SERVICE DATE

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, Respondent.	)	DOCKET NO. UE-981238 FOURTH SUPPLEMENTAL ORDER ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR CLARIFICATION/ RECONSIDERATION

PROCEEDINGS: This proceeding concerns Puget Sound Energy's (PSE) filing to establish a fair, just, reasonable, and sufficient rate under the company's rate Schedule 48 (Optional Large Power Sales Rate) for the period November 1, 1998, through October 31, 1999. Administrative Law Judge Dennis J. Moss conducted prehearing conferences at the Commission's offices in Olympia, Washington on December 15, 1998, and January 8, 1999. Among other things, the prehearing conferences established a schedule for parties to file Responses to PSE's November 9, 1999, Petition for Clarification/Reconsideration, and for PSE's Reply. This Order resolves the issues raised by PSE's Petition.

PARTIES: Matthew Harris, attorney, Seattle, Washington, represents Puget Sound Energy (PSE). James M. Van Nostrand and Andree Gagnon, attorneys, Bellevue, Washington, are on PSE's Petition. Bradley Van Cleve and Melinda J. Horgan, attorneys, Portland, Oregon, represent the Industrial Customers of Northwest Utilities, Air Liquide America Corporation, Air Products and Chemicals, Inc., The Boeing Company, Equilon Enterprises LLC, and Tesoro Northwest Company (collectively ICNU). Simon ffitch, Assistant Attorney General, Seattle, Washington, represents public counsel. Robert Cedarbaum, Assistant Attorney General, Olympia, Washington represents Commission Staff (Staff).

PETITION FOR CLARIFICATION/RECONSIDERATION: The Commission's October 28, 1998, Complaint and Order Suspending Tariff Revisions and Order Authorizing Temporary Rates authorized PSE to put in effect on November 1, 1998, temporary rates, subject to refund, pending Commission determination of a fair, just, reasonable, and sufficient rate for the applicable one-year period. PSE asks us to clarify and reconsider our prior Order to provide that "the proposed rate of $0.46 per kVa/month is the effective rate pending a final determination, and any different rate would be effective as of the prospective date stated in the Commission's final order after its investigation. PSE asks to be relieved from any potential refunds. PSE also asks us to clarify the burden of proof. PSE requests oral argument.

COMMISSION: The Commission denies PSE's petition to the extent PSE requests to be relieved from the refund condition we imposed via our October 28, 1998, Order Authorizing Temporary Rates. The interim rate we authorized in that Order, $0.46/kVa/month, is the effective rate, subject to refund, pending our final determination in this proceeding. We grant PSE's motion to clarify the burden of proof. The Commission denies PSE's request for oral argument.

MEMORANDUM

Background. PSE's Schedule 48, Optional Large Power Sales Rate, provides market-based pricing for PSE's industrial and large commercial customers. The Commission approved Schedule 48 in Docket No. UE-960696, effective November 1, 1996. Adoption of Schedule 48 recognized a "non-core" customer class whose members elect under PSE's tariff to bear risks of power unavailability and price variability. Schedule 48 provides for "optional firming" service to allow customers to receive the equivalent of firm, or "core," service. The Commission approved a $0.50 per kVa Month rate for optional firming service. That rate was to remain effective until November 1998, when it was to be redetermined based on market prices; annual redetermination is required for subsequent years. PSE Electric Tariff G, Third Revised Sheet No. 48-a.

On September 28, 1998, PSE filed to adjust the rate for optional firming effective November 1, 1998. The company's proposed tariff revision would establish a $0.46 per kVa Month rate. PSE contends this represents the then-current market price for service.

On October 28, 1998, the Commission issued its Complaint and Order Suspending Tariff Revisions and Order Authorizing Temporary Rates. The Order states:

> Since Schedule 48, as originally filed and approved by the Commission on October 31, 1996, requires that a new rate for Optional Firming Service be in effect on November 1, 1998, the Commission determines that the proposed rate for the service shall be authorized on a temporary basis, subject to refund pending investigation and hearing(s), until such time as a final determination can be made with respect to the proposed rates.

PSE's Petition. On November 9, 1998, PSE filed its Petition for Clarification/Reconsideration. PSE requests

> the Commission to clarify the Order to provide that (1) the proposed rate of $0.46 per kVa/month is the effective rate pending a final determination, and (2) any different rate would be effective as of the prospective date stated in the Commission's final order after its investigation.

PSE asserts the Commission's Order is contrary to law and sound policy if it means the Commission may approve after November 1, 1998, a final rate to be effective as of November 1, 1998, and require PSE to pay refunds if that final rate is less than $0.46 per kVa/month. Specifically, PSE argues that the Order violates the Filed Rate Doctrine and the prohibition against retroactive rates. PSE asserts also that it would be unwise policy and contrary to Commission precedent to implement a rate reduction on a temporary basis subject to refund. PSE also questions the basis for our assignment of the burden of proof.

PSE's Reply requests oral argument.

Responses. Staff filed its response on February 5, 1999. Staff urges us to reject PSE's petition and argues that the Commission's Order enforces the tariff's requirement for Optional Firming Service rate redetermination effective November 1, 1998. Staff asserts the Commission properly accepted PSE's proposed rate as a temporary rate subject to refund, "consistent with the Filed Rate Doctrine and the prohibition against retroactive ratemaking." Staff also argues that the order is consistent with Commission precedent and policy. Staff says PSE has the burden to support its proposed rate as being market based.

ICNU and its individual members who are intervenors here (collectively ICNU) filed a joint Answer opposing PSE's petition. Like Staff, ICNU argues that the Commission's order approving a temporary rate subject to refund doe not raise the specter of a retroactive rate reduction. ICNU argues further that the Commission's Order reflects sound policy.

Commission's Analysis and Decision. The parties briefed the issues fully. We see no need for oral argument. PSE's request for oral argument is denied.

Stated simply, PSE asks us to remove the refund condition imposed by our October 28, 1998, Order, leaving in place the authority we granted PSE to charge its proposed rate, $0.46/kVa/month, pending determination of a final rate to apply prospectively. We consider first the practical import and policy implications of what PSE requests.

PSE's Schedule 48 requires that the rate for Optional Firming Service be redetermined each November. When PSE files for a new rate each year, the Commission has three choices under its governing statutes and precedent: (1) approve the proposed rate change as filed, after 30 days notice,[1] without a hearing; (2) suspend the proposed rate change for up to ten months and initiate hearing proceedings, leaving the preexisting rate in place during the suspension period; (3) suspend the proposed rate change for up to ten months and initiate hearing proceedings, setting an interim rate to be effective during the suspension period. RCW 80.28.060; *State ex rel. Puget Sound Navigation v. Dept. of Transportation*, 33 Wn.2d 448, 206 P.2d 456 (1949).

The first option is available only if we are fully satisfied the proposed rate is fair, just, reasonable, and sufficient. When, as here, we are not fully satisfied, we reject the first option and embark upon a hearing process that may require the full ten month suspension period. Recognizing again that it sometimes takes ten months to determine whether the proposed rate is fair, just, reasonable and sufficient, and preferring to not leave in place a higher rate when PSE says a lower rate ought apply, it is sound policy to reject the second option, too. Thus, we are left with, and make, the sensible decision to suspend the proposed rate and set an interim rate.

It is particularly important in this case that the interim rate remain subject to refund. The parties requested that this proceeding be held in abeyance pending our completion of the proceedings in Docket No. UE-981410, a complaint case that also involves Schedule 48. Under the procedures to which the parties agreed, and to which the Presiding Administrative Law Judge acquiesced, the evidentiary phase of this docket will not even commence in earnest until sometime in July 1999. The parties waived the statutory suspension period for three months in anticipation that their requested procedural schedule may mean that this case will not be concluded until after November 1, 1999. By then, PSE presumably will have made another rate redetermination filing under Schedule 48. It is likely PSE will collect these rates for much of, if not the entire, period at issue under the present filing. Were we powerless to order refunds for what very well may turn into a locked-in period from November 1, 1998, through October 31, 1999, this case would become moot and our process hollow.

Thus, from a policy standpoint what PSE urges us to do yields a completely untenable result. We reject PSE's suggestion that our October 28, 1998, Order reflects unwise policy.

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[1] RCW 80.28.060 requires 30 days minimum notice for proposed rate changes to become effective, unless the Commission waives the requirement for good cause shown. During the notice period, the Commission may suspend the proposed rate change for up to ten months.

We turn next to PSE's arguments that our October 28, 1998, Complaint and Order Suspending Tariff Revisions, and Order Authorizing Temporary Rates, is unlawful. PSE's first argument is that the Commission's order violates the Filed Rate Doctrine by establishing a temporary rate and making the revenue PSE collects under that rate subject to refund. In essence, PSE asserts that the Commission is powerless to approve interim rates. Yet, as PSE acknowledges in the introduction to its arguments and in a separate section of its Petition, "the Commission has approved temporary rate *increases* (subject to refund) to provide interim rate relief pending the outcome of the investigation of permanent rates." PSE Petition at 4, 12. PSE cites *State ex rel. Puget Sound Navigation, supra*, the case Staff and ICNU also cite, as precedent for the Commission's authority to permit interim rates, subject to refund if the finally determined rates are lower than the temporary rates.

PSE argues the holding in *Puget Sound Navigation* is limited to the circumstances of that case which involved a proposed rate increase and temporary rates higher than preexisting rates. PSE Reply at 5.[2] Following careful review, however, we see nothing in the Court's reasoning in this early case that distinguishes our authority to approve temporary rates subject to refund, whether they are higher or lower than preexisting rates. As ICNU points out, our governing statutes do not distinguish between rate increases and rate decreases, but refer expressly to rate "changes." ICNU Answer at 3 - 4 (citing RCW 80.04.130; RCW 80.28.060).

PSE asserts interim rate decreases are distinct from interim rate increases because when "a rate *increase* is implemented on a temporary basis, subject to refund, . . . the utility can rely on the previously approved rates as a floor below which the final rate determination will not fall for the period prior to a Commission order establishing that final rate." PSE Petition at 5. This premise is incorrect. PSE's argument confuses what we do when we establish an interim rate, subject to refund, with the more familiar situation where we suspend a proposed rate increase and leave a preexisting rate in effect. The two scenarios are fundamentally different.

Typically, when a company files for new rates and an investigation is required, the Commission suspends the proposed rate increase and takes no steps to approve an interim rate. In that situation, the preexisting, Commission-approved rate simply remains in effect as the "filed rate" and refunds cannot be ordered for the

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[2] PSE reads into the Court's opinion a limit to the Commission's refund authority based on the level of preexisting rates which PSE calls a "lawful minimum rate." As a practical matter, there was little or no question in *Puget Sound Navigation* that the rate ultimately determined would be higher than the preexisting rates; the only question was how much higher. There simply is no discussion in the Court's lengthy opinion that contemplates the possibility of rates lower than preexisting rates.

suspension period even if the rate finally determined is lower than the preexisting rate.[3] This is what Goodman refers to as "a large caveat to the rule that permits a litigant to attack the reasonableness of a filed rate." *Id.* at 173 (1998). So long as a final, nonprovisional rate is in place it can be changed only prospectively. That is the very definition of the Filed Rate Doctrine. *Texas Eastern Transmission Corp. v. F.E.R.C.*, 102 F.3d 174, 183 (5th Cir. 1996). PSE's Filed Rate Doctrine arguments, based on Goodman's discussion and *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1931), thus relate to circumstances not present in this case--the typical situation involving suspension of proposed rates with preexisting, Commission-approved, nonprovisional rates left in place.

When the Commission establishes an interim rate it acts in its legislative capacity and exercises powers necessarily implied from its statutory authority to allow an unexamined rate to become effective immediately subject to reasonable conditions. *State ex rel. Puget Sound Transportation, supra* at 475; *See Trans Alaska Pipeline Rate Case,* 436 U.S. 631, 654 (1978). By establishing a new effective rate (*i.e.*, the interim rate), the Commission rescinds the company's authority to charge the preexisting rate. The interim rate is the only rate the company may charge until the Commission again exercises its legislative power, following its investigation, and establishes a new, permanent rate for prospective application.

As the Commission's investigation of a company's proposed permanent rate proceeds in a case where a temporary rate is established subject to a refund condition, the Commission simultaneously undertakes its judicial function to establish a benchmark against which to judge whether the temporary rate was excessive from and after the date it was authorized. The fact that the Commission ultimately establishes a single rate both for prospective application and as a benchmark for determining any refunds may blur the distinct legislative and judicial functions from a lay person's perspective, but the distinction is clear in the professional literature on ratemaking, and courts long have recognized its importance. *See* Goodman, *supra.* 173-74; *Arizona Grocery, supra* at 388; *State ex rel. Puget Sound Navigation Co., supra* at 480. Because the interim rates are provisional only and subject to the Commission's judicial powers, if the rate ultimately determined establishes a benchmark lower than the interim rate, and the interim rate is found to have been excessive and unlawful, the Commission may order refunds for the period from the date the interim rate went into effect, without violating the Filed Rate Doctrine. *See Texas Eastern Transmission*

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[3] Other, less typical circumstances may allow for other results. Goodman, for example, describes the situation where an agency may commence proceedings looking to eventual rate reductions and order the company to establish a deferred revenue account that may later become subject to a rate refund requirement. Leonard Saul Goodman, *The Process of Ratemaking,* 167 (1998). Other exceptions are conceivable.

Corp. v. F.E.R.C., *supra* at 183 (Filed Rate Doctrine means that "once a rate is in place with ostensibly full legal effect and is not made provisional, it can then be changed only prospectively"). The preexisting rate does not establish a floor for refunds under these circumstances because it simply had no status as a lawful rate during the pendency of the proceeding; it lost that status when the interim rate went into effect.[4]

This brings us to PSE's second argument: that approving at some future point in time a final rate lower than $0.46/kVa month, and requiring refunds for the past period during which the $0.46/kVa month rate was collected, constitutes unlawful retroactive ratemaking. This again ignores that the Commission both suspended the proposed $0.46/kVa month rate and, as a separate act memorialized in the same Order, authorized an interim rate to go into effect, subject to refund. The Commission now is embarked both on a quasi-legislative path to determine rates to be effective prospectively, and on a quasi-judicial path to determine the lawfulness of the interim rates. If we grant a refund at the conclusion of this case our act will not constitute "retroactive ratemaking," because finding a non-final rate unlawful is an adjudicatory determination that reaches back to the date of our complaint and order instituting this proceeding. As Goodman observes, "[i]f an agency possesses a power to suspend the effectiveness of a tariff rate, it may subject the regulated company to an obligation to account for and refund amounts collected under interim rates that are in effect during the suspension period. Goodman, *supra.* at 108 (citing *Trans Alaska Pipeline Rate Cases, supra*).

We turn next to PSE's argument that implementing a lower rate for Optional Firming Service on a temporary basis, subject to refund, is contrary to Commission precedent. As Staff points out, the two cases PSE cites, *Washington Natural Gas Company,* Docket No. UG-920840, Fourth Supplemental Order (1993) and *WUTC v. U S WEST Communications, Inc.,* Docket No. UT-950200, Fifteenth Supplemental Order (1996), did not involve approval of temporary rates subject to refund, but only suspension of proposed rates and determination of final rates for prospective application. Thus, these cases are inapposite for reasons previously discussed.

PSE again notes in this connection that the Commission (or predecessor authority) sometimes has approved temporary rate increases, subject to refund. We already have discussed the leading case, *State ex rel. Puget Sound Navigation, supra.* That case did not result in a final determination of a rate lower than the preexisting rate. PSE cites to us no case where we have approved an interim rate increase and then set

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[4] It does not matter for purposes of our decision whether the Optional Firming Service rate expires by its own terms each November 1, as Staff and ICNU contend, and PSE disputes. The previous rate was extinguished by our order authorizing an interim rate.

a final rate lower than the preexisting rate. Thus, the precise question of whether we might order refunds pegged to a final rate lower than a preexisting rate apparently has not been presented in the line of authority to which PSE refers in its Petition. PSE Petition at 11-12.

Although PSE found no "situations where the Commission has implemented a proposed rate reduction on a temporary basis, subject to refund," there is, in fact, a recent such case decided since PSE filed its Petition.[5] In *WUTC v. American Water Resources, Inc.*, Docket No. UW-980076, American Water Resources, Inc. (AWRI) filed for a rate decrease from $3,500 to $2,500 for its Facilities Charge. The Commission allowed a temporary rate of $2,500, subject to refund, and set the matter for joint hearing with an AWRI general rate case and other matters in Docket Nos. UW-980072, *et al.* The Commission entered on February 25, 1998, its Complaint and Order Suspending Tariff Revision, Ordering Temporary Rate and Instituting Investigation. The temporary rates there, as here, were subject to refund. In its Sixth Supplemental Order denying petitions for review of an Initial Order, the Commission ordered the Facilities Charge rate to be set at $1,860, and required AWRI to pay $640 refunds to each customer who paid the $2,500 temporary rate during the pendency of the case. AWRI did not challenge the Commission's refund order. Because the precise issues PSE raises here were not disputed, the precedential value of our Order in *American Water Resources, Inc.* is limited. Nevertheless, to the extent there is any Commission authority at all on the question PSE presents by its Petition, that authority is consistent with our decision here and with our October 28, 1998, Order.

PSE seeks clarification on another issue unrelated to the question of our power to approve a temporary rate lower than a preexisting rate, subject to refund. Our October 28, 1998, Order says: "[i]n accordance with RCW 80.04.130, the burden of proof to show that such *increases* are just and reasonable shall be upon respondent." (emphasis added). PSE says it is not proposing to increase any rate or charge and that our Order thus "erroneously places on PSE the Burden of Proof to show that such increases are just and reasonable." PSE is correct. The company proposed a lower rate, not a rate increase. As PSE says "[t]he Order should be corrected to reflect that RCW 80.04.130 does not, by its terms, assign to PSE the burden of justifying its proposed rate." PSE Petition at 14.

Staff argues that although PSE is "[t]echnically speaking . . . correct," PSE nevertheless bears the burden to show that its proposed rate meets the "market price" standard stated in Schedule 48. On Reply, PSE acknowledges it has the burden to

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[5] The case was decided by a Commission Order entered on January 21, 1999, between the time PSE filed its Petition and Reply, and before Staff's and ICNU's responses.

show its proposed rate is market based. PSE Reply at 9. Staff and PSE, then, are in agreement. As a general proposition in rate proceedings, when a party proposes a specific rate, it must support that rate under applicable standards. We follow that rule here. PSE bears the burden to justify its proposed rate. If it does not, and another party advocates a different rate, that party bears the burden to show by substantial competent evidence that the rate it proposes is market-based. In the final analysis, we must be satisfied that the rate we approve is fair, just, reasonable, and sufficient.

Our prior Order is both clear in what it demands, and lawful. Our action to allow temporary rates subject to refund reflects sound policy. We deny PSE's Petition to the extent it asks us to remove the refund condition from our grant of authority to collect interim rates. We offer clarification regarding the burden of proof.

ORDER

THE COMMISSION ORDERS That Puget Sound Energy's Petition for Clarification/Reconsideration is DENIED insofar as it requests relief from the refund condition attached to the temporary rate authority granted by our October 28, 1998, Complaint and Order Suspending Tariff Revisions and Order Authorizing Temporary Rates in this Docket No. UE-981238.

THE COMMISSION ORDERS FURTHER That Puget Sound Energy's Petition for Clarification/Reconsideration is GRANTED insofar as it requests clarification that "RCW 80.04.130 does not, by its terms, assign to PSE the burden of justifying its proposed rate."

THE COMMISSION ORDERS FURTHER That Puget Sound Energy bears the burden to support its proposed rate as fair, just, reasonable, sufficient, and market-based.

DATED at Olympia, Washington, and effective this 5th day of April, 1999.

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner