

Agenda Date: July 12, 2012  
Item Numbers: A2 and A3

**Dockets: UE-120805 and UG-120806**  
Company: Puget Sound Energy

Staff: Kendra White, Regulatory Analyst  
Chris McGuire, Regulatory Analyst

### **Recommendation**

Issue a Complaint and Order suspending the revised tariff filed in Dockets UE-120805 and UG-120806.

### **Background**

On June 1, 2012, Puget Sound Energy (PSE) filed a petition with the Washington Utilities and Transportation Commission (commission) to revise WN U-60, Tariff G for electric service along with a companion petition to revise WN U-2 for natural gas service. The petitions request the approval of the following tariff sheets:

WN U-60, Tariff G for electric service

3 <sup>rd</sup> Revision of Sheet No. 80-a	-General Rules and Provisions (Continued)
87 <sup>th</sup> Revision of Sheet No. 81	-Tax Adjustment
93 <sup>rd</sup> Revision of Sheet No. 81-a	-Tax Adjustment (Continued)
14 <sup>th</sup> Revision of Sheet No. 81-b	-Tax Adjustment (Continued)
8 <sup>th</sup> Revision of Sheet No. 81-c	-Tax Adjustment (Continued)

WN U-2 for natural gas service

112 <sup>th</sup> Revision of Sheet No. 101	-Natural Gas Schedule No. 1, Tax Adjustment
142 <sup>nd</sup> Revision of Sheet No. 101-A	-Natural Gas Schedule No. 1, Tax Adjustment (Continued)
20 <sup>th</sup> Revision of Sheet No. 101-B	-Natural Gas Schedule No. 1, Tax Adjustment (Continued)
6 <sup>th</sup> Revision of Sheet No. 101-C	-Natural Gas Schedule No. 1, Tax Adjustment (Continued)

All revised tariff sheets have an effective date of July 13, 2012.

Approval of these filings would allow PSE to:

- Pass through tax assessments and other related fees to ratepayers within the taxing jurisdiction including those resulting from “difference(s) of interpretation [which arise] between PSE and the taxing jurisdiction as to the meaning or application of a tax,”<sup>1</sup>
- Determine, at PSE’s discretion, the pass-through period of tax assessments and other related fees “over a one to six months period...in order to avoid the addition of carrying costs,”<sup>2</sup>
- Remove “exclusions” from the electric tariff sheet for Schedule 81, and

---

<sup>1</sup> Docket UE-120806, June 1, 2012, Cover letter to Mr. David Danner, p. 1.

<sup>2</sup> Id., p. 2.

- Include clarifying language regarding the availability of the “utility tax credit...to eligible customers who take service within Indian County...from the date of eligibility (when the Company receives the necessary documentation) forward.”<sup>3</sup>

#### 1999: Redmond Decision.

City of Redmond audited PSE and found that “PSE did not include the amount customers paid to cover the tax in its ‘gross income’ and thus did not pay the five percent utility tax on it” (a practice known as grossing-up). PSE paid, under protest, the additional assessment levied by Redmond and then went to court for a refund plus interest, claiming that it had properly excluded money collected from customers in its determination of “gross income.” Courts ruled in favor of PSE stating that the city’s ordinance was ambiguous regarding “gross income” and “if there is any doubt about the meaning of a tax ordinance, it must be construed most strongly against the taxing authority and in favor of the taxpayer.”<sup>4</sup>

#### 2011: Bellingham Decision.

A routine audit of PSE by the city of Bellingham for 2004-2008 led to additional assessed tax and penalties. Again, PSE paid the assessments and penalties under protest and brought the case to court where they eventually lost after appeal. The Bellingham Decision effectively made the opposite determination regarding grossing-up as compared to the Redmond Decision. The Court of Appeals of Washington ruled that “the utility tax imposed here is simply one of PSE’s operating expenses” and therefore should have been included in the calculation for “gross income.” The Bellingham Decision also stated that the “City Utility Tax applied to traditional non-taxed utility services and to non-utility services.” The additional “assessment against PSE [was] in the amount of \$919,663.11 – consisting of \$680,316.76 in city utility tax and \$239,345.35 in penalties. The assessment was based upon the city’s determination that certain revenue upon which PSE had paid city B & O tax was, instead, properly subject to city utility tax,”<sup>5</sup> and that PSE has neglected to pay “city tax on service related activities, and city tax on retail sales.”<sup>6</sup> Hoping that Bellingham would rule in PSE’s favor, PSE continued to pay contested taxes and assessments without passing through the costs to consumers. The total amount uncollected by PSE as a result of the Bellingham Decision is \$1,633,662 as of the end of 2011.<sup>7</sup>

Since 2011, five municipalities have contacted PSE indicating that they now interpret their ordinance in the same manner as the Bellingham Decision.<sup>8</sup> PSE currently operates in 107 cities.<sup>9</sup>

---

<sup>3</sup> Docket UE-120806, June 1, 2012, Cover letter to Mr. David Danner, p. 2.

<sup>4</sup> Puget Sound Energy Inc. v. City of Redmond, Court of Appeals’ Clerk’s Office, No. 44004-7-I, 2-11 (1999).

<sup>5</sup> Puget Sound Energy Inc. v. City of Bellingham Finance Department, FindLaw, No. 65928-6-I, 1-3 (2011).

<sup>6</sup> Email from Lynn Logen, Tariff Consultant, Puget Sound Energy, to Kendra White, Regulatory Analyst, Washington Utilities and Transportation Commission (June 13, 2012, 16:18 PST) (on file with recipient).

<sup>7</sup> Id., (July 3, 2012, 14:58 PST) (on file with recipient)

<sup>8</sup> Id., (June 13, 2012, 13:38 PST) (on file with recipient).

## **Discussion**

Staff has four concerns with the filings.

First, the proposed language under “Timing of Collection,” on the Eighth Revision of Sheet No. 81-c, seemingly transfers to the company authority which properly belongs to the commission

The proposed language states that:

When the Company has paid tax assessments or other related charges for past periods to a taxing jurisdiction the Company will determine the appropriate time period and rate over which to adjust rates to recover the amount of such tax assessments or other related charges imposed by a taxing jurisdiction.<sup>10</sup>

As stated in RCW 80.28.020, “whenever the commission shall find...that such rates or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine the just, reasonable, or sufficient rates, charges, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order.” Therefore, if the company incurs costs for which they are not currently receiving reasonable compensation, it is for the commission to determine the appropriate method of recovery and not the company.

Second, proposed language under the heading “Timing of Collections,” on the Eighth Revision of Sheet No. 80-C, constitutes retroactive rate making

The language specifically states that the company intends to collect monies from ratepayers to cover charges “when the Company has paid tax assessments or other related charges for past periods.”<sup>11</sup> This is the very definition of retroactive rate making offered in *WUTC v. US WEST Communication, Inc.* Docket No. UT-970010, Second Supp. Order at 10 (Nov. 7, 1997):

“[retroactive rate making involves] surcharges or ordered refunds applied to rates which had been previously paid, an additional charge applied after the service was provided or consumer.”<sup>12</sup>

*WUTC v. US WEST Communication, Inc.* provides an argument against allowing retroactive rate making as “the evil in retroactive rate making as thus understood is that the consumer has no opportunity prior to receiving or consuming the service to learn what the rate is or to participate in the proceeding by which the rate is set. The Commission agrees that retroactive rate making,

---

<sup>9</sup> Docket UE-120806, June 1, 2012, Cover letter to Mr. David Danner, p. 1.

<sup>10</sup> Docket UE-120806, June 1, 2012, Eighth Revision of Sheet No. 81-c.

<sup>11</sup> *Id.*.

<sup>12</sup> *UTC v. PSE*, Docket UE-010410, Order at 2 (Nov. 9, 2001) which cites *WUTC v. US WEST Communication, Inc.* Docket No. UT-970010, Second Supp. Order at 10 (Nov. 7, 1997).

as thus understood, is extremely poor public policy and is illegal under the statutes of Washington State as a rate applied to a service without prior notice and review.”<sup>13</sup> The current tariffs do not provide prior notice or review for customers.

Third, the language proposed in the tariff filings is too vague

In the Third Revision of Sheet No, 80-a, under Tax Adjustment, the proposed language has the effect of broadening the company’s ability to recover municipal taxes to also include any “assessment or other charge related thereto.” This broadening is cause for concern as the new language could allow for the recovery of costs the commission may wish to exclude such as penalties.

And fourth, the remove of “exclusions” from the tariff sheets will make it unclear if a customer’s bill properly reflects qualifying exemptions

The proposed changes to the Ninety-Second Revision of Sheet No. 81-a, the Fourteenth Revision of Sheet No. 81-b, and the Eighth Revision of Sheet No, 81-c remove “exclusions” from the electric service tariff sheets in entirety. The removal of “exclusions” is problematic as customers will no longer be able to calculate their bill from tariff sheets alone, but will have to contact their municipality to see if their bill should reflect exclusions for which they may qualify. Furthermore, the tariff filings will provide no indication that exclusions even exist. Given that tariffs are a contract for service, all terms of the contract should be included.

**Conclusion**

Issue a Complaint and Order suspending the revised tariff filed in Dockets UE-120805 and UG-120806.

---

<sup>13</sup> UTC v. PSE, Docket UE-010410, Order at 2 (Nov. 9, 2001) which cites WUTC v. US WEST *Communication, Inc.* Docket No. UT-970010, Second Supp. Order at 10 (Nov. 7, 1997).