BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of **Revisions to Puget Sound Energy Inc.'s Electric Schedule 95A – Federal Incentive Tracker**	**Docket No. UE-120277**

INITIAL BRIEF OF PUGET SOUND ENERGY, INC.

APRIL 17, 2012

PUGET SOUND ENERGY, INC.

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I. INTRODUCTION

1. The Schedule 95A – Federal Incentive Tracker ("Schedule 95A") tariff revisions, which Puget Sound Energy, Inc. ("PSE") submitted to the Commission on February 29, 2012, pass through to customers interest on the average unamortized balance of the Treasury Grants for the Wild Horse ("WH") Expansion Wind Project,[1] beginning when the law first allowed for such interest to be credited to customers. PSE's ability to pass on this credit to customers commenced when Congress amended section 1603 of the American Recovery and Reinvestment Tax Act ("ARRA") on December 31, 2011. This amendment did not come about by chance. PSE worked diligently for more than two years with numerous members of Congress to effect a change in the law to eliminate the normalization requirement for Treasury Grants and, in so doing, maximize the benefit the Treasury Grants provide to PSE's customers. The revisions to Schedule 95A provide an increased credit to customers for calendar year 2012 in the amount of $2.4 million, beginning the first day this additional credit was allowed by law.

2. It is ironic that Commission Staff now responds to PSE's successful efforts to change the law by penalizing PSE for its good work. Commission Staff takes an extreme view of the language amending section 1603 and wrongly interprets this change in law to retroactively impose a different rate than the rate stated in the tariff that was on file with the Commission in 2011. Such an interpretation of the amendment violates state and federal law and makes for poor public policy because it removes the important element of certainty on which both customers and utilities rely with respect to filed tariffs.

3. The amendment should be interpreted to eliminate normalization for *all* section 1603 Treasury Grants—including those received *before* the change in law—*effective on the date the law changed*. Such an interpretation gives meaning to the language of the amendment without trampling on long-established state and federal law and PSE's vested rights.

[1] Hereafter, "WH Expansion Project" or the "Project".

II. LEGAL STANDARDS

4. PSE's revisions to Schedule 95A are fair, just, reasonable and sufficient and, therefore, should be approved by the Commission. RCW 80.28.020 requires the Commission to order only the just, and reasonable or sufficient rates to be *thereafter* observed and in force. Thus, the Commission must set rates on a prospective basis. While the Commission has broad general powers to "[r]egulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation," RCW 80.01.040(3), the Commission may not engage in retroactive ratemaking.[2]

III. BACKGROUND

5. As discussed in more detail below, the normalization of the WH Expansion Project Treasury Grant was required by federal law prior to December 31, 2011, and PSE appropriately reflected this normalization in its filed tariff for that time period. Commission Staff's proposal seeks to retroactively unwind normalization, disregarding the law in existence at that time and the rates published in PSE's filed tariffs.

A. Section 1603 of ARRA Required PSE to Normalize Treasury Grants

6. Section 1603 of the American Recovery and Reinvestment Act of 2009 ("ARRA"), enacted into law as of February 17, 2009, authorizes the Department of Treasury ("Treasury") to provide a nontaxable cash grant ("Treasury Grant") equal to thirty percent (30%) of a qualifying renewable energy investment, for the purpose of reimbursing a portion of the expense of such investment.[3] PSE's WH Expansion Project is a qualifying renewable resource under ARRA, and in 2009 PSE began the process of obtaining a Treasury Grant for the Project.

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[2] *See, e.g., Puget Sound Navigation Co. v. Dep't of Pub. Works*, 157 Wash. 557, 561 (1931) (rejecting retroactive ratemaking proposal as violation of the Filed Rate Doctrine).

[3] Stipulation of Facts, filed in this docket on April 12, 2012 (hereafter "Stipulated Facts") ¶ 1; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, Div. B, tit. I, § 1603, 123 Stat. 115, 364 (February 17, 2009).

7. Section 1603(f) of ARRA required the Secretary of the Treasury to apply certain rules to the Treasury Grants—specifically, "rules similar to the rules" of section 50 of the Internal Revenue Code ("IRC"):[4]

> In making grants under this section, the Secretary of the Treasury shall apply rules similar to the rules of section 50 of the Internal Revenue Code of 1986. In applying such rules, if the property is disposed of, or otherwise ceases to be specified energy property, the Secretary of the Treasury shall provide for the recapture of the appropriate percentage of the grant amount in such manner as the Secretary of the Treasury determines appropriate.[5]

8. Subsection 50(d)(2) of the IRC, in turn, requires the application of "rules similar to the rules" of section 46(f) :[6]

> (d) Certain rules made applicable.
>
> For purposes of this subpart, rules similar to the rules of the following provisions (as in effect on the day before the date of the enactment [11/5/90] of the Revenue Reconciliation Act of 1990) shall apply:
>
> * * *
>
> (2) Section 46(f) (relating to limitation in case of certain regulated companies).[7]

Section 46(f) is the Investment Tax Credit ("ITC") normalization requirement in the IRC. Generally, the ITC normalization provisions restrict the ratemaking treatment of the unamortized balance of the ITC by allowing an offset to rate base or a ratable amortization of the ITC balance, but not both.[8]

9. PSE representatives met with tax normalization teams from the IRS and Treasury to explain why PSE believed tax normalization would be inappropriate for section 1603 Treasury

[4] I.R.C. §50.
[5] Stipulated Facts ¶ 2.
[6] I.R.C. §46(f).
[7] Stipulated Facts ¶ 3.
[8] Stipulated Facts ¶ 5, Att. A 72:7-10.

Grants. However, in July 2009, the Treasury issued guidelines ("Treasury Guidance"[9]) on the Treasury Grants. In reference to normalization, the Treasury Guidance states in Part VIII. F, "Applicability of Normalization Rules" as follows:

> Payments received under the Section 1603 program must be normalized. See former §46(f). [10]

B. PSE Complied with the Normalization Rules Pursuant to this Commission's Orders

10. As discussed in more detail below, PSE complied with the federal law requiring normalization when it obtained an accounting order from the Commission approving the federally mandated normalization and filed tariffs with the Commission that included a customer credit based on the federally-mandated normalization.

1. The Commission Approved PSE's Accounting Petition and Authorized Normalization

11. On September 30, 2009, in advance of the Project's commercial operation date—and before PSE applied for a Treasury Grant—PSE filed a petition for an accounting order in Docket UE-091570, requesting authorization of the appropriate tracking of Treasury Grant funds PSE anticipated it could receive for the Project.[11] The petition detailed the normalization treatment required under ARRA and the ten-year amortization that would be applied to Treasury Grant funds received for the Project.[12] Commission Staff recommended that the Commission issue an order authorizing the proposed accounting and normalization treatment requested by PSE.[13] On December 10, 2009, the Commission approved of the proposed accounting and normalization treatment in Order 01.[14]

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[9] Formally titled "Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009", U.S. Treasury Department, Office of the Fiscal Assistant Secretary, July 2009/Revised March 2010/Revised April 2011.

[10] Stipulated Facts, ¶ 4, Att. A 72:17-73:6.

[11] Stipulated Facts ¶ 11.

[12] Stipulated Facts ¶ 12; PSE's Petition for Accounting Order, Docket UE-091570, filed September 30, 2009, ¶¶ 9-10.

[13] Stipulated Facts ¶ 13.

[14] Stipulated Facts ¶ 14.

12. The WH Expansion Project began commercial operations on November 9, 2009.[15] On December 22, 2009, following receipt of the Commission's approval in Order 01 of PSE's proposed accounting and normalization treatment, PSE applied for the Treasury Grant.[16] As part of the application, PSE submitted the Commission Order granting PSE's accounting and normalization treatment in order to demonstrate that PSE had Commission approval to apply that normalization methodology for the Treasury Grant.[17] The Treasury approved PSE's grant application on February 19, 2010. PSE received a $28,674,664 million Treasury Grant for the Project on February 23, 2010.[18]

2. PSE Filed Its Schedule 95A Tariff and Credited Customers Based on the Tariff

13. On October 29, 2010, PSE filed a revision to Schedule 95A in order to pass-through $5,750,205 of the Treasury Grant as a bill credit in 2011. This amount represented 23 months (February 23, 2010 to December 31, 2011) of amortization to be passed through over the 12 months of 2011. The tariff filing included a change in the title of the tariff from Production Tax Credit Tracker to Federal Incentive Tracker to reflect the inclusion of Treasury Grants. The WH Expansion Project Treasury Grant was the only item in Schedule 95A, since the pass-through of Production Tax Credits was set to a zero rate effective July 1, 2010. The tariff was not disputed, and it went into effect on January 1, 2011.[19]

14. Normalization under section 46(f) allows PSE to provide customers with either (1) an offset to rate base for the unamortized balance of the Treasury Grant or (2) the amortization of the Treasury Grant as a reduction to cost of service. Normalization only allows one or the other, not both. PSE used Method 2 – provide customers with the benefit of amortization of the

[15] Stipulated Facts ¶ 8.
[16] Stipulated Facts ¶ 9.
[17] Stipulated Facts ¶ 15.
[18] Stipulated Facts ¶ 10.
[19] Stipulated Facts ¶ 16.

Treasury Grant as part of cost of service.[20]

15. On October 31, 2011, PSE filed a revised Schedule 95A tariff for 2012, seeking to pass-through $4,620,963, on a normalized basis, of the WH Expansion Project Treasury Grant as a bill credit over the 12 months in 2012. Again, the tariff was not disputed, and it went into effect on January 1, 2012.[21]

C. PSE Fought for, and Obtained, an Amendment to Section 1603 Eliminating the Normalization Requirement for All Treasury Grants

16. PSE worked with members of Congress to enact an amendment to ARRA that would remove the normalization requirement. PSE's federal legislative team brought together a coalition of Washington State elected officials from both sides of the aisle to work collaboratively to support this change for the benefit of PSE's customers. Various members of Congress supported PSE's position and introduced the amendment into twelve separate pieces of legislation. Although it took 33 months and numerous attempts, PSE's efforts were ultimately successful. In May 2011, an amendment to section 1603 of ARRA to eliminate the normalization requirement was included in the National Defense Authorization Act for Fiscal Year 2012 ("NDAA").[22]

17. On December 31, 2011, the amendment to section 1603 of ARRA was signed into law as section 1096 of the NDAA. The amendment states:

> (a) In General.—The first sentence of section 1603(f) of the American Recovery and Reinvestment Tax Act of 2009 is amended by inserting "other than subsection (d)(2) thereof" after "section 50 of the internal Revenue Code of 1986".
>
> (b) Effective Date.—The amendment made by this section shall take effect as if included in section 1603 of the American Recovery and Reinvestment Tax Act of 2009.[23]

[20] Stipulated Facts ¶ 5.
[21] Stipulated Facts ¶ 17.
[22] Stipulated Facts ¶ 6, Att. A 73:11-15.
[23] Section 1096 of the National Defense Act for Fiscal Year 2012, H.R. 1540, 112th Congress, 1st Session; Stipulated Facts ¶ 6.

The amendment allows PSE to pass through interest on the unamortized balance of the Treasury Grant starting January 1, 2012. Prior to that date such a pass through was prohibited.[24]

D. PSE Requested Commission Approval to Pass Through Increased Ratepayer Benefits Effective as of the Date of the Section 1603 Amendment, Which Was the First Date that PSE Could Lawfully Begin to Pass Through These Benefits

18. PSE filed the tariff revision at issue in this docket on February 29, 2012. The proposed revision would increase the credit passed through to customers as a result of the elimination of the normalization requirements for the WH Expansion Project Treasury Grant. The proposed increase represents $2,405,683 of interest based on the average unamortized balance of the Treasury Grant for the period January 1 through December 31, 2012, multiplied by 6.9 percent, which is the net of tax overall rate of return from the Company's 2009 general rate case, Docket UE-090704 grossed up for income taxes and revenue sensitive items.[25] PSE's proposed tariff passes through this increased credit beginning on the first date that PSE could lawfully begin passing through interest on the unamortized balance of the Treasury Grant—January 1, 2012.

19. Unsatisfied with these additional benefits, Commission Staff seeks to retroactively increase benefits for the time period during which PSE was prohibited from passing through such increased benefits. Commission Staff contests PSE's calculations and claims that the interest should be calculated from the time the WH Expansion Project Treasury Grant was received, February 23, 2010, through December 31, 2011, in addition to the year 2012 as proposed by PSE. Staff's calculation of interest is $7,994,310, based on the average unamortized balance of the Treasury Grant for the period February 23, 2010 through December 31, 2012, multiplied by the net of tax overall rates of return from the Company's 2009 general rate case (6.9 percent) and 2007 general rate case (7.0 percent), grossed up for income taxes and revenue sensitive items.[26] The impact on PSE of Commission Staff's proposal is the difference between Commission

[24] February 29, 2012 Tariff Filing, p. 1. PSE calculated the pass through interest beginning January 1, 2012, based on a 2012 calendar year. *Id.* The law was enacted on December 31, 2011; thus, the first day rates could be affected by this change in law was January 1, 2012.

[25] *See* Stipulated Facts ¶ 18.

[26] Stipulated Facts ¶ 19.

Staff's proposed $8 million interest credit and PSE's proposed $2.4 million interest credit, adjusted for taxes. If Commission Staff's proposal were approved, PSE would be forced to immediately book this amount as a regulatory liability, with the difference between the two amounts being charged to interest expense.

IV. ARGUMENT

20. The Commission should interpret the amendment to section 1603 of ARRA in a manner consistent with long-standing principles of state and federal law including the Filed Rate Doctrine and the rule against retroactive ratemaking. The Commission should reject the extreme interpretation of the amendment that Commission Staff proposes, which would retroactively increase the credit to customers for Treasury Grants for the WH Expansion Project for the time period of February 2010 through December 2011 beyond the amount published in the filed tariff for that time period. Such an interpretation is unlawful because it impairs PSE's vested rights in its previously published tariff rates. Further, it is poor public policy because it removes the certainty that filed tariffs are intended to provide to customers and the utility.

A. Retroactively Adjusting Unconditional Tariffed Rates Under Schedule 95A Violates the Filed Rate Doctrine and the Prohibition Against Retroactive Ratemaking

1. Filed Rate Doctrine

21. As a general rule, "the attempt retroactively to charge something other than the tariff rate that was in effect for the past period, is a violation of the Filed Rate Doctrine."[27] Washington follows this general rule. The Filed Rate Doctrine is codified in RCW 80.28.080, which provides in relevant part:

> No gas company, electrical company or water company shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such service *as specified in its schedule filed and in effect at the time . . . .*[28]

[27] Goodman, The Process of Ratemaking, Public Utilities Reports, Inc., p. 170 (1998).
[28] RCW 80.28.080 (emphasis added).

22. Thus, as held by the Washington State Supreme Court in *General Telephone Co. v. City of Bothell*, "[o]nce a utility's tariff is filed and approved, it has the force and effect of law."[29] The Commission has similarly recognized that "[f]iled and approved tariffs have the force and effect of state law and are analyzed in the same manner and following the same principles as govern a court's consideration of statutes."[30]

2. Prohibition Against Retroactive Ratemaking

23. A necessary corollary of the Filed Rate Doctrine is the prohibition against retroactive ratemaking. Where, as here, "a statute requires that the regulated company file a tariff of rates with the appropriate regulatory agency, no deviations are permitted from those tariffs without further filing with the agency, *and then only prospectively*; the tariff rates are the rates that are legally binding on both the company and the ratepayer."[31] As Commission Staff has previously acknowledged, the "express statutory embodiment of the rule against retroactive ratemaking" is found in RCW 80.28.020, "which empowers the Commission to order only the just and reasonable rates 'to be *thereafter* observed and in force . . . .'").[32] Thus, "[t]he retroactive ratemaking doctrine prohibits the Commission from authorizing or requiring a utility to adjust current rates to make up for past errors in projections. . . . With few exceptions (not applicable here), under RCW 80.28.020, the Commission is charged with setting rates on a *prospective* basis."[33]

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[29] 105 Wn.2d 579, 585 (1986). *See also, e.g., Standard Oil Co. of Cal. v. Dep't of Pub. Works*, 185 Wash. 235, 238 (1936) ("the rates specified in the schedules filed and in effect are held to be the only lawful rates and remain such so long as they are effective"); *Puget Sound Navigation Co. v. Dep't of Pub. Works*, 157 Wash. 557, 561 (1931) ("when a rate is filed, published, and permitted to become effective by the department, it is and remains, until challenged in the manner provided by statute, the lawful rate and the only lawful rate to be charged and collected"); *Albers Bros. Mill. Co. v. Dep't of Pub. Serv.*, 197 Wash. 622, 625 (1939) ("[t]he tariff on file constitutes the 'lawful rate'"); *Model Water & Light Co. v. Dep't of Pub. Serv. of Wash.*, 199 Wash. 24, 36 (1939) ("During the time that rates and standards are in force they are the only lawful rates and standards.").

[30] *In re Puget Sound Energy, Inc.*, Docket No. UE-061626, Order 04 ¶ 19 (Dec. 19, 2007).

[31] Goodman at p. 169 (emphasis added).

[32] Reply Brief of Commission Staff, *WUTC v. PacifiCorp*, Docket No. UE- 020417, *et al.* at ¶ 10 (Sept. 6, 2002) (emphasis in original) (quoting RCW 80.28.020).

[33] *In re Puget Sound Energy*, Docket UE-010410, Order Denying Petition to Amend Accounting Order ¶ 7 (Nov. 9, 2001) (internal citation and quotations omitted) (emphasis in original). Because the prohibition against retroactive ratemaking in Washington is statutorily based, the only exceptions to this rule are those that are likewise

24. In addition to being illegal under Washington law, retroactive ratemaking is "extremely poor public policy . . . as a rate applied to a service without prior notice and review."[34] The prohibition against retroactive ratemaking is protective of both customers and utilities. For customers, the doctrine protects customers from taking service at one rate and later being charged additional sums based on a new rate unilaterally fixed by a utility.[35] For utilities, the doctrine protects companies from being denied revenues that have been previously approved by a commission as yielding a proper rate of return and to provide certainty to companies regarding rates and earnings.[36]

25. To determine whether a given rate proposal is retroactive in nature, the Commission looks to the substantive effect of the proposal and asks whether the proposal "seeks to change the past effect of a tariffed rate, contrary to the terms of the tariff in effect at that time."[37]

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statutorily authorized. *See* Goodman at p. 105 ("Authority to award a refund must be expressly or impliedly conferred by statute."); *id.* at p. 167 ("The courts recognize that when agencies entertain complaints against rates already in effect, the final rate orders are sometimes made retroactive to the date of commencement of the ratemaking proceeding; *but unless a statute expressly so provides, they are never retroactive to an earlier date.*") (emphasis added); *id.* at p. 165–66 ("*In the absence of express statutory direction, it is unlawful for an agency to alter the past legal consequences of past actions*, such as by awarding damages fore past illegal conduct.") (emphasis added). No such statutory exception applies here.

[34] *In re Puget Sound Energy*, Docket UE-010410, Order Denying Petition to Amend Accounting Order ¶ 7 (Nov. 9, 2001) (quoting *WUTC v. U S WEST Commc's, Inc*., Docket No. UT-970010, Second Supp. Order, 10 (Nov. 7, 1997); *see also WUTC v. Puget Sound Power & Light Co*., Docket No. U-81-41, Sixth Supplemental Order, pp. 17–18 (Dec. 19, 1988) (same); *WUTC v. Olympic Pipe Line Co*., Docket No. TO-011472 ¶¶ 117–19 (Sept. 27, 2002) (rejecting proposal to "reach back in time to alter the tariffed rate under which [company] operated" as violation of retroactive ratemaking doctrine).

[35] *See, e.g., Hearde v. City of Seattle*, 26 Wn. App. 219, 222 (1980); *In re Puget Sound Energy*, Docket UE-010410, Order Denying Petition to Amend Accounting Order ¶ 7 (Nov. 9, 2001) ("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 a proceeding by which the rate is set.").

[36] *See, e.g., Puget Sound Navigation Co. v. Dep't of Pub. Works*, 157 Wash. 557, 561–62 (1931) (rejecting retroactive ratemaking proposal as violation of the Filed Rate Doctrine and reasoning, "[o]therwise, the carrier would never know what its lawful earnings were, and could never allocate its earnings to betterments and dividends without the possibility of being embarrassed by delayed orders to make restitution"); *Alabama Power Co. v. ICC*, 852 F.2d 1361, 1373 (D.C. Cir. 1988) (citing *Arizona Grocery Co. v. Atchison, T. & S.F. Ry*., 284 U.S. 370, 390 (1932) for the proposition that "where the Commission has approved the maximum reasonable rate a carrier may charge, it may not later require a carrier that adhered to the established rules to pay reparations measured by what the Commission now determines it should have decided earlier to be a reasonable rate").

[37] *In re Puget Sound Energy*, Docket No. UE-010410, Order Denying Petition to Amend Accounting Order ¶ 7 (Nov. 9, 2001). Where the tariffed rate was unconditionally approved and implemented as written, any change in the past effect of that rate constitutes unlawful retroactive ratemaking. *See id.* at ¶¶ 7–8.

3. Commission Staff Improperly Seeks to Change the Past Effect of an Unconditional Tariffed Rate

26. Commission Staff in this proceeding proposes to adjust current rates under Schedule 95A in order to make up for a perceived deficiency in the rates credited under Schedule 95A for the historical period of February 23, 2010 to December 31, 2011. This proposal is contrary to Washington law and directly conflicts with the position taken by Commission Staff in a PSE proceeding in which retroactive ratemaking was addressed. In Docket No. UE-010410, PSE petitioned for an amendment of a prior accounting order and to pass-through certain net Conservation Incentive Credit costs in PSE's schedule 120 Conservation Rider. Commission Staff opposed the petition, arguing that

> the proposal would result in retroactive ratemaking. PSE is paying customers $0.05 per kWh pursuant to an approved tariff. PSE's Petition proposes to retroactively re-account for the $0.05 per kWh CIC as a regulatory asset (deferral). The balance would then be surcharged (billed back) to customers through Schedule 120, Conservation Rider.[38]

The Commission in that proceeding agreed with Commission Staff, holding that PSE's proposal would result in retroactive ratemaking because it would "unwind" a rate credit that had been unconditionally approved under Schedule 125.[39]

27. The same result would occur under Commission Staff's present proposal. There is no dispute that PSE filed its Schedule 95A tariff with the Commission in October 2010, and the rates became effective January 1, 2011. Those rates were not temporary or subject to refund.[40] Both PSE and its customers had the right, by law, to rely on that published rate. Nevertheless, Commission Staff seeks to unwind the Treasury Grant credits that flowed back to customers under the Schedule 95A tariff that was previously on file with the Commission. Commission

[38] *In re Puget Sound Energy*, Dockets UE-010410 & UE-011442, Open Meeting Memo (Nov. 7, 2001)

[39] *See In re Puget Sound Energy, Inc.*, Docket No. UE-010410, Order Denying Petition to Amend Accounting Order ¶¶ 7–8 (Nov. 9, 2001).

[40] The Schedule 95A tariff provides for rates to be adjusted annually, and allows for a limited true-up to adjust the tracker due to actual load being different than the forecast load used to set rates. Schedule 95A.Sheet No. 95-f (Oct. 29, 2010)

Staff asks the Commission to disregard the filed rate and now, retroactively, credit customers a higher rate than that published in the filed tariff. As Commission Staff recognized in 2001, such unwinding of an approved tariff constitutes impermissible retroactive ratemaking. Commission Staff's efforts to alter the past effect of PSE's unconditional tariffed rate—by retroactively increasing the customer credit for a discrete historical period—is inconsistent with the Commission's precedent and would exceed the Commission's statutory authority.

B. The Amendment to Section 1603 Does Not Require or Authorize Retroactive Ratemaking and Violation of the Filed Rate Doctrine

1. The Presumption Against Retroactivity Protects Existing and Vested Rights

28. When interpreting statutes, there is a strong presumption against statutory retroactivity where retroactive application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[41] If retroactive application of a statute would cause a retroactive consequence in this disfavored sense, federal courts will "apply the presumption of retroactivity by construing the statute as inapplicable to the event or act in question" unless Congress has expressed a "clear indication . . . that it intended such a result."[42]

29. Washington courts have similarly limited the extent to which an amendment may be retroactively applied. Retroactive application of an amendment may be authorized if the legislature clearly intended retroactivity; if the amendment is "clearly curative," or if the legislation is "remedial."[43] However, "even if one of these rules of statutory interpretation calls for retroactive application, retroactivity will be granted *only* if it does not violate constitutional

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[41] *Fernandez-Vargas v. Gonzalez*, 548 U.S. 30, 37 (2006) (quotations omitted); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

[42] *Fernandez-Vargas*, 548 U.S. at 37–38.

[43] *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460 (1992); *Scott Paper Co. v. Anacortes*, 90 Wn.2d 19, 35 (1978) ("absent a clear expression of intent that they be retroactively applied, it would be improper to do so").

protections relating to due process and the impairment of contracts."[44] Under the Washington State Supreme Court's holding in *Gillis v. King County*, "[a] statute may not be given retroactive effect, regardless of the intention of the legislature, where the effect would be to interfere with vested rights."[45]

30. Commission Staff's proposal divests PSE of vested rights and imposes new burdens on PSE, after the fact, in violation of law.[46] Based on the filed tariff, PSE was entitled to rely on its obligation to pay the Schedule 95A credits to customers set forth in that tariff. Now, Commission Staff argues that PSE owes an additional credit to customers—greater than the credit published in the tariff—for the time period when that approved, published tariff was in effect. The impact on PSE is significant. Under Commission Staff's proposal, PSE would be required to pay to customers an additional credit comprised of the difference between Commission Staff's proposed $8 million interest and PSE's proposed $2.4 million interest, adjusted for taxes. Because of the normalization requirement that was in place, such interest was not required from February 2010 through December 31, 2011 and the funds that Commission Staff now asks PSE to disgorge have been used for operational purposes in lieu of additional borrowing or additional equity. To pay out this additional amount now unfairly burdens the Company, causing it to borrow or seek funds elsewhere that it had already committed to other uses. This is an especially harsh result given the fact that it was shareholders—not ratepayers—who funded the efforts of PSE's federal legislative team to get the law changed.[47]

2. Retroactive Application of Amended Section 1603 to Divest Utilities of Previously Collected Rates Was Not Intended or Authorized By Congress

31. PSE agrees that Congress intended for the amendment to Section 1603 to apply to

[44] *F.D. Processing*, 119 Wn.2d at 460 (emphasis added). *Scott Paper Co.*, 90 Wn.2d at 35 ("Even were such [retroactive] intent manifest, though[,] a legislative enactment will not be given such effect when to do so would impair the obligation of a contract.").

[45] *Gillis v. King County*, 42 Wn.2d 373, 376 (1953).

[46] *See Landgraf*, 511 U.S. at 270 ("The presumption against statutory retroactivity has been consistently explained by the reference to the unfairness of imposing new burdens on persons after the fact.").

[47] *See e.g., WUTC v. Washington Natural Gas*, Docket No. UG-931405, Fourth Supplemental Order, p. 177 (May 27, 1994) (acknowledging activities to influence state and federal legislation shall be booked below the line).

Treasury Grants received prior to December 31, 2011, the date of the amendment. In advocating for this legislation, PSE specifically sought to ensure that utilities with Treasury Grant-eligible projects that were placed in service prior to the date of the amendment would not be precluded from taking advantage of the favorable change in law. This was especially important given the uncertainty as to when and whether the amendment would pass—as evidenced by the 33 months that elapsed before the amendment was passed and the twelve separate pieces of legislation in which the amendment was considered[48]—and the impending commercial operation date for PSE's Lower Snake River Wind Project. That the amendment was intended to apply to pre-existing Treasury Grants is evident from the effective date selected by Congress in subsection (b) of the amendment, which states:

> EFFECTIVE DATE.—The amendment made by this section shall take effect as if included in section 1603 of the American Recovery and Reinvestment Tax Act of 2009.[49]

a. Congress Did Not Intend Retroactive Application In the Manner Advocated by Staff

32. The retroactive application of the amendment that Commission Staff proposes is impermissible. The presumption against statutory retroactivity, discussed above, applies here because there is no indication whatsoever—let alone the requisite "clear statement of congressional intent"—that Congress had any intention of authorizing such a retroactive application. A back-dated effective date, standing alone, is insufficient to provide the required clear statement of congressional intent.[50] It is not reasonable to believe that Congress intended to preempt state law prohibiting retroactive ratemaking and deprive utilities of vested property rights in their previously filed tariffs—without expressly stating an intention to take such extreme action.

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[48] Stipulated Facts, Att. A 73:11-15.

[49] NDAA § 1096(b).

[50] *INS v. Cyr*, 533 U.S. 289, 317 (2001) ("[T]he mere promulgation of an effective date for a statute does not provide sufficient assurance that Congress specifically considered the potential unfairness that retroactive application would produce.").

33. Where, as here, the statutory language is susceptible to more than one reasonable meaning, the language is ambiguous and the court may resort to tools of construction including legislative history.[51] The "fundamental object of judicial construction or statutory interpretation is to ascertain, if possible, and to give effect to, the intention of the legislature in enacting a particular statute."[52] The legislature's intent "may be determined from . . . extrinsic aids, such as legislative history."[53] Extrinsic aids may also include the history of events during the process of enacting the statute and "the circumstances under which the statute was passed, the mischief at which it was aimed and the object it was supposed to achieve."[54]

34. Here, PSE worked with the Treasury and members of Congress for two years to effect a change to the normalization requirement. The proposed amendment was included in twelve separate pieces of legislation before it was finally enacted on December 31, 2011.[55] Prior to that time, it was not clear whether the amendment would pass or when it would pass. With the commercial operation date for PSE's Lower Snake River Wind Project looming, and no amendment yet enacted, it was especially important that the amendment include language that eliminated normalization for Treasury Grants received prior to the date the amendment became law--whenever that might be. Without the "Effective Date" language, PSE faced the potential of another adverse ruling from the Treasury *i.e.*, that the amendment eliminated normalization only for plants placed in service after the amendment was passed. The "Effective Date" language leaves no room for such a ruling by Treasury and allowed for elimination of normalization effective with the amendment of the law, regardless of whether the Treasury Grant was received prior to or after enactment of the law. Given this history, it is reasonable to interpret the language in the amendment to eliminate normalization for all Treasury Grants awarded from the date ARRA was enacted, while not mandating retroactive flow-through treatment by Treasury

[51] *See State v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11–12 (2002).
[52] *In re Kurtzman's Estate*, 65 Wn.2d 260, 263 (1964).
[53] *State v. Hennings*, 129 Wn.2d 512, 522 (1996).
[54] 2A Sutherland Statutory Construction § 48:3–4 (7th ed.).
[55] Stipulated Facts, Att. A 73:11-15.

Grant recipients who were complying with the normalization requirement prior to the amendment.

35. Commission Staff's contrary presumption, that Congress intended for the amendment to result in retroactive ratemaking by state utility commissions, is particularly untenable given that such an application would also have the effect of conflicting with state law.[56] No such federal preemption of state regulatory authority can or should be presumed. As stated by the Washington State Supreme Court, "the goal is to avoid interpreting statutes to create conflicts between different provisions so that we achieve a harmonious statutory scheme."[57] Further, "[i]n the interest of avoiding unintended encroachment on the authority of the States . . . a court interpreting a federal statute pertaining to a subject traditionally governed by a state law will be reluctant to find pre-emption."[58] No preemption can be found where, as here, Congress has expressed no "clear and manifest purpose" to repeal state law.[59]

b. The Retroactive Application Advocated by Staff Is Unlawful

36. Further, even had such an intent to repeal state law been manifested, under Washington law the amendment could not be given retroactive effect to deprive a utility of its vested right to rates previously charged, for services previously rendered, pursuant to a lawful, unconditionally approved tariff.[60]

37. Commission Staff's interpretation of the amendment interferes with PSE's vested right and imposes new burdens on PSE after–the-fact, beyond those obligations contained in PSE's

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[56] *See Gen. Tele. Co.* 105 Wn.2d at 585 ("Once a utility's tariff is filed and approved, it has the force and effect of law.").

[57] *Am. Legion Post # 149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 585 (2008); *accord Waste Mgmt. of Seattle, Inc. v. WUTC*, 123 Wn.2d 621, 630–31 (1994) (rejecting Commission interpretation of statute, which would have had the effect of rendering another statutory provision inoperative).

[58] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663–64 (1993).

[59] *See id*.

[60] *See Scott Paper Co.*, 90 Wn.2d at 35 (holding that city could not impose after-the-fact surcharge for prior electric deliveries without running afoul of *Gillis* rule); *Gillis*, 42 Wn.2d at 376 ("[a] statute may not be given retroactive effect, regardless of the intention of the legislature, where the effect would be to interfere with vested rights"); *Landgraf*, 511 U.S. at 270 ("The presumption against statutory retroactivity has been consistently explained by the reference to the unfairness of imposing new burdens on persons after the fact.").

filed tariff. PSE had a right to rely on the credit obligation in its filed tariff. Commission Staff seeks to increase that burden by more than $5 million, retroactively. As the United States Supreme Court has stated, imposition of such a new burden, after–the-fact, is unfair.[61]

C. The Retroactive Application Advocated by Commission Staff Fails the Matching Principle

38. In the Open Meeting Memorandum, Commission Staff inaccurately justifies its retroactive ratemaking by referencing the matching principle.[62] Commission Staff's position assumes the amendment to section 1603 can be interpreted to retroactively claw back a previously filed tariff rate. As discussed above, principles of statutory interpretation and construction preclude the Commission from interpreting the amendment to authorize retroactive ratemaking. Moreover, such an interpretation would be constitutionally suspect as it would strip PSE of a previously vested right.

39. Contrary to Commission Staff's claims, the Schedule 95A – Federal Incentive Tracker fully and completely matched the benefits and costs appropriate at the time the rates were set, based on the law in effect at that time. Commission Staff's argument that the Commission should revisit the matching of costs and benefits, after a change of law, for a tariff that is no longer in effect, should be summarily rejected. It is "extremely poor public policy"[63] and violates principles of certainty and repose that are important to customers and regulated utilities alike.

V. CONCLUSION

40. The revisions to Schedule 95A that PSE submitted conform to both section 1603 of ARRA as originally passed and the amendment to section 1603 contained in the NDAA. The

[61] *See Landgraf*, 511 U.S. at 270.

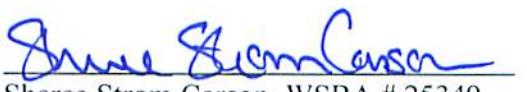
[62] *See* Docket UE-120277, Open Meeting Memorandum dated March 29, 2012 at 2 (noting that "[a] fundamental ratemaking principle that must not be ignored is matching of costs and benefits.").

[63] *See, e.g., In re Puget Sound Energy*, Docket UE-010410, Order Denying Petition to Amend Accounting Order ¶ 7 (Nov. 9, 2001) (quoting *WUTC v. U S WEST Commc's, Inc*., Docket No. UT-970010, Second Supp. Order, 10 (Nov. 7, 1997).

revised tariff eliminates normalization for the WH Expansion Project Treasury Grant, which was received prior to the amendment to section 1603 of ARRA, and credits to customers the interest on the unamortized balance of the Treasury Grant beginning January 1, 2012. The tariff revisions do not attempt to unwind the previously filed tariff rates or the normalization that was required under the law prior to the amendment. As discussed above, PSE's proposal is consistent with federal and state law and should be approved by the Commission.

DATED this 17th day of April, 2012.

PERKINS COIE LLP

By 
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