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BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

GEORGIA-PACIFIC WEST, INC.,  
  
Complainant,  
  
v.  
  
PUGET SOUND ENERGY, INC.,  
  
Respondent.

NO. UE-001616  
  
PUGET SOUND ENERGY, INC.'S  
MOTION FOR SUMMARY  
DETERMINATION  
  
[Oral Argument Requested]

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1 exercising the opt-in had commenced to run. GP declined to opt into Schedule 48 then, and  
2  
3 the unambiguous deadline fixed by the tariff has long since expired.

4  
5 6. GP's Complaint is without merit, and should be dismissed.  
6

7 **II. FACTS**  
8

9 7. GP's special contract with PSE provides:  
10

11 If, subsequent to the effectiveness of this agreement, the Company  
12 offers to industrial customers, under any tariff of general applicability,  
13 electric service equivalent to that offered under the Schedule RTP  
14 attached to this agreement, the customer will have the right to elect to  
15 take electric service from the Company under such tariff; provided,  
16 that following the exercise by the customer of such election right, such  
17 tariff will be deemed to be substituted for the Schedule RTP attached  
18 to this agreement and the customer will take such equivalent electric  
19 service from the Company under such tariff (as amended or varied by  
20 this agreement) for the remainder of the term of this agreement.  
21  
22

23 Power Sales Agreement, § 3.5 (the "Most Favored Nations Clause" or "MFN Clause").<sup>1</sup>  
24

25 8. PSE's Schedule 48 provides:  
26

27  
28 Customers Taking Service Under Special Contracts. Any customer  
29 receiving service from Company pursuant to a Special Contract  
30 (pursuant to WAC 480-80-335) as of the effective date of Schedule 48  
31 shall have a one-time option, expiring ninety (90) days after the  
32 effective date of this Schedule, to cancel such Special Contract in favor  
33 of taking service under this Schedule. Following the expiration of  
34 such Special Contract, such customer shall have the option of taking  
35 service under this Schedule.  
36  
37

38 Section IV.6, Schedule 48 ("90-Day Opt-In Clause").<sup>2</sup>  
39  
40  
41

42  
43  
44 <sup>1</sup> The GP Special Contract, as originally allowed to go into effect by the Commission, is  
45 attached as Exhibit A to the Declaration of George R. Pohndorf, Jr. ("Pohndorf Decl."), filed  
46 herewith. The terms of the GP and Bellingham Cold Storage ("BCS") Special Contracts are  
47 identical.

1           9.       In addition to the plain language of the Most Favored Nations Clause and the  
2  
3 90-Day Opt-In Clause quoted above, consideration of the issues raised by GP's Complaint  
4  
5 requires a review of undisputed events that have occurred since 1996 that are related to PSE's  
6  
7 Special Contracts with GP and BCS and to Schedule 48, as outlined below:  
8

<u>Date</u>	<u>Event</u>
<b>1996:</b>	
May 6, 1996	PSE, GP and BCS execute Special Contracts, which include the MFN Clause quoted above.  Prices are based on an "Index" which, initially means the COB Non-Firm index then, 180 days following the effective date of the Special Contracts, means "Mid-Columbia Non-Firm Electricity Index prices" reported to Dow Jones. <sup>3</sup>
May 24, 1996	PSE files its proposed Schedule 48 with the Commission. As proposed, Schedule 48 contains the 90-Day Opt-In Clause quoted above. <sup>4</sup>
June 7, 1996	WUTC permits GP and BCS Special Contracts to go into effect. <sup>5</sup>
Oct. 9, 1996	WUTC approves Schedule 48 at its open meeting, with an effective date of November 1, 1996.

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35           <sup>2</sup> For the Commission's convenience, Schedule 48 is attached to the Pohndorf Decl. as  
36 Exhibit B.

37           <sup>3</sup> Special Contracts, p. 5, Schedule RTP at I (Definitions: "Non-Firm Energy").

38           <sup>4</sup> See PSE's filing with WUTC dated May 24, 1996, attached to Pohndorf Decl. at Exhibit C.

39           <sup>5</sup> In re the Special Contract Filed by Puget Sound Power & Light Co., Docket  
40 No. UE-960612, Order Imposing Conditions on Special Contract Allowed To Go Into Effect (June 7,  
41 1996); In re the Special Contract Filed by Puget Sound Power & Light Co., Docket No. UE-960613,  
42 Order Imposing Conditions on Special Contract Allowed To Go Into Effect (June 7, 1996)  
43 (collectively the "Special Contract Orders").  
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effective date of November 1, 1999.

Oct. 30, 1996 PSE notifies GP and BCS of the approval and effective date of Schedule 48, and calls their attention to the 90-Day Opt-In Clause.<sup>6</sup> Neither GP nor BCS elect to opt into Schedule 48.<sup>7</sup>

Oct. 31, 1996 WUTC issues its written order approving Schedule 48 effective Nov. 1, 1996, without revising the 90-Day Opt-In Clause.<sup>8</sup>

**1997:**

Jan. 30, 1997 Schedule 48's 90-day opt-in period expires.

**1998:**

June 1, 1998 Dow Jones begins publishing Mid-C Non-Firm Index.

Nov. 6, 1998 Five of PSE's Schedule 48 customers file complaint objecting to PSE's use of an index that blended the Mid-C Non-Firm and Firm indices (the "Blended Index").<sup>9</sup> GP is not a party to that complaint, and never intervenes.

**1999:**

Aug. 3, 1999 WUTC issues order on the Schedule 48 complaint, concluding that as of June 1, 1998, Schedule 48 required PSE to charge prices based on the Mid-C Non-Firm rather

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<sup>6</sup> See Letter from PSE's John Campion to GP's John Asmundson dated October 30, 1996, attached to Pohndorf Decl. as Exhibit D.

<sup>7</sup> See Pohndorf Decl. at ¶ 6.

<sup>8</sup> WUTC v. Puget Sound Power & Light Co., Docket No. UE-960696, Commission Order Approving Schedule 48 With Conditions (Oct. 31, 1996) ("Schedule 48 Approval Order").

<sup>9</sup> See Complaint in Docket No. UE-981410, attached to Pohndorf Decl. as Exhibit E.

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than the Blended Index.<sup>10</sup>

Oct. 27, 1999 PSE, GP and BCS enter into "Accord and Satisfaction And Agreement Regarding Index" ("Accord"). PSE agrees to pay \$800,000 to GP and BCS in full satisfaction of any claims with respect to billing prior to Nov. 1, 1999.

The parties also agree to negotiate a replacement for the Special Contracts, or if they cannot agree to entire replacement, then to a "mutually acceptable index" to replace the Special Contract Index, or to a replacement index chosen through binding arbitration.<sup>11</sup>

**2000:**

April 28, 2000 PSE, BCS and GP execute "Amendment to Power Sales Agreement" under which pricing to GP and BCS will be based on the Mid-C *Firm* Index less 1.07 m/kWh.<sup>12</sup>

July 12, 2000 WUTC addresses Amendments at its open meeting, where GP and BCS support the Amendments on a going-forward basis.<sup>13</sup> WUTC issues order permitting Amendments to become effective as of July 13, 2000.<sup>14</sup>

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<sup>10</sup> Air Liquide America Corp. et al. v. Puget Sound Energy, Inc., Docket No. UE-981410, Fifth Supplemental Order Granting Complaint, Ordering Refunds and Other Relief, 1999 Wash. UTC LEXIS 591 (Aug. 3, 1999) ("Air Liquide").

<sup>11</sup> See Accord, attached to Pohndorf Decl. as Exhibit F.

<sup>12</sup> See GP Amendment, attached to Pohndorf Decl. as Exhibit G.

<sup>13</sup> See July 12, 2000 Open Meeting Transcript excerpt, attached to Pohndorf Decl. as Exhibit H.

<sup>14</sup> In re the Special Contract Filed by Puget Sound Energy, Docket No. UE-960612 and Docket No. UE-960613, Second Supplemental Order Granting Amendment to Special Contract on Less Than Statutory Notice (July 12, 2000) ("Amendment Orders"). The effective date was changed from November 1, 1999 to July 13, 2000 due to Staff's concern that an earlier effective date would constitute a violation of the filed rate doctrine. The Commission subsequently issued a complaint in

1  
2 Aug./Sept. 2000 GP demands that PSE permit GP to obtain electric service  
3 from PSE pursuant to the pricing set forth in Schedule 48,  
4 Mid-C Non-Firm, effective September 1, 2000, citing the  
5 MFN Clause of the GP Special Contract.<sup>15</sup>  
6

7 PSE refuses.  
8

9 Oct. 25, 2000 GP files its Complaint in this docket.  
10

11  
12  
13 **III. ARGUMENT**  
14

15 **A. Standard on Motion for Summary Determination**  
16

17 10. Pursuant to WAC 480-09-426(2), a party requesting summary determination  
18 must show that "the pleadings filed in the proceeding, together with any properly admissible  
19 evidentiary support, show that there is no genuine issue as to any material fact and the  
20 moving party is entitled to summary determination in its favor." The Commission considers  
21 motions for summary determination under "the standards applicable to a motion made under  
22 CR 56 of the civil rules for superior court." Id. The civil rules provide:  
23  
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29 The judgment sought shall be rendered forthwith if the pleadings,  
30 depositions, answers to interrogatories, and admissions on file,  
31 together with the affidavits, if any, show that there is no genuine issue  
32 as to any material fact and that the moving party is entitled to a  
33 judgment as a matter of law.  
34  
35

36 CR 56(c).  
37  
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40 Docket No. UE-001521 to investigate and address this and related issues. The Commission recently  
41 approved and adopted the settlement reached by PSE, BCS and GP in that docket. See WUTC v.  
42 PSE, Docket No. UE-001521, Second Supplemental Order: Approving And Adopting Settlement  
43 Agreement; Dismissing Complaint With Prejudice (Dec. 29, 2000).  
44

45 <sup>15</sup> See Letter from GP's James Cunningham to PSE's Gary Swofford dated August 24, 2000  
46 and Letter from GP's C.E. Smith to PSE's Gary Swofford dated September 11, 2000, attached to  
47 Pohndorf Decl. as Exhibit I.



1           11.     The moving party bears the burden of demonstrating an absence of any  
2  
3 material fact and entitlement to judgment as a matter of law. Magula v. Benton Franklin  
4 Title Co., 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact is one of such nature  
5  
6 that it affects the outcome of the litigation. Greater Harbor 2000 v. Seattle, 132 Wn.2d 267,  
7  
8 279, 937 P.2d 1082 (1997).  
9

10  
11 **B.     Standards for Considering the Complainant's Challenge**

12  
13           12.     The Special Contracts have "the same effect as filed tariffs and are subject to  
14 enforcement, supervision, regulation, and control as such." WAC 480-80-335(3). When a  
15 rate is filed, published and permitted to become effective, it is the only lawful rate until  
16  
17 challenged in the manner provided by statute, and PSE must charge the tariffed rate. See  
18  
19 RCW 80.28.080; Puget Sound Navigation Co. v. Dept. of Pub. Works, 157 Wash. 557,  
20  
21 561-62, 289 P. 1006 (1930), aff'd, 160 Wash. 703 (1931); State ex rel. Standard Oil Co. of  
22  
23 Cal. v. Dept. of Pub. Works, 185 Wash. 235, 238-239, 53 P.2d 318 (1936); Gen. Tel. Co. of  
24  
25 the Northwest v. City of Bothell, 105 Wn.2d 579, 585, 716 P.2d 879 (1986).  
26  
27

28  
29           13.     GP's Complaint brings into issue a dispute over what the provisions of its  
30  
31 Special Contract and Schedule 48 require.

32  
33                   When, as here, parties dispute what particular provisions require, [the  
34                   Commission] must look first to the plain meaning of the tariff. If the  
35                   tariff language is plain and unambiguous, there is no need to resort to  
36                   rules of construction.  
37

38  
39 Air Liquide America Corp. et al. v. Puget Sound Energy, Inc., Docket No. UE-981410, Fifth  
40  
41 Supplemental Order Granting Complaint, Ordering Refunds and Other Relief, 1999 Wash.  
42  
43 UTC LEXIS 591 (Aug. 3, 1999) ("Air Liquide"), at 6 (citations omitted). If tariff language is  
44  
45 not plain, or is ambiguous, the Commission applies rules of construction to determine what  
46  
47 the Commission intended in approving the tariff. Where the tariff at issue is a special

1 contract or a product of negotiation, the Commission will also keep in mind principles of  
2 contract law. See id. at 4-7.  
3

4 14. The complainant in a challenge brought pursuant to RCW 80.04.110 bears the  
5 burden of proving its case. See, e.g., State ex rel. Model Water & Light Co. v. Dept. of Pub.  
6 Serv., 199 Wash. 24, 35, 90 P.2d 243 (1939); In re Complaint of AT&T Communications of  
7 the Northwest, Inc. v. U S WEST Communications, Inc., Docket No. UT-991292, Tenth  
8 Supplemental Order, Order Granting Motion to Dismiss (May 19, 2000) at 5. Thus, GP bears  
9 the burden of showing that it is entitled to the relief it seeks.  
10  
11  
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15

16  
17 **C. PSE Is Entitled to Summary Determination In Its Favor**  
18

19 **1. GP may not obtain Schedule 48 pricing because the MFN Clause**  
20 **provides for opting into a tariff as a whole, and does not permit**  
21 **GP to pick and choose only the pricing provision of a tariff**  
22

23 15. At the prehearing conference in this docket, GP stipulated on the record that  
24 the scope of its Complaint is limited to the claim that GP is entitled "to invoke the most  
25 favored nations clause regarding pricing only, and that the other terms and conditions of the  
26 special contract remain in effect." See Transcript of Nov. 30, 2000 Prehearing Conference  
27 at 22, Pohndorf Decl. at Exhibit K. GP further stipulated that it is asking the Commission for  
28 "merely a substitution of pricing" in this proceeding. Id. at 23.  
29  
30  
31  
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34

35 16. The MFN Clause provides:  
36

37 If, subsequent to the effectiveness of this agreement, the Company  
38 offers to industrial customers, under any *tariff of general applicability*,  
39 electric service equivalent to that offered under the Schedule RTP  
40 attached to this agreement, the customer will have the right to elect to  
41 take electric service from the Company *under such tariff*; provided,  
42 that following the exercise by the customer of such election right, *such*  
43 *tariff* will be deemed to be substituted for the Schedule RTP attached  
44 to this agreement and *the customer will take such equivalent electric*  
45 *service from the Company under such*  
46  
47

1                    *tariff* (as amended or varied by this agreement) for the remainder of the  
2 term of this agreement.  
3

4 Power Sales Agreement, § 3.5 (emphasis added).  
5

6            17.        Thus, the MFN Clause unambiguously requires that if GP wishes to exercise  
7 the MFN Clause, it must take service under Schedule 48 as a whole, "as amended or varied  
8 by" the Special Contract. Under such a scenario, the parties would need to determine in  
9 which respects the Special Contract amends Schedule 48. For example, as described in PSE's  
10 withdrawn counterclaims, the Special Contract amends the term and transportation contract  
11 provisions of Schedule 48.  
12  
13  
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16

17            18.        GP's Complaint does not request service under Schedule 48. Instead, GP  
18 seeks to retain the Special Contract in place, as a whole, and to merely substitute the Mid-C  
19 Non-Firm index pricing of Schedule 48 for the Mid-C Firm less 1.07 pricing of the Special  
20 Contract that was approved by the Commission effective July 13, 2000. The MFN Clause on  
21 which GP relies unambiguously prohibits such selective picking and choosing of an isolated  
22 provision of another tariff. Thus, GP's Complaint should be dismissed.  
23  
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29

30            2.            **GP's access to Schedule 48 is barred by the 90-Day Opt-In Clause**  
31 **of Schedule 48**  
32

33            a.            **Schedule 48 unambiguously required special contracts**  
34 **customers to decide whether to switch from their special**  
35 **contracts to Schedule 48 within 90 days of the effective date**  
36 **of Schedule 48**  
37  
38

39            19.        The 90-Day Opt-In Clause of Schedule 48 provides:  
40

41                    Customers Taking Service Under Special Contracts. *Any customer*  
42 *receiving service from Company pursuant to a Special Contract*  
43 *(pursuant to WAC 480-80-335) as of the effective date of Schedule 48*  
44 *shall have a one-time option, expiring ninety (90) days after the*  
45 *effective date of this Schedule, to cancel such Special Contract in favor*  
46 *of taking service under this Schedule.*  
47

1 Section IV.6, Schedule 48 (emphasis added).

2  
3 20. The Commission approved Schedule 48 on October 9, 1996 (open meeting  
4 order) and October 31, 1996 (written order), with an effective date of November 1, 1996.  
5  
6 WUTC v. Puget Sound Power & Light Co., Docket No. UE-960696, Commission Order  
7  
8 Approving Schedule 48 With Conditions (Oct. 31, 1996) ("Schedule 48 Approval Order").  
9  
10 GP was a Special Contracts customer as of November 1, 1996. In re the Special Contract  
11  
12 Filed by Puget Sound Power & Light Co., Docket No. UE-960612, Order Imposing  
13  
14 Conditions on Special Contract Allowed To Go Into Effect (June 7, 1996). Schedule 48  
15  
16 unambiguously required GP to decide whether to take service under Schedule 48 by 90 days  
17  
18 after November 1, 1996.<sup>16</sup>

19  
20  
21 21. If Schedule 48 were for some reason held not to be clear on its face as to the  
22  
23 90-Day Opt-In Clause, the Commission would look to its intent in approving Schedule 48.  
24  
25 See Air Liquide at 6; Nat'l Union Ins. Co. v. Puget Sound Power & Light Co., 94 Wn. App.  
26  
27 163, 171, 972 P.2d 481 (1999), review denied, 138 Wn. 2d 1010 (1999). During the  
28  
29 Commission's consideration of Schedule 48, the participants noted that the tariff was  
30  
31 designed to provide an alternative to forcing PSE's large industrial customers to enter into  
32  
33 individual special contracts with PSE. See excerpt from the July 12, 2000 Open Meeting  
34  
35 Transcript dated October 10, 2000, attached to Pohndorf Decl. as Exhibit H. The  
36  
37 Commission was well aware at the time it considered and approved Schedule 48 that the  
38  
39 special contract customers that would be subject to the 90-Day Opt-In clause were GP, BCS  
40  
41 and ARCO, and was aware of GP's MFN Clause. See id.; Special Contracts Orders (BCS  
42  
43  
44

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<sup>16</sup> The 90-Day Opt-In Clause provides another window for opt-in "[f]ollowing the expiration of such Special Contract," but that aspect of Schedule 48 is not at issue in this proceeding.

1 and GP); In re Special Contract Filed by Puget Sound Power & Light Co., Docket No.  
2  
3 UE-950599, Order Approving Contract On Less Than 30-Day Notice (May 31, 1995)  
4  
5 (ARCO). See also In re Marriage of Little, 96 Wn.2d 183, 189-90, 634 P.2d 498 (1981)  
6  
7 (legislating body is presumed to be aware of its past legislation). Clearly, the Commission  
8  
9 intended to require these customers, including GP, to make a decision within 90 days as to  
10  
11 whether to take service from PSE in the future through their special contracts, or through  
12  
13 Schedule 48.

14  
15 22. GP may argue that the MFN Clause of the GP Special Contract is not limited  
16  
17 in time. That is true, and GP may well have the right to opt into some other general tariff that  
18  
19 meets the conditions of the MFN Clause in the future, should PSE ever file and the  
20  
21 Commission approve such a tariff. But GP may not use the MFN Clause to opt into  
22  
23 Schedule 48.

24  
25 23. Fundamental rules of statutory construction provide that: (1) a "specific statute  
26  
27 supersedes a general statute when both apply," Gen. Tel. Co. of the Northwest, Inc. v.  
28  
29 WUTC, 104 Wn.2d 460, 464, 706 P.2d 625 (1985); and (2) a statute enacted later in time  
30  
31 repeals a prior statute to the extent the two statutes conflict. See Walder v. Belnap, 51 Wn.2d  
32  
33 99, 101, 316 P.2d 119 (1957); Hartig v. City of Seattle, 53 Wash. 432, 437, 102 P. 408  
34  
35 (1909). The 90-Day Opt-In Clause of Schedule 48, which set a specific, 90-day deadline for  
36  
37 any opt-in to Schedule 48, superseded GP's general right in the MFN Clause to opt into a  
38  
39 subsequently enacted tariff. In addition, Schedule 48 was enacted after the GP Special  
40  
41 Contract. In Schedule 48, the Commission imposed a deadline by which GP and other  
42  
43 special contracts customers were required to elect to take service under Schedule 48. The  
44  
45 Commission's later enactment of that deadline effectively repealed the MFN Clause with  
46  
47 respect to any election to take service under Schedule 48 beyond the 90-day deadline.

1           24.     GP may also argue that Schedule 48 does not prohibit the relief it seeks  
2  
3 because GP seeks only to obtain Schedule 48 pricing, and not Schedule 48 as a whole.  
4  
5 However, as set forth above, the MFN Clause does not permit GP to pick and choose the  
6  
7 portions of Schedule 48 it likes, and import them into the Special Contract. Moreover, a  
8  
9 tariff must be read "to harmonize and give effect to all its provisions." Air Liquide at 16  
10  
11 (citations omitted). GP's argument would require the Commission to read out of existence  
12  
13 the 90-Day Opt-In Clause of Schedule 48.

14  
15                   **b.     Although PSE notified GP of the commencement of the**  
16                   **90-day opt in period, GP did not elect to opt into**  
17                   **Schedule 48 within the 90 day deadline**  
18

19           25.     By letter dated October 30, 1996, PSE notified GP that the Commission had  
20  
21 approved Schedule 48. PSE explicitly alerted GP to the 90-Day Opt-In Clause. See Letter  
22  
23 from PSE's John Campion to GP's John Asmundson dated October 30, 1996, Pohndorf Decl.  
24  
25 at Exhibit D.

26  
27           26.     At no time during the applicable 90-day period after November 1, 1996 did  
28  
29 GP ever seek to change to Schedule 48 pricing. See Pohndorf Decl. at ¶ 6.  
30

31           27.     The first time GP ever purported to request access to Schedule 48 pricing was  
32  
33 in its requests to PSE in August and September 2000. See Letter from GP's James  
34  
35 Cunningham to PSE's Gary Swofford dated August 24, 2000 and Letter from GP's C.E.  
36  
37 Smith to PSE's Gary Swofford dated September 11, 2000, Pohndorf Decl. at Exhibit I. GP's  
38  
39 attempt to obtain Schedule 48 pricing at that time was clearly far beyond the deadline for  
40  
41 such opt-in.  
42

43           28.     Schedule 48 unambiguously bars GP from obtaining the relief it seeks in this  
44  
45 proceeding, and its Complaint should be dismissed.  
46  
47

1           **3. Contractual and equitable principles also bar GP's attempt to**  
2           **escape the bargain it struck with PSE for pricing based on the**  
3           **Mid-C Firm Index less 1.07 m/kWh, which this Commission**  
4           **approved just three months before GP filed its Complaint**  
5

6           29. In addition to the clear limitations of the MFN Clause and Schedule 48  
7  
8 described above, fundamental equitable and contractual principles support dismissal of GP's  
9  
10 Complaint. Through its Complaint, GP is improperly seeking the assistance of the  
11  
12 Commission to relieve GP from the bargain it struck with PSE less than a year ago to take  
13  
14 service at pricing based on the Mid-C Firm Index less 1.07, which the Commission approved  
15  
16 a mere three months before GP filed its Complaint in this docket.  
17

18           30. The Commission has noted that contractual and equitable principles may be  
19  
20 applicable in interpreting tariffs. See Air Liquide, at 6-7, 20-21 and n.2.  
21

22           31. The Commission's Air Liquide decision of August 3, 1999, was an important  
23  
24 declaration of the meaning of the pricing language in Schedule 48. After that decision issued,  
25  
26 PSE, GP and BCS discussed how the decision affected the Special Contracts, which  
27  
28 contained similar, but not identical, pricing language.<sup>17</sup> GP could have chosen to pursue  
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30 Mid-C Non-Firm index pricing for its Special Contract at that time, on the basis of the Air  
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32 Liquide decision. Instead, GP, BCS and PSE negotiated and agreed to an "Accord and  
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34 Satisfaction And Agreement Regarding Index" dated October 27, 1999 ("Accord"). In the  
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39           <sup>17</sup> Although the details of these discussions are not relevant to the Commission's resolution  
40 of GP's Complaint, PSE notes that the Special Contracts, unlike Schedule 48, do not contain  
41 language permitting use of a substitute index. Since no Mid-C Non-Firm index existed 180 days  
42 after the effective date of the Special Contracts, arguably the Air Liquide decision would have  
43 required PSE to adjust its billing to BCS and GP to base pricing on the COB Non-Firm index until  
44 the date the Mid-C Non-Firm was created, June 1, 1998, with billing based on the Mid-C Non-Firm  
45 after June 1, 1998. Such adjustment could have resulted in GP and BCS owing PSE amounts in  
46 excess of amounts paid based on PSE's Blended Index billing. See "GP/BCS Talking Points",  
47 attached to Pohndorf Decl. as Exhibit J.

1 Accord, PSE agreed to pay \$800,000 to GP and BCS in full satisfaction of any claims they  
2 might have with respect to billing prior to November 1, 1999. As an integral part of the  
3 Accord, the parties also agreed to negotiate a replacement for the Special Contracts, or if they  
4 could not agree to a replacement, then to a "mutually acceptable index" to replace the Special  
5 Contract index, with any such replacement index to be effective November 1, 1999. If the  
6 parties reached an impasse, they agreed that a replacement index would be chosen through  
7 binding arbitration. See Accord, Pohndorf Decl., Exhibit F. The Accord thus clearly and  
8 unambiguously sets forth the parties' agreement that pricing under the Special Contract would  
9 no longer be based on the Mid-C Non-Firm index.  
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19 32. Thereafter, PSE, GP and BCS agreed to a replacement index, under which  
20 pricing to GP and BCS would be based on the Mid-C *Firm* Index less 1.07 m/kWh. This  
21 agreement was reduced to writing and executed as of April 28, 2000, in an "Amendment to  
22 Power Sales Agreement" for each of GP and BCS ("Amendment"). See GP Amendment,  
23 Pohndorf Decl. at Exhibit G.  
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29 33. The Amendments were filed with the Commission on June 28, 2000. On  
30 July 12, 2000, GP testified before the Commission at its open meeting in support of the  
31 Commission's approval of the Amendments on a going-forward basis. See excerpt from the  
32 July 12, 2000 Open Meeting Transcript, Pohndorf Decl. at Exhibit H. The Commission  
33 issued an order permitting the Amendments to become effective as of July 13, 2000. In re the  
34 Special Contract Filed by Puget Sound Energy, Docket No. UE-960612 and Docket  
35 No. UE-960613, Second Supplemental Order Granting Amendment to Special Contract on  
36 Less Than Statutory Notice (July 12, 2000) ("Amendment Orders"). Thus, since July 13,  
37 2000, the "Index" for the Special Contracts has been linked to the Mid-C Firm index, not the  
38 Non-Firm index:  
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1 For purposes of this agreement, "Index" means the Dow Jones  
2 Mid-Columbia Electricity Index reporting "*Firm On-Peak*," "*Firm*  
3 "*Off-Peak*" and "*Sunday & NERC Holidays 24 Hour Firm*" energy  
4 prices (in dollars per megawatt-hour). For purposes of this agreement,  
5 "on-peak," "off-peak," "*Firm On-Peak*," "*Firm Off-Peak*" and "*Sunday*  
6 "*& NERC Holidays 24 Hour Firm*" have the respective meanings  
7 ascribed to such terms by Dow Jones in connection with the Dow  
8 Jones Mid-Columbia Electricity Index.  
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11 Amendments at ¶ 1(a) (emphasis added).  
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13 34. Just a few weeks later, in late August and early September 2000, GP  
14 demanded that as of September 1, 2000, PSE permit GP to obtain electric service from PSE  
15 under the pricing set forth in Schedule 48. GP thus effectively demanded that it be released  
16 from its agreement in the Accord and Amendment, and be permitted to return to Mid-C  
17 Non-Firm pricing.<sup>18</sup> The Commission should reject this blatant attempt by GP to escape the  
18 bargain it voluntarily struck with PSE.  
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21 35. A party may not escape its obligations under a contract simply because market  
22 conditions change in a way that makes its terms less attractive than when the contract was  
23 negotiated. "Equity has never presumed to rewrite contracts for parties *sui juris* merely  
24 because of disappointed expectations" such as "rise or fall in values, profit or loss in the  
25 undertaking, mistakes of judgment, unforeseen events, which yet were fairly possible  
26 contingencies." Blanck et al. v. Pioneer Mining Co., et al., 93 Wash. 26, 32, 159 P. 1077  
27 (1916).  
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39 36. In addition, the Commission has consistently recognized that the industrial  
40 customers who enter into special contracts with PSE or take service under Schedule 48 are  
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46 <sup>18</sup> GP has never suggested that it is willing to return its portion of the \$800,000 payment  
47 received from PSE under the Accord.

1 sophisticated business actors who are capable of protecting themselves and advancing their  
2 interests with respect to PSE. See, e.g., Air Liquide at 19. The Commission's limited time  
3 and resources should not be consumed by such customers in a quest for relief from the  
4 bargains they have struck, in violation of the plain language of special contracts and  
5 negotiated tariffs approved by the Commission.  
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11 37. PSE's rejection of GP's request for access to Schedule 48 pricing is fully  
12 consistent with the parties' Special Contract, including the MFN Clause, the Commission's  
13 recent order approving the Amendment to the Special Contract price, and Schedule 48. At  
14 base, GP's Complaint represents just another attempt to escape the bargain it struck with PSE,  
15 an effort that should receive no support from this Commission.  
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21 38. For the reasons set forth above, PSE is entitled to summary determination in  
22 its favor dismissing the Complaint in its entirety.  
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25 **D. Even If GP Prevails On Its Complaint, GP Is Not Entitled to Retroactive**  
26 **Adjustment of Power Prices, or to Adjustment of Past Bills**  
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28 39. Even if, arguendo, GP were able to show that it is entitled to Schedule 48  
29 pricing, such adjustment must be made prospectively, as of the date of the Complaint in this  
30 proceeding, and not as of the September 1, 2000, date that GP has requested.  
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34 40. RCW 80.28.080 requires PSE to charge the rate "specified in its schedule filed  
35 and in effect at the time." Special Contracts filed with and approved by the Commission  
36 have "the same effect as filed tariffs and are subject to enforcement, supervision, regulation,  
37 and control as such." WAC 480-80-335(3).  
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42 41. Generally, the "attempt retroactively to charge something other than the tariff  
43 rate that was in effect for the past period, is a violation of the Filed Rate Doctrine."  
44 Goodman, The Process of Ratemaking, Public Utilities Reports, Inc., 170 (1998).  
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1 Washington follows the general rule: "[W]hen a scheduled rate is challenged, that challenge  
2 should affect the scheduled rate only from the date of the filing of the complaint." Puget  
3 Sound Navigation Co., 157 Wash. at 561-62. See also State ex rel. Model Water & Light  
4 Co., 199 Wash. at 33; State ex rel. Standard Oil Co. of Cal., 185 Wash. at 238-239.  
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9 42. As set forth above, the lawful rate for GP in effect as of July 13, 2000, sets the  
10 price for electric service based on the Mid-C Firm Index less 1.07 m/kWh, not the Mid-C  
11 Non-Firm Index found in Schedule 48.  
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14 43. Retroactive adjustment to the pricing provisions of the Special Contracts, over  
15 PSE's objection, would violate the Filed Rate Doctrine.<sup>19</sup> GP is seeking wholesale  
16 *replacement* of the existing Index with the entirely different index set forth in Schedule 48.  
17 Thus, the Commission should determine, as a matter of law, that even if GP is entitled to  
18 change to Schedule 48 pricing, the earliest date that such adjustment could be effective would  
19 be the date GP filed its Complaint: October 25, 2000.  
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#### 26 IV. CONCLUSION

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29 44. For the reasons set forth above, PSE respectfully requests that the Commission  
30 dismiss the Complaint, with prejudice.  
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33 45. In the alternative, if the Commission rules in favor of GP, PSE respectfully  
34 requests that the Commission enter an order that provides for adjustment of GP's billing only  
35 as of October 25, 2000, the date GP filed its Complaint.  
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44 <sup>19</sup> By contrast, the retroactive adjustment back to November 1, 1999, that was the subject of  
45 Docket No. UE-001521 was voluntarily negotiated and agreed to by the only parties affected by the  
46 rate at issue. See, e.g., In re Application of Consumers Power Co. Requesting the Commission to  
47 Review and Approve a Settlement Agreement, Case No. U-10037, 1992 Mich. PSC LEXIS 94 at \*14  
(Mich. PSC 1992).

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DATED: January \_\_, 2001.

**PERKINS COIE LLP**

By \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**  
**Docket No. UE-001616**

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I hereby certify that I have caused Puget Sound Energy's Inc.'s Motion for Summary Determination and Declaration of George R. Pohndorf, Jr. to be served upon all parties of record in this proceeding, as follows:

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12 Dated at \_\_\_\_\_, Washington, this \_\_\_\_\_ day of \_\_\_\_\_, 2001.  
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