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

RESPONSE BRIEF

ON BEHALF OF

THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

May 4, 2012

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I. INTRODUCTION

1 Pursuant to the April 5, 2012 Notice of Recessed Open Meeting ("Notice of Recess"), the Industrial Customers of Northwest Utilities ("ICNU") hereby submits this response brief requesting that the Washington Utilities and Transportation Commission ("WUTC" or the "Commission") adopt Staff's recommendation and direct Puget Sound Energy to pass through to customers all benefits required by the amended Section 1603 of the 2009 American Recovery and Reinvestment Tax Act ("ARRA").[1/] At issue in this case is whether Congress intended that Section 1096 of Public Law No. 112-81 ("the Amendment") should apply retroactively to grants made under ARRA.[2/] Because the language of the Amendment unambiguously states that Congress intended this law to apply retroactively, the Commission should order Puget Sound Energy, Inc. ("PSE" or the "Company") to pass through to customers interest credit on the unamortized balance of U.S. Treasury Department ("Treasury") grants for the Wild Horse Expansion Wind Project.

II. BACKGROUND

2 ICNU accepts the Stipulation of Facts filed by PSE and Staff on April 12, 2012 (the "Stipulation"). While ICNU appreciates any efforts made by PSE to reduce costs to ratepayers, it neither disputes nor affirms PSE's representations regarding its lobbying efforts related to the Amendment.

1/ Pub. L. No. 111–5, Div. B, tit. I, § 1603, 123 Stat. 115, 364 (Feb. 17, 2009).
2/ National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Congress, 1st Session.

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3 On February 23, 2010, pursuant to section 1603 of the ARRA, PSE received a Treasury grant of $28,674,664 for the Wild Horse Expansion Project.[3/] PSE normalized the payment, as directed by the Treasury, which meant that it could choose either to offset rate base by the amount of the grant or amortize the grant and return the amortized amount to customers through its Federal Incentive Tracker.[4/] PSE chose to amortize the grant and, on December 10, 2009, received permission from the WUTC to set up a deferred account to refund the grant outside of regular rates.[5/] On December 31, 2011, the National Defense Authorization Act ("NDAA") was signed into law, and section 1096 of that bill amended section 1603 of the ARRA to remove the normalization requirement that had been imposed by Treasury regulations.[6/] All parties agree that removal of the normalization requirement entitles customers to payment of interest on the unamortized balance of the Treasury grant; PSE filed a revision to its tariff that would begin passing interest through to customers, accruing from the date the amendment was signed.[7/] The sole question in this proceeding is whether, by making the amendment retroactive to the date of the passage of the ARRA, Congress intended that customers be entitled to interest accruing from February 23, 2010, the date of the grant award.

4 The language of the Amendment unambiguously makes the Amendment retroactive; therefore, ICNU requests that the WUTC require PSE to pass through to

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[3/] Stipulation at 1, 4.
[4/] Id. at 3, 5.
[5/] Id. at 5.
[6/] Id. at 3.
[7/] Id. at 5.

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customers the full benefit of the Treasury grant, including interest from February 23, 2010, forward.

III. ARGUMENT

5 Federal law requires a retroactive adjustment that will credit ratepayers for interest on Treasury grants related to the Project held by the Company. While Federal law generally preempts both state law and ratemaking doctrines that carry the force of state law, compliance with the federal statute does not offend either the Filed Rate Doctrine or the Rule Against Retroactive Ratemaking because neither applies in this case.

A. Congress Made Section 1603 Retroactively Effective

1. Textual Indicators of Congressional Intent

6 When interpreting a federal statute, a "court, as well as [an] agency, must give effect to the unambiguously expressed intent of Congress."[8/] In statutory interpretation, the primary evidence to be used is the actual text of the statute, and it must be assumed "that the ordinary meaning of that language accurately expresses the legislative purpose."[9/] This textual inquiry is accomplished by looking to the language of the statute, the specific context of the language in question, and the context of the statute as a whole.[10/]

8/ Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837, 842-43 (1984).
9/ Hardt v. Reliance Std. Life Ins. Co., ___ U.S. ___, 130 S. Ct. 2149, 2156 (2010).
10/ Robinson v. Shell Oil, 519 U.S. 337, 341 (1997).

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7 Because the parties agree that part (a) of the Amendment[11/] removes the normalization requirement imposed by the Treasury and entitles customers to interest on the grant, the only statutory language at issue is part (b), which reads:

> (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.[12/]

The language of this paragraph unambiguously addresses the effective date of the amendment, calling for the change to be made *as if* the amendment had been included in the original 2009 bill. Congress did not define the term "as if" in the statute.

8 When words in a statute are not specifically defined, they must be given their ordinary meaning, and courts turn to dictionaries to make this determination.[13/] In this case, Webster's Dictionary defines the term "as if" to mean "as it would be if."[14/] The American Heritage Dictionary agrees, defining the term to mean "in the same way that it would be if."[15/] Thus, the plain meaning of the amendment is that it should take effect "as it would be if" it had been included in the 2009 ARRA or "in the same way that it would be if" it were included in the 2009 law. This is a clear, unambiguous statement of congressional intent to make the Amendment retroactive.

[11/] The text of part (a) 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'." National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Congress, 1st Session (the "NDAA") § 1096(a).

[12/] Id. § 1096(b).

[13/] Mohamad v. Palestinian Auth., __ U.S. __, 132 S. Ct. 1702, __ (2012) (relying on Merriam-Webster's and other dictionaries to determine the ordinary meaning of the term "individual").

[14/] Webster's Third New International Dictionary, 128 (1993).

[15/] American Heritage Dictionary, 108 (3d ed. 1996).

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9 The context makes clear that the purpose of part (b) is to make this section retroactively effective. The NDAA does not have a "catchall" effective date, meaning that, unless otherwise noted, its provisions were to become law when the bill was signed. A number of provisions in the law do have exceptions to this default rule, specifying that they would become effective at different times.[16/] Like section 1096, these sections use the term "effective date" to specify the date from which the sections would become governing law because the effective date of each was to be *different* than the default signing date applicable to the rest of the bill. There is no reason to believe that Congress intended the term "effective date" to have a different meaning in section 1096 than it meant throughout the rest of the Act. To assume that Congress intended this section alone of all the sections with discrete effective date provisions to be effective on the generic effective date would render the plain language meaningless–a result that federal courts do not countenance.

10 If the text of a statute is "inescapably ambiguous," courts may look to legislative history to determine legislative intent.[17/] While this statute is not ambiguous, ICNU is nonetheless unaware of any evidence in the bill file that indicates what members of Congress were thinking when they voted for this amendment. While ICNU finds it encouraging that PSE claims to be acting as a lobbyist on behalf of customers, PSE's assertions regarding its intent as a lobbyist are not evidence of Congress' intent.[18/] In the

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[16/] See, e.g., NDAA § 541 (effective 180 days after enactment of the bill); Id. § 1022 (effective 60 days after the enactment of the bill).

[17/] Holder v. Hall, 512 U.S. 874, 932 n. 28 (1994).

[18/] Initial Brief of PSE at 6.

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words of Judge Easterbrook, "'[e]verybody knows' is no substitute for support in the text. Legislative history may help decode ambiguous statutory text, but what lobbyists told the staff is not legislative history."[19/]

2. Congressional Power to Retroactively Correct Implementation of Laws

11 Legislation is ordinarily effective on the date that it is signed into law, but Congress may decide whether the statute will "govern from the date of enactment, from a specified future date, or even from an expressly announced earlier date.[20/] The Supreme Court has stated "Congress, of course, has the power to amend a statute that it believes we have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product."[21/] If Congress wishes to reach conduct that precedes a "corrective" amendment, it only needs to make clear that the amendment should apply retroactively.[22/]

12 Cases wherein retroactive effectiveness is only implied, not stated, receive a different analysis. In a case in which there is only a negative inference of retroactivity, courts may apply the canon of construction that disfavors retroactive treatment.[23/] On the other hand, the Supreme Court has noted that there is also a presumption that "remedial statutes are to be liberally construed and if a retroactive interpretation will promote the

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19/ Straaten v. Shell Oil Prods. Co. LLC, __ F.3d __, 2012 U.S. App. Lexis 7789, 7 (7th Cir. 2012).
20/ Rivers v. Roadway Express, 511 U.S. 298, 313 n.12 (1994).
21/ Id. at 313.
22/ Id.
23 Landgraff v. USI Film Prods, 511 U.S. 244, 264 (1994).

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ends of justice, they should receive such construction."[24/] Regardless of the interplay between these dueling canons, when Congress explicitly speaks to retroactivity, canons and presumptions do not displace the meaning of the text.[25/]

13 In this case, Congress has required retroactive application of the Amendment to correct the Treasury's misapplication of section 1603 of the ARRA. By stating that the Amendment is to govern as it would if it had been included in the original law, Congress requires that it be given retroactive effect to correct the undesirable past effects of the Treasury's misinterpretation of congressional intent. Therefore, because retroactivity is express in this statute, not a negative implication, the appropriate canon is the presumption that this remedial statute should be liberally construed to ensure that customers receive the full amount of interest to which they were entitled, but did not receive because of the Treasury's incorrect ruling on normalization. This is emphasized by the text of the Amendment, which does not simply name an earlier effective date, but specifically requires that the Amendment be applied as it would if it had been included in the original 2009 statute.

B. Complying with the Amended Federal Law Does Not Violate State Law

1. Deferred Accounting Violates Neither the Filed Rate Doctrine nor the Rule Against Retroactive Ratemaking

14 The Filed Rate Doctrine forbids any utility from charging, demanding, collecting or receiving "a greater or less or different compensation for any service" than

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[24/] Id. n.16.

[25/] Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008).

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what is specified by the appropriate rate schedule.[26/] The WUTC adopted the closely related Rule Against Retroactive Ratemaking, stating, "the evil in retroactive ratemaking . . . 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."[27/] In this case, neither of these doctrines is implicated because no past error or improper rate charged by the utility is being corrected; rather, federal tax law requires an adjustment to a previously established deferred account.

15 Washington, like many other states, provides for deferred accounting and trackers that serve as the exception to these rules and are often used to ensure that benefits follow burdens and rewards follow risks.[28/] Deferred accounting has been used by many jurisdictions to deal with exceptional and one-time events, including cases involving the effects of Congressional acts and tax dispositions.[29/] Deferred accounting

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[26/] RCW § 80.28.080.

[27/] WUTC v. Puget Sound Power and Light Co., Docket No. U-81-41. Sixth Supp. Order at 31 (Dec. 19, 1988).

[28/] WUTC v. PSE, Docket No. UE-070725, Order No. 3 at 41 (May 20, 2010) (citing In re Avista, Docket Nos. UE-991255 et al., Second Supp. Order at 84-85 (Mar. 6, 2000).

[29/] E.g., Popowsky v. Pa. Pub. Util. Comm'n, 868 A.2d 606, 609 (Pa. Commw. Ct. 2004) (stating "the PUC may take into account extraordinary losses or gains occurring in the past by amortizing them" and affirming commission's holding of an extraordinary and nonrecurring event against retroactive challenge); Office of Consumer Advocate v. Iowa State Commerce Comm'n, 428 N.W.2d 302, 306-07 (Iowa 1988) (finding consequences flowing from a Congressional act satisfied the extraordinary occurrence exception to the retroactive ratemaking rule); Pike County Light & Power Co. v. Pa. Pub. Util. Comm'n, 487 A.2d 118, 120 (Pa. Commw. Ct. 1985) (rejecting retroactive ratemaking challenge in finding utility "must pass on the savings from t[ax] deductions to its customers" and allowing extraordinary gains or losses to be amortized); In re Entergy Arkansas Inc., Docket No. 06-101-U, Order No. 16, 2007 Ark. PUC LEXIS 324, at *54-55 (Ark. Pub. Service Comm'n, Aug. 13, 2007) (confirming application of the general exception to the rule against retroactive ratemaking for the occurrence of extraordinary events); Washington Gas Light Co. v. Pub. Service Comm'n, 450 A.2d 1187, 1218-19 (D.C. 1982) (dismissing retroactive ratemaking question in noting that "it is the ratepayers, rather than the stockholders, who are burdened with payment of income taxes" and rejecting the notion that "stockholders acquired an immediate 'vested' interest in all gains realized").

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has been used in Washington to benefit both customers and utilities by permitting unusual or unexpected costs or benefits to be tracked separately from regular rates, thus it serves as a narrow exception to the Filed Rate Doctrine.[30/] It is also a long-standing exception to the Rule Against Retroactive Ratemaking, because a deferred account allows for true-ups of legally imposed costs or benefits.[31/] A deferred account is a proper exception to both the Rule Against Retroactive Ratemaking and the Filed Rate Doctrine if it is filed with and approved by the Commission, it is formula driven, and, when established, it applies to prospective rates.[32/]

16 In this case, PSE was properly authorized by the Commission to establish a deferred account that would be used to amortize and return to customers the $28.7 million Treasury grant over ten years.[33/] This deferred account prevented the grant from entering or affecting regular rates. Further, PSE used a previously existing tracking account to pass through to customers the amortization of the deferred account starting on January 1, 2011.[34/] The amount to be passed through to customers during 2011 was established on October 29, 2010, and the tariff was revised on October 31, 2011 to set the refund amount for 2012.[35/] This deferred account is properly authorized and a legal exception to the Rule Against Retroactive Ratemaking and the Filed Rate Doctrine.

30/ See, eg., id.; WUTC v. Puget Sound Power & Light Co., Cause U-82-38, Third Supp. Order at 19-20 (Jul. 28, 1983); WUTC v. Avista, Docket No. UE 991606, Third Supp. Order at 115, 234 (Sept. 29, 2000).

31/ See, e.g., Docket No. U-81-41, Second Supp. Order at 33-34 (Mar. 12, 1982).

32/ Id. at Sixth Supp. Order at 32-33 (Dec. 19, 1988).

33/ Re Puget Sound Energy, Docket No. UE-091570, Order No. 1 at 2 (Dec. 10, 2009).

34/ Stipulation of Facts at 5.

35/ Id.

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17 Congress has now retroactively changed the tax rules concerning the accounting treatment of the amortized funds in this deferred account. This means that interest should accrue to the amortized funds starting retroactively on February 23, 2010, when the grant was received. This is a legally binding change on the formula that has been used to calculate the amount of pass-through funds due to customers, but no more. Neither the Filed Rate Doctrine nor the Rule Against Retroactive Ratemaking is applicable to implementing the tax and accounting change that Congress has mandated in section 1096 of the NDAA.

2. Staff's Proposal Gives Full Effect to Federal Law Without Conflicting with Washington Law

18 The Supreme Court has stated that "[i]t is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that 'interfere with, or are contrary to,' federal law.[36/] However, if an intention to preempt state law is not expressly stated, preemption will only be found when it is absolutely impossible to comply both with state and federal law.[37/]

19 In this case, Staff's proposal to adjust the deferred account permits the Commission to comply with state law without contradicting the express intent of Congress. Staff's proposal complies with the retroactive removal of the normalization requirement, but does so without implicating the Filed Rate Doctrine or the Rule Against Retroactive Ratemaking, because deferred accounts are the long-standing exception to

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[36/] Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712 (1985).
[37/] Id. at 713.

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these rules. Correcting the accounting mechanism applicable to a deferral simply is not an act of ratemaking. Instead, it is like correcting what Congress determined to have been an accounting error. If the Rule Against Retroactive Ratemaking or the Filed Rate Doctrine, both of which have the power of state law,[38/] were implicated, they would conflict directly with federal law. Were these doctrines in conflict with federal law, they would be preempted and invalidated to the extent that it was absolutely impossible to comply with both. Staff's proposal is consistent with both state and federal law.

IV. CONCLUSION

20 By enacting the Amendment, Congress intended utilities like PSE to return the full value of customer investment in projects like the Wild Horse Expansion Wind Project to the customers who bore the expense and risk of the investment. The full refund authorized and required by the retroactively effective Amendment to section 1603 of the ARRA does not violate state law or WUTC precedent because the Commission recognizes the well-established deferred accounting exception to the Rule Against Retroactive Ratemaking and the Filed Rate Doctrine. Any other outcome would lead to a direct conflict between state and federal law, and should be avoided.

21 ICNU respectfully urges the Commission to fully adopt Staff's proposal and direct PSE to increase the pass-through of funds through the Federal Incentive Tracker to reflect all interest on the unamortized balance of the Treasury Grant, as it

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[38/] RCW § 80.28.080.

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would have accrued since February 23, 2010, as explicitly required by Section 1096(b) of the Amendment.

Dated this 4th day of May, 2012.

Respectfully submitted,

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