. Mr. Owens also ignores that PSE relies on other weather forecasts as well as actuals throughout its system. There is quite a variation in

temperatures could be colder than predicted was reasonable given the prior relationship between actual and forecasted temperatures.

5. There Is No Evidence That Any of the Individuals Who Were Responsible for Making the Curtailment Decisions Continued the Curtailment Due to Concerns About Sending Meter Readers Out Over the Christmas Weekend

Kimberly-Clark relies heavily on a few unsubstantiated statements in some emails to demonstrate that PSE's determination to continue the curtailment through the peak hour on December 28, 1998 was unreasonable. Kimberly-Clark attempts to give the impression that availability of meter readers was a significant concern to PSE in resuming service to interruptible customers, and cites multiple copies of the same documents which were attached to the testimony of Mr. Faddis and Mr. Owens. On review of these documents--which are unreliable hearsay--it appears that they relate to one complaint.¹⁰

The Exhibits at issue all stem from two emails that appear to be authored by Molly Bork, a PSE employee involved in providing preliminary responses in the informal complaint process. Ex. 4; Ex. 99 at PSE 04152. Ms. Bork is not part of PSE management and was not involved in any decisions with regard to the December 1998 Curtailment. Any statements made by Ms. Bork regarding the availability of meter readers as affecting curtailment decisions are inherently unreliable, as she was not involved in the curtailment process nor were such statements reviewed by those involved in the December 1998 Curtailment decision-making process.

The two key PSE employees who were involved in the determination to continue the curtailment were Mr. Hogan and Mr. Riley. Mr. Hogan testified that his decision to extend the curtailment was not based on a concern about sending meter readers out on Christmas. In fact, meter readers worked on

temperature even at the 9 RTU points selected by Mr. Owens. Although it is difficult to ascertain what the exact temperatures are given the graph that Mr. Owens has chosen to depict this data, it appears that on the 26th there was at least a 70 variation at the different RTU points.

December 25 and 26, 1998. Tr. 215; Ex. T-81, p. 9. In Mr. Hogan's experience, working for a utility often requires that employees work through winter holidays. Ex. T-81, p. 9. Mr. Riley testified that his recommendation to Mr. Hogan was not based on the availability of meter readers and that the parameters he was operating under in monitoring the curtailment were not based on the availability of meter readers. Ex. T-101, p. 11-12.⁹

When Mr. Owens was questioned regarding Exs. 17 and 18, which relate to Complaint No. 5005-46, counsel for PSE asked whether he ever spoke with Molly Bork. Mr. Owens stated that he had not, nor had he done any independent investigation to determine whether or not there was a management decision not to send out meter readers because of the holiday weekend.¹⁰

⁹ The only other document that contained information similar to that contained in these two emails is a statement in a document entitled "Big Chill 1998." The document contains the statement that "[b]ased on this, as well as the relatively small distribution system problems and the logistics involved to resume all customers on Christmas weekend after the significant amount of overtime employees had already worked; , [sic] the decision was made to extend the curtailment through Monday at 5:00 p.m." Ms. Caswell explained during the hearing what the original purpose of this document was. She explained that she was asked by her supervisor to prepare a chronicle of events that occurred during the cold weather time in 1998. It was Ms. Caswell's understanding that the document was intended to be an internal document to characterize the actions taken during a cold weather emergency on the gas system, which would include curtailment in cold weather action planned steps. Tr. 271-72. Ms. Caswell testified that although she was the primary author, she did not draft the entire document. In fact, she sent the document out for review and others commented and shipped it back. The document never became finalized and gross inaccuracies never got cleaned up. Tr. 239-40. For example, the document states that the decision to extend the curtailment was made on December 23 when actually that decision was made on December 24. Tr. 245. Ms. Caswell did not believe that she wrote the sentence about regarding overtime, nor did she know who wrote it. Mr. Riley testified that he didn't believe that he wrote it nor did he know who did. Tr. 320. Ms. Caswell had no idea how many people had received or provided input to the document.

¹⁰ Mr. Owens alluded to a "number of these statements coming from several sources" Tr. 91. However, on further cross-examination by PSE's counsel, Mr. Owens could only identify Exhibits 17 and 18 as the sources for his testimony and both of those relate to a

C. Kimberly-Clark Failed to Fulfill Its Obligations Under the Tariff

Rate Schedule 57 provides that

If the customer fails to comply with the company's request to curtail or interrupt its use of gas in accordance with the provisions set forth in Section 15 of this rate schedule, all gas used in excess of such curtailment will be billed at the applicable Rate Schedule No. 41 commodity rates, and, in addition, the customer shall pay its pro rata share of any penalties imposed upon the Company by its supplier(s) on the day(s) of violation or at the penalty rate of \$2.00 per therm, whichever is greater. The provisions of this paragraph are exclusive of, and in addition to, the Company's right to enforce compliance with its curtailment or interruption request by immediate suspension of all gas service to the customer.

Rate Schedule No. 57, Section 8. The Rate Schedule 57 Service Agreement provides that

"Transportation Service is subject to constraint periods that may be declared at the Company's sole determination." The purpose of the penalty charge under the Rate Schedule 57 tariff is to deter customers from violating curtailments. Nothing in the language of Rate Schedule 57 or the Service Agreement allows a customer to consume penalty gas because it does not have an adequate source of backup fuel. Exs. 29, 112.

Less than two months before the December 1998 Curtailment, Mr. Armstrong signed a certification stating that he understood that "during periods of curtailment there will be no natural gas available for use except that amount previously contracted for on a firm basis." Ex. 131. At the same time that Mr. Armstrong signed this certification, it was Kimberly-Clark's policy to consume penalty gas rather than shut down mill operations under certain conditions. According to Mr. Armstrong, these operational priorities are based on the cost of lost production if Kimberly-Clark shuts down the tissue machines in the mill compared to the cost of penalty gas. There is no evidence that PSE was ever informed that this was Kimberly-Clark's policy. Both Mr. Armstrong and Mr. Walton understood that a curtailment meant that Kimberly-Clark was restricted to consuming only its firm load. Tr. 154-55;

single complaint.

Tr. 118-19. Even though Mr. Armstrong and Mr. Walton clearly understood that they were not entitled to consume penalty gas during a curtailment, they had a policy in place that, under certain circumstances, called for Kimberly-Clark to violate the curtailment. Based on this policy, Kimberly-Clark knowingly violated the terms of PSE's tariff.

1. Kimberly-Clark's Fuel Strategy Resulted in Insufficient Backup Fuel to Meet the Needs of Its Mill Operation

Kimberly-Clark contracts for only 14,000 therms of firm transportation a day. According to Mr. Faddis, that is the "base amount" required to keep the Kimberly-Clark tissue mill functional, but not the pulp mill. Tr. 43. Kimberly-Clark operates two boilers as part of its cogeneration facility, Boilers No. 10 and No. 14. Ex. T-41, p. 2. According to Mr. Armstrong, the cogeneration facility supplies the heat energy that supports the tissue machines in the pulp process. Mr. Armstrong testified that Boiler No. 10 primarily uses spent sulfite liquor, with natural gas as a backup fuel, and the No. 10 boiler uses wood waste as its primary fuel, with natural gas as a secondary fuel source. Mr. Armstrong testified that even though spent sulfite liquor is the primary fuel for the No. 10 boiler, natural gas is required to shut down the No. 10 boiler. Tr. 137. In other words, during a shutdown of the No. 10 boiler, natural gas becomes a primary fuel because spent sulfite liquor alone cannot be used to shut down the boiler. The No. 10 boiler requires approximately 2,000 MMBtu (20,000 therms) to accomplish a controlled shutdown. Ex. 161. Mr. Armstrong also testified that in the winter, the spent sulfite liquor supply can run short because the "pulping operation is susceptible to freeze-up due to the amount of water used." Ex. T-41, p. 3. Since natural gas is the only backup fuel that can be used with the No. 10 boiler, the risk that Kimberly-Clark will need to use natural gas for the No. 10 boiler is much greater during the winter.

While Kimberly-Clark's fuel strategy appears to provide more options for continuing to fuel the No. 14 boiler, both Mr. Walton and Mr. Armstrong testified that there was a shortage of wood going into the curtailment period. Ex. T-41, p. 5; Tr. 103-04. This increases the likelihood that Kimberly-Clark

will need to rely on natural gas or diesel to fuel the No. 14 boiler. According to Kimberly-Clark, to comply with air emissions permit conditions, Kimberly-Clark cannot shut down the No. 14 boiler without using natural gas and/or fuel oil. Ex. 157. Mr. Armstrong testified that on a daily basis over a year, Kimberly-Clark could operate the No. 14 boiler without natural gas approximately 75% of the time. Tr. 174. However, this percentage appears to be optimistic when compared to the data in Ex. C-169.¹¹ In addition, Mr. Armstrong identified numerous possible fuel interruptions that interfere with the ability of Kimberly-Clark to meet all of the fuel needs of the No. 14 boiler with bark feed. Ex. 164.

Based on this information, Kimberly-Clark runs a high risk during the winter months that it will require more than 1,400 MMBtu (14,000 therms) to keep its cogeneration system and its mill operations going. This, coupled with Kimberly-Clark's policy not to shut down mill operations, increases the risk that Kimberly-Clark will violate a curtailment and incur penalties.

2. That Gas Control Did Not Call Kimberly-Clark to Advise That Their Consumption of Penalty Gas Was Causing Problems Does Not Prove Anything About the State of the Gas Distribution System

Under its Tariff, PSE has no obligation to re-curtail customers once a notice of curtailment has been provided. Mr. Owens testified that because Kimberly-Clark consumed gas from December 24 to December 28, and PSE did not request that Kimberly-Clark cut back on its usage, the distribution system thus apparently had the capacity to serve Kimberly-Clark's interruptible load during that period. Ex. T-11, p. 11. There has been no evidence that Gas Control would be able to identify whether Kimberly-Clark's usage was causing problems beyond the vicinity of the gas main that serves Kimberly-Clark, based on the RTU point located at Kimberly-Clark's facility. As Ms. Caswell testified, Kimberly-Clark's usage affects more than just the main that serves Kimberly-Clark. According to Ms. Caswell's testimony:

Kimberly-Clark's proximity to the high pressure backbone allows it to create a huge drain in the system, and the gas will follow the path of least resistance, which is essentially out that drain. This means customers served from the intermediate pressure systems in Everett and Marysville can be negatively affected by Kimberly-Clark's operation.

Ex. T-91, p. 17. At a minimum, Kimberly-Clark affects intermediate pressure systems well beyond the main that serves the Everett facility. Of course, this does not include Kimberly-Clark's effect on the high-pressure system.¹² During the period from December 24, 1998, to December 28, 1998, PSE continued to receive customer service calls in areas that would be affected by Kimberly-Clark's consumption of gas. Compare Ex. C-96 and C-106.

In addition, PSE takes into account expected customer compliance when it curtails interruptible customers. Ex. T-91, p. 5. It is not material that PSE is able to continue to serve a small number of non-complying customers, such as Kimberly-Clark, who violate the terms of their Tariff and continue to consume gas, notwithstanding clear instructions to curtail. It would jeopardize firm service to operate on such a narrow margin for error, that a small number of violators could potentially disrupt service to firm customers across an entire system. Obviously, PSE expects a certain number of customers to violate and manages the gas distribution system accordingly.

3. The Safety Issues That Kimberly-Clark Raises in This Matter Are Irrelevant to the Question of Whether PSE Provided Kimberly-Clark With Adequate Service

Whether Kimberly-Clark had adequate fuel to manage its plant safely does not change the conditions under which Kimberly-Clark has agreed to take service. There are no exceptions in the Tariff or under the Rate Schedule 57 Service Agreement that would allow a customer to consume penalty gas without having to pay for the penalty. Therefore, it is irrelevant whether safety issues were a basis for Kimberly-Clark violating PSE's Tariff. Moreover, the testimony regarding the "safety issues" is contradictory and raises concerns about the credibility of Mr. Walton and Mr. Armstrong.

- According to Mr. Armstrong's testimony, the response to going below the minimal value of condensed steam would be to curtail production. Safety concerns appear to be addressed by curtailing production. Ex. 166, pp. 43-44.
- Mr. Walton testified that if Kimberly-Clark had not used penalty gas to fire the boilers beginning on December 24, 1998, there would have been safety risks at the facility. Ex. T-31, p. 4.

- Kimberly-Clark has represented that if fuel oil is unavailable, approximately 3,500 MMbtu of natural gas is required to shut down the No. 14 boiler in a controlled manner, and approximately 2,000 MMBtu of natural gas is required to shut down the No. 10 Boiler in a controlled manner. Exs. 157, 161.
- During the December 1998 Curtailment, Mr. Walton never advised PSE of the potential safety issues if Kimberly-Clark did not consume penalty gas. Tr. 122.
- At hearing, Mr. Walton testified that the entire Kimberly-Clark mill recently shut down within ten minutes. Although the No. 14 boiler contained high concentrations of sulfur dioxide, operators stabilized the equipment. Tr. 121.
- In Kimberly-Clark's original complaint letter to the Commission, safety risks were never raised. Ex. 159.
- Kimberly-Clark has represented that it does not make operational sense to contract for additional firm supply of natural gas. Ex. T-42, p. 2.

Based on the confusing and contradictory testimony about potential safety risks, it is unclear under what conditions safety risks exist. In its Complaint, Kimberly-Clark alleges that it told PSE Gas Control that in order to prevent safety risks it was going to increase its flow of gas beyond the 14,000 therms for which it has firm transportation. Kimberly-Clark witnesses testified to the contrary.

D. Mr. Owens' Testimony That Duke Energy's Delivery of Gas to PSE's System on December 19-22, 1998, Benefited PSE Misinterprets the Balancing Provisions of the Tariff

In an obvious attempt to minimize the deliberate violation of PSE's Tariff by Kimberly-Clark to the detriment of PSE's core customers, Mr. Owens testifies that PSE was not harmed by this violation. In fact, Mr. Owens testifies that PSE may have even benefited because Kimberly-Clark's supplier delivered approximately 110,000 therms into PSE's system in excess of the amount of gas that Kimberly-Clark consumed. Ex. T-11, p. 11. Mr. Owens' argument simply ignores how balancing works under Rate Schedule 57.¹³

Imbalances are tracked by PSE and, pursuant to Rate Schedule 57, periodically cleared by the customer. According to Mr. Donahue's review of Exhibit 6, Kimberly-Clark owed PSE on average more than 94,000 therms per day (with a high of 174,000 therms) for each of the first 18 days in December

1998. Moreover, PSE had more than sufficient supplies available to it during the curtailment to serve all the needs of its firm customers and, therefore, Kimberly-Clark's delivery of gas was not a "benefit" since PSE did not need this gas. Ex. 121, p. 10.

At hearing, in order to claim that Kimberly-Clark provided some kind of benefit to PSE by neglecting to reduce its nominations for December 20 and 21, counsel for Kimberly-Clark asked Mr. Donahue to assume that the gas delivered by Kimberly-Clark's marketer, Duke Energy, was valued at \$1.78 per therm (PSE's highest-cost contract that day) and, therefore, the gas was worth approximately \$250,000. Tr. 357. In light of how the balancing provisions work, this is an inaccurate representation of the value of the gas Duke delivered to PSE. Without evaluating all the costs to PSE caused by Kimberly-Clark's previous imbalance during this billing period, there is no basis for Kimberly-Clark's claim that Duke's continued delivery of gas onto PSE's system "benefited" PSE.

However, all of this is irrelevant to the complaint in this matter. Kimberly-Clark's complaint does not challenge whether the balancing provisions in Rate Schedule 57 are reasonable, or whether PSE failed to follow the balancing provisions in the December 1998 Curtailment. That Duke Energy continued to deliver gas above Kimberly-Clark's firm load on December 20 and 21, 1998 demonstrates that Kimberly-Clark and Duke Energy were "asleep at the wheel." PSE has no obligation under its Tariff to notify a gas supplier of a curtailment. PSE's customer is Kimberly-Clark, and Kimberly-Clark was notified of the curtailment in compliance with PSE's Tariff. Ex. T-31, p. 2. Kimberly-Clark's attempts to characterize the fact that it did not reduce its nominations for December 20 and 21, as a benefit to PSE, is both irrelevant and unsubstantiated by the evidence presented in this matter. Tr. 355-58.

E. Complainant's Request for Injunctive Relief Is Unsupported by the Facts of This Case and the Law

Under the guise of seeking declaratory relief, Kimberly-Clark is seeking a permanent injunction against PSE. Paragraph 3 under the section entitled "Relief Sought" of Kimberly-Clark's Complaint

requests that the Commission:

3. Issue a declaratory order (A) requiring PSE to exercise reasonable discretion in declaring constraint periods under Rate Schedule 57 and (B) prohibiting PSE from imposing arbitrary and unreasonable penalties under Rate Schedule 57.

This is not a request for declaratory relief; rather, this is a request for injunctive relief. Under the law and the facts of this case, Kimberly-Clark is not entitled to such relief. A request for declaratory relief generally seeks a declaration that one party's interests prevail over another's interests under the law. Kimberly-Clark is seeking an order both requiring PSE to do something in the future, and prohibiting it from doing something in the future.¹⁴

Injunctive relief is not available if the complainant has a complete, speedy and adequate remedy at law. Tyler Pipe Indus., Inc. v. State, Dep't of Revenue, 96 Wn. 2d 785 (1982) *vacated on other grounds by*, Tyler Pipe Indus. v. Wash. State Dep't of Rev., 483 U.S. 232, 107 S. Ct. 2810 (1987). Kimberly-Clark has such a remedy: the Commission may order PSE to credit Kimberly-Clark's account with the amount of any penalties that the Commission determines were unreasonably assessed. The Commission also has the authority to make a declaration as to whether PSE's conduct in implementing its Tariff is reasonable. However, what Kimberly-Clark is seeking is a general order that PSE comply with its Tariff. The Tariff already provides that PSE cannot arbitrarily declare constraint periods or assess unreasonable penalties.

The Supreme Court of Washington overturned a similar injunction, which permanently enjoined the defendant from "conducting or continuing to conduct its business contrary to the Public Service Laws of the state of Washington as follows: In violating its tariff on file with the Washington Department of Public Works. . . ." State of Washington, on the Relation of the Department of Public Works v. Skagit River Navigation & Trading Company, 181 Wash. 642, 643-44 (1935) ("Public Works"). The court found instructive Swift & Co. v. United States, 196 U.S. 375, 25 S. Ct. 276 (1905), in which the

Supreme Court stated that it "was bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of law." Public Works at 646, *citing Swift & Co. v. United States*. Neither the law nor the facts of this case support Kimberly-Clark's request for injunctive relief.

F. Kimberly-Clark Is Not Entitled to Attorneys' Fees

Under Washington law, a party is not entitled to its attorneys' fees unless they are provided for under statute or by contract. State ex rel. Macri v. Bremerton, 8 Wn.2d 93, 102 (1941) (the rule that applies in all ordinary civil actions is that the successful litigant may recover on such attorney fees for which a statute or agreement of the parties provides).¹⁵ Neither the Tariff nor the Rate Schedule 57 Service Agreement provides that PSE's customers are entitled to attorneys' fees under any circumstances. No statute entitles Kimberly-Clark to attorneys' fees. Moreover, this Commission has stated that it does not have the authority to award attorneys' fees unless expressly provided for in a tariff. Richard L. Pope, Jr., v. GTE Northwest Inc., 146 PUR 4th 175 (1993).¹¹

G. If the Commission Finds Unreasonable Any of the Penalty Therms Assessed by PSE to Kimberly-Clark for the Time Period Beginning on Gas Day December 25, 1998, through 5:00 p.m. on December 28, 1998, Kimberly-Clark Should Pay PSE's Actual Gas Costs for Such Therms to Account 191

Although the evidence produced at hearing demonstrates that both PSE's management of the

¹¹ If any party to this proceeding is entitled to attorneys' fees, it is PSE. Rate Schedule 57, Section 9, "Other Costs, Charges, Penalties" provides that "the customer shall reimburse the company for extra costs, charges, and penalties assessed against the company but attributable to the customer." PSE is required to assess penalties for gas consumed in violation of its curtailments. PSE has incurred attorneys' fees and costs in attempting to collect the penalty due from Kimberly-Clark. PSE's attorneys' fees and costs in defending this action are attributable to Kimberly-Clark and under the language of Rate Schedule 57, the customer--in this case Kimberly-Clark--is required to reimburse the company for such costs.

curtailment and its determination that there was insufficient distribution system capacity to serve all customers were reasonable, if the Commission finds any of the penalty therms assessed by PSE to Kimberly-Clark were unreasonable during the period from gas day December 25, 1998, until 5:00 p.m. on December 28, 1998, Kimberly-Clark should still pay PSE's gas costs for such therms to Account 191.¹⁶

Kimberly-Clark was billed under Rate Schedule 41 because it violated the curtailment and consumed "penalty therms." Under Rate Schedule 57, a customer is billed under Rate Schedule 41 for penalty therms, in addition to a penalty charge of \$2.00 per therm. The total amount billed to Kimberly-Clark under Rate Schedule 41 was \$58,194.3952. Ex. T-1, p. 5. However, only \$32,800 of that amount was for the cost of gas, including demand gas cost and refunds of prior gas cost. Ex. T-121, p. 4. The remainder covered other costs, i.e., a distribution charge. Tr. 51, Ex. 6. Under Rate Schedule 41, customers are billed for an average cost of gas, and the payment of a \$2.00 per therm penalty ensures that a transportation customer who violates a curtailment does not place an economic burden on sales customers. Ex. T-121, p. 5.

If the Commission decides that any of the penalty therms assessed by PSE on Kimberly-Clark were unreasonable, then Kimberly-Clark would receive a windfall to the detriment of gas sales customers if Kimberly-Clark is not required to pay the actual cost of gas for such therms.¹² Kimberly-

¹² Kimberly-Clark may try to argue that because it did not reduce its nominations until after December 22, 1998, the benefit of the gas that it placed on PSE's system offsets any detriment to PSE's gas customers. However, as briefed above in Section E., the balancing provisions have been designed to ensure compliance with the balancing provisions of Rate Schedule 57, and Mr. Owens does not take into account that balancing occurs over a entire billing cycle. Kimberly-Clark was not in compliance with the balancing requirements of the Rate Schedule 57 prior to the curtailment and took back the majority of the "oversupply" on December 31, 1998. Ex. 6, p. 10. Moreover, the balancing provisions of the Rate Schedule 57 are separate from penalty assessments for violations of a curtailment. Kimberly-Clark has an affirmative obligation to comply with both aspects of Rate Schedule 57 and

Clark should not be placed in a better position than it would have been if the curtailment ended earlier. If Kimberly-Clark had purchased the penalty terms it consumed from gas day December 25 until December 28, 1998, from Duke Energy, the actual cost would have been only slightly less than PSE's actual cost during the same period. *Compare* Ex. C-152 and to Ex. C-123.

should not be rewarded for non-compliance with the balancing provisions.

IV. CONCLUSION

The evidence presented at hearing demonstrates that both the process PSE used to effectuate the curtailment and the basis for the continuation of the curtailment from gas day December 25 through 5:00 p.m. on December 28, 1998, were reasonable and complied with PSE's Tariff and the language of Rate Schedule 57, and therefore met the statutory requirement set out by RCW 80.28.010(2). For the foregoing reasons, PSE respectfully requests that the Commission deny Kimberly-Clark's Complaint and declare that (a) PSE has complied with Rate Schedule 57 and (b) the penalty amount of \$362,064.86 (which includes municipal tax) charged to Kimberly-Clark's account is correctly calculated and past due.

DATED: December 17, 1999.

PERKINS COIE LLP

By _____
Andrée G. Gagnon, WSBA #27480

STOEL RIVES LLP

By _____
James M. Van Nostrand, WSBA #15897

Attorneys for Respondent
PUGET SOUND ENERGY, INC.

¹. According to the mill manager of the Everett Facility, the mill operation includes "a workforce of 950 personnel; an annual operating budget in excess of \$250 million; an asset base valued at \$884 million; an annual payroll of \$72 million and generated net sales in excess of \$325 million." Ex. T-1.

². This was closed down on December 23, 1998, when Gas Dispatch and Gas Control were able to maintain control of the situation from the Eastside Operations Center. Ex. T-91, p. 15. The 24-Hour Operations office, located at the Eastside Operations Center, is staffed to provide continuous 24-hour emergency response and is responsible for handing off specific responsibilities to other groups when system events exceed the Operations office's ability to manage those events. Ex. T-81, pp. 4-5.

³. Consistent with the Tariff and service agreements, PSE reads the meters of Rate Schedule 86 customers before resuming service to Rate Schedule 86 customers, followed by resumption of service to other lower priority customers (i.e., Rate Schedule 57 customers), in order to maintain the priority of service under Rule 23 and to manage the gas distribution system.

⁴. According to Mr. Owens, senior management would be officers of PSE. Ex. 168, p. 48. Senior management at PSE provided the necessary input into the determination to continue the curtailment from December 25 through December 28, 1998, when Mr. Hogan set the parameters for the continuation.

⁵. According to Ms. Caswell, Mr. Hogan was the senior manager primarily involved with key decisions during the December 1998 Curtailment. Tr. 230.

⁶. Mr. Riley was the Day System Manager-Gas and the ERPS; therefore, "management" did monitor the decision to continue curtailment. At other points in Mr. Owens' testimony, he states that senior management should have been on-site. Ex. 168, p. 48.

⁷. The gas day for December 27, 1998, began at 7:00 a.m. on December 27, 1998, and ended at 7:00 a.m. on December 28, 1998.

⁸. Mr. Owens testified that conditions were returning to those experienced prior to the beginning of the curtailment by December 24, 1998; however, Kimberly-Clark is not contesting whether the curtailment was reasonable on gas day December 24, 1998. See paragraph 12 of Kimberly-Clark's Complaint and the hearing transcript at page 52.

⁹. Mr. Owens appears not to understand how forecasted load is used to determine whether there is sufficient distribution capacity to serve all customers. This is apparent from his reliance on actual sendout over a 24-hour period to support his opinion that conditions changed during the curtailment. The source of the sendout information that Mr. Owens is relying on is contained in Ex. C-71. Page 4 of Ex. C-71 contains sendout information for firm sales, interruptible sales and transportation deliveries. This information is considered "actual" by PSE and would not have been available until some time after the gas day was over. In addition, sendout over a 24-hour period does not provide any information as to the estimated customer loads during peak hour, which is the evaluation PSE relies on to determine whether there will be sufficient distribution capacity to serve all customers. Tr. 289-91. In addition, what PSE experienced was not a supply constraint, and as Ms. Caswell testified, after five days of extended cold, distribution system capacity has eroded significantly. Tr. 300.

¹⁰. This complaint is identified as number 5005-46 and Ex. 17, Ex. 18, Ex. 4 (which is the same document as Ex. 18), and Ex. No. 3 all relate to this complaint. PSE objected to the admission of these exhibits based on the unreliable nature of the information contained in these documents. The fact that PSE produced these documents to a data request does not mean that these documents are business records or that PSE management was aware of or has adopted any of the statements contained in the documents. Some of the statements appear to be made by third parties who are potentially unconnected to PSE; others appear to be made

by PSE employees who are not management and appear to have had no contact with anyone involved in making curtailment decisions or recommendations regarding the December 1998 Curtailment. Since Kimberly-Clark has sponsored these exhibits, it is Kimberly-Clark's burden to substantiate any hearsay contained within these documents. Kimberly-Clark failed to do so. The two Kimberly-Clark witnesses who sponsored these exhibits, Mr. Faddis and Mr. Owens, made no attempt to contact anyone at PSE to determine who made statements regarding the availability of meter readers over the holiday weekend and whether those individuals participated in any curtailment decisions. Tr. 45-46; Tr. 88. In fact, having reviewed the same documents, Mr. Faddis believed that Ms. Otto worked for PSE while Mr. Owens believed that Ms. Otto worked for the Commission. Tr. 45; Tr. 88.

^{11.} A review of Exhibit C-169 reveals that from the period of January 1998 until August 1999, Kimberly-Clark limited its consumption to 1,400 MMBtu on only 53 days, or less than 10% of the time.

^{12.} Kimberly-Clark may claim that since Ms. Caswell testified that the high distribution system was "stable enough" on December 22, 1998, it was not necessary to evaluate the high pressure distribution system. However, Ms. Caswell also testified that this was prior to when Kimberly-Clark began consuming penalty gas. Ex. T-91, p. 11.

^{13.} The balancing provision in effect in December 1998 was approved by the Commission in its Fifth Supplemental Order in Docket Nos. UD-940034 and UG-940814. In that Order, the Commission found that the balancing provisions are "designed to provide incentive for accuracy and to prevent the need to loan or store gas. It is not unduly inflexible nor burdensome and should be accepted as an effective way to meet the stated goals." *Id.* at 27. The purpose of the balancing provisions and the penalties associated with imbalances that have not been cleared is to keep imbalances within a range permitting the system to function well. *Id.* at 26. The Commission recognized that costs are associated with customers using less gas than nominated, which may require the Company to absorb gas into its system (including into its storage facilities), or, if transportation customers use more gas than nominated, the Company may need to withdraw the gas from its facilities.

^{14.} RCW 7.40.020 provides the grounds for issuance of injunctions. The statute provides that

[w]hen it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in *restraining the commission or continuance of some act* . . . an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion.

RCW 7.40.020.

^{15.} While Washington recognizes an exception to this standard for "bad faith or wantonness" there has been no evidence that PSE's determination to continue the curtailment through 5:00 p.m. was based on bad faith. On the contrary, PSE was clearly concerned with keeping interruptible customers on as long as possible, and the fact that Mr. Owens may disagree with PSE's determination is not a basis for a finding of bad faith.

^{16.} Although Kimberly-Clark originally included the \$29,592.61 assessed for gas day December 24, 1998 in its Complaint, Kimberly-Clark stipulated that it was not objecting to the penalty charges for gas day December 24, 1998. Tr. 52. PSE's actual gas costs would be

calculated by multiplying the number of therms by \$.330. See, Ex. T-121, p. 4, and Ex. C-123.