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 RESPONSE TO GP'S MOTION FOR SUMMARY DETERMINATION [Oral Argument Requested]

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I. INTRODUCTION

1. Georgia-Pacific West, Inc. ("GP") and Puget Sound Energy, Inc. ("PSE") agree in their motions for summary determination that there are no issues of material fact in dispute with respect to the issue that is before the Commission in this proceeding: "whether G-P can change its pricing provisions pursuant to the Most Favored Nations Clause" of the parties' Special Contract. Complainant's Motion for Summary Determination ("GP's Motion") at 2.[1]

2. GP is correct that this dispute should be resolved through summary determination. However, GP's reading of the Most Favored Nations ("MFN") Clause of the Special Contract is fatally flawed. GP argues repeatedly that the MFN Clause permits it to change the pricing provisions of the Special Contract. Yet, GP fails to cite to any language in the MFN Clause that permits a change of "pricing." As is clear on the face of the Special Contract, there simply is no such language. Instead, the MFN Clause plainly provides that GP has a right to elect to take service from PSE under a subsequently enacted tariff (as amended or varied by the Special Contract). Nothing in the MFN Clause permits GP to pick and choose the pricing or other isolated terms of a subsequently enacted tariff.

3. In addition, because GP seeks to obtain Schedule 48 pricing, its invocation of the MFN Clause must be squared with the provisions of Schedule 48. On its face, Schedule

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[1] GP's motion states several times that the parties' Special Contract "was intended by the parties to be a complete integration of their agreement," without citation to anything in the Special Contract or submission of any evidence in support of that statement. PSE takes no position on that statement at this time because it is irrelevant to the issues before the Commission at this time. Neither party has suggested that evidence outside the four corners of the Special Contract and the public record regarding its adoption by the Commission is relevant to the Commission's resolution of GP's Complaint.

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48 required special contracts customers to make their decision whether to take service under Schedule 48 within 90 days of the effective date of Schedule 48. That deadline has long since passed. GP's position that this 90-Day Opt In Clause does not apply fails to reconcile and give effect to all provision of the MFN Clause and Schedule 48.

4. The clear and unambiguous terms of the Special Contract and Schedule 48 require PSE to continue to provide service to GP under the Mid-C Firm Index less 1.07 m/kWh pricing of the parties' Special Contract that the Commission recently approved. In addition, as set forth in PSE's Motion for Summary Determination ("PSE's Motion"), fundamental principles of contract law and equity bar GP's attempt to undo its recent bargain with PSE and to return to Mid-C Non-Firm Index pricing.

II. ARGUMENT

A. GP's Articulation of the Standard for Interpreting Special Contracts is Incorrect

5. GP is correct that interpretation of Schedule 48 and the Special Contract present legal, not factual, issues in this case. GP's Motion at 6. However, GP incorrectly invokes contract law cases and rules of construction rather than rules of statutory construction as the primary line of authority guiding the Commission's decision in this case. See id. at 6-7, 9-10.

6. Special contracts have "the same effect as filed tariffs and are subject to enforcement, supervision, regulation, and control as such." WAC 480-80-335(3). Rules of statutory construction apply to the interpretation and application of tariffs and special contracts.

> When, as here, parties dispute what particular provisions require, [the Commission] must look first to the plain meaning of the tariff. If the tariff language is plain and unambiguous, there is no need to resort to

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rules of construction.

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"), at 6 (citations omitted). If tariff language is not plain, or is ambiguous, the Commission applies rules of statutory construction to determine what the Commission intended in approving the tariff. See id. See also Nat'l Union Ins. Co. v. Puget Sound Power & Light Co., 94 Wn. App. 163, 171, 972 P.2d 481 (1999), review denied, 138 Wn. 2d 1010 (1999).

7. It is true that where the tariff at issue is a special contract or a product of negotiation, the Commission will also keep in mind principles of contract law. See Air Liquide at 4-7. However, such principles help inform the Commission's decision, and are not a replacement for principles of statutory construction.

8. In any case, the contract principles GP invokes in its motion are irrelevant in this proceeding. Neither PSE nor GP are seeking to introduce extrinsic evidence regarding the parties' intent with respect to the MFN Clause or the 90-Day Opt In Clause of Schedule 48.

9. GP has failed to present any arguments or authority regarding the rules of statutory construction, and has failed to present any evidence that the Commission's intent in approving the MFN Clause or Schedule 48 support GP's position in this proceeding.

B. GP Is Not Entitled To Switch To Schedule 48 Pricing

1. GP's interpretation of the 90-Day Opt In Clause and the MFN Clause is inconsistent with those provisions and fundamental rules of statutory construction

10. GP acknowledges that Schedule 48 clearly and unambiguously sets forth a 90-

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day window for special contracts customers to elect to take service under Schedule 48.

11. GP seeks to escape application of this section of Schedule 48, arguing that it "created a separate and additional right from the Most Favored Nations Clause" of its Special Contract, GP's Motion at 10, and that it "applied only to Customers that intended to 'cancel' their Special Contract in order to take service under Schedule 48." Id. at 11. GP argues that it only "wishes to 'substitute' Schedule 48 pricing for Schedule RTP pricing," not to "cancel" the existing Special Contract. Id.

12. GP's argument that the 90-Day Opt In does not apply at all if GP is not seeking to "cancel" the Special Contract fails "to harmonize and give effect to" all of the provisions of Schedule 48 and the parties' Special Contract. See Air Liquide at 16. To the degree possible, the MFN Clause and the 90-Day Opt In must be read together. Where one of the clauses is more specific as to a particular point, the specific controls over the general. See Gen. Tel. Co. of the Northwest, Inc. v. WUTC, 104 Wn.2d 460, 464, 706 P.2d 625 (1985). And where the two clauses conflict, the 90-Day Opt In controls, as the later-enacted provision. See Walder v. Belnap, 51 Wn.2d 99, 101, 316 P.2d 119 (1957); Hartig v. City of Seattle, 53 Wash. 432, 437, 102 P. 408 (1909).

13. The MFN Clause does not restrict the time within which GP must choose to opt into a subsequently enacted tariff. However, Schedule 48 imposed a 90-day deadline for special contracts customers to opt into Schedule 48, and that later-enacted, specific deadline controls. Had GP acted within the 90-day opt-in window, then the Special Contract may have been "cancelled," and replaced with Schedule 48. On the other hand, aspects of the Special Contract may have survived GP's opt in, because the term "cancel" would need to be harmonized, if possible, with the MFN Clause's requirement that service would be taken under the new "tariff (as amended or varied by this agreement)." Thus, the Special Contract

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may have been "cancelled," but with some of its terms surviving for incorporation into the service agreement required by Schedule 48. See Schedule 48, Section IV.1. Schedule 48 requires that the service agreement be "substantially in the form attached" to Schedule 48, but it "may include additional terms and conditions as agreed upon between the Company and Customer." Id.

14. In any case, the Commission need not resolve these questions in this proceeding, as GP did not seek to opt into Schedule 48 within the 90-day window, and is not seeking to do so now. GP chose not to act within the 90-day timeframe. The result is that GP has missed its chance to opt into Schedule 48, and instead must continue taking service under the Special Contract. Nothing in the MFN Clause, Schedule 48 or the rules of statutory construction supports GP's argument that GP is somehow, four years later, entitled to read the 90-Day Opt In Clause out of existence, or to suggest that it had and has no effect on the MFN Clause.

2. The MFN Clause does not permit GP to substitute isolated terms that it picks and chooses from another tariff.

15. A second fundamental problem with GP's Complaint is that the argument on which it relies in an effort to evade the 90-Day Opt In Clause deals a fatal blow to its argument under the MFN Clause. GP argues that it wishes only to "'substitute' Schedule 48 pricing for Schedule RTP pricing." GP's Motion at 11. GP thereby seeks only to "change[] the pricing component of the Power Sales Agreement." Id. See also id. at 7 (the MFN Clause "allows G-P to switch the pricing under the contract to any PSE industrial tariff"). The plain and unambiguous language of the MFN Clause does not permit such limited substitution.

16. The MFN Clause provides:

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> If, subsequent to the effectiveness of this agreement, the Company offers to industrial customers, under any tariff of general applicability, electric service equivalent to that offered under the Schedule RTP attached to this agreement, the customer will have the right to elect to take electric service from the Company *under such tariff*; provided, that following the exercise by the customer of such election right, *such tariff* will be deemed to be substituted for the Schedule RTP attached to this agreement and the customer will take such equivalent electric service from the Company *under such tariff* (as amended or varied by this agreement) for the remainder of the term of this agreement.

Power Sales Agreement, § 3.5 (emphasis added). The MFN Clause speaks repeatedly in terms of taking service under the new tariff. Nothing in the MFN Clause permits GP to choose to "substitute" only the "pricing" of a tariff for the pricing in the Special Contract.

17. GP may be arguing that the following MFN Clause language supports its Complaint: "such tariff will be deemed to be *substituted for the Schedule RTP*…." GP's Motion at 4 (emphasis added). However, Schedule RTP of the Special Contract does not contain only pricing provisions. It also contains a set of definitions and a section setting forth additional "Terms & Conditions" of the Special Contract. The plain language of the MFN Clause does not permit substitution of only pricing provisions of a subsequently enacted tariff.

3. Fundamental principles of contract law and equity support PSE's reading of the MFN Clause and Schedule 48

18. As set forth in PSE's Motion, just months ago, GP bargained for and agreed to amend the pricing provisions of the Special Contract to obtain service based on the Mid-C Firm Index less 1.07 m/kWh rather than the Mid-C Non-Firm Index. The Commission approved this amendment on a going-forward basis less than two months before GP reversed course and demanded that PSE provide service at Mid-C Non-Firm prices. The Commission should not permit GP to disregard the bargain it struck with PSE and return to Mid-C Non-

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Firm prices based on GP's tortured reading of the Special Contract and Schedule 48. See PSE's Motion at 12-16.

C. GP's Request for Schedule 48 Pricing Violates the Filed Rate Doctrine

19. As set forth in PSE's Motion, PSE continues to charge GP under the newly-approved, revised Special Contract pricing because that is the filed rate that is in effect. Nothing in the MFN Clause permits GP to obtain the pricing it seeks, and Schedule 48 explicitly forbids it. Thus, PSE has not violated the Filed Rate Doctrine.

20. GP argues as a general proposition that "[t]he utilization of index-substitution provisions, in the absence of any objection from customers, is permitted under both Washingon law and the Filed Rate Doctrine." GP's Motion at 12. PSE does not disagree with this statement, generally. However, it has no applicability in the present circumstances, where the Special Contract contains no index-substitution provision, the MFN Clause does not permit the pricing substitution that GP seeks, and PSE has not agreed to any pricing substitution.

21. PSE's rejection of GP's request for access to Schedule 48 pricing is fully consistent with the parties' Special Contract, including the MFN Clause, the Commission's recent order approving the Amendment to the Special Contract price, and Schedule 48.

IV. CONCLUSION

22. For the reasons set forth above and in PSE's Motion, PSE is entitled to summary determination in its favor dismissing GP's Complaint in its entirety.

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DATED: February ___, 2001.

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CERTIFICATE OF SERVICE
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I hereby certify that I have caused Puget Sound Energy's Inc.'s Response to GP's Motion for Summary Determination to be served upon all parties of record in this proceeding via first class mail, postage prepaid, as follows:

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