

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**Puget Sound Energy, Inc., Federal  
Incentive Tracker Tariff Filing**

**DOCKET UE-120277**

**RESPONSE BRIEF ON BEHALF OF COMMISSION STAFF**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	DISCUSSION .....	2
	A. The Express Language of NDAA Allows the Commission to Calculate Interest on the Treasury Grant Beginning February 23, 2010 .....	2
	B. The Calculation of Interest on the Treasury Grant from February 23, 2010, Does Not Constitute Retroactive Ratemaking and Does Not Violate the Filed Rate Doctrine .....	7
	C. The Calculation of Interest on the Treasury Grant from February 23, 2010, Implements Important Public Policy .....	12
III.	CONCLUSION .....	15

## TABLE OF AUTHORITIES

### *Table of Cases*

<i>Fernandez-Vargas v. Gonzales</i> , 549 U.S. 30 (2006) .....	4
<i>Gillis v. King County</i> , 42 W.2d 373, 255 P.2d 546 (1953) .....	5, 6
<i>Home Depot USA, Inc. v. Dep't of Revenue</i> , 151 Wn. App. 909, 215 P.3d 222 (2009) .....	7
<i>In re F.D. Processing</i> , 119 Wn.2d 452, 832 P.2d 1303 (1992) .....	4, 6
<i>Reves v. Ernst &amp; Young</i> , 507 U.S. 170 (1993) .....	4
<i>Tracfone Wireless, Inc. v. Dep't of Revenue</i> , 170 Wn.2d 273, 242 P.3d 810 (2010) .....	4
<i>Scott Paper Co. v. Anacortes</i> , 90 Wn.2d 19 (1978) .....	4
<i>Southern Union Gas Co. v. Railroad Comm'n</i> , 701 S.W. 2d 277 (Tex. Ct. App. 1985) .....	11, 12
<i>United States v. Carlton</i> , 512 U.S. 26 (1994) .....	6, 7
<i>Washington Gas &amp; Light Co. v. Public Service Comm'n</i> , 450 A.2d 1187 (D.C. 1982) .....	11
<i>Welch v. Henry</i> , 305 U.S. 134 (1938) .....	6
<i>W.R. Grace &amp; Co. v. Dep't of Revenue</i> , 137 Wn.2d 580, 973 P.2d 1011 (1999) .....	7

*Table of Administrative Cases*

*In the Matter of the Petition of Puget Sound Energy, Inc. for an Accounting Order Regarding the Treatment of U.S. Treasury Grant to be Received Under Section 1603 of the American Recovery and Reinvestment Act of 2009 Associated with the Wild Horse Expansion Project,*  
Docket UE-091570, Order 01 (December 10, 2009).....3, 10

*Re Application of Puget Sound Energy for Authorization Regarding the Deferral of the Net Impact of the Conservation Incentive Credit Program,*  
Docket UE-010410, Order Denying Petition to Amend Accounting  
Order (November 9, 2001) ..... 7-9

*Utilities and Transp. Comm'n v. Puget Sound Power & Light Co.,*  
Docket U-81-41, Sixth Supplemental Order (December 19, 1988) .....7

*Utilities and Transp. Comm'n v. US WEST Communications, Inc.,*  
Docket UT-970010, Second Supplemental Order (November 7, 1997) .....7

*Utilities and Transp. Comm'n v. Puget Sound Energy, Inc.,*  
Docket UE-090704, Order 11 (April 2, 2010) ..... 12

*Statutes*

American Recovery and Reinvestment Act of 2009,  
Pub. L. No. 111-5, Div. B, tit. I, § 1603, 123 Stat. 115, 364  
(February 17, 2009) ..... 2-5

National Defense Authorization Act for Fiscal Year 2012,  
H.R. 1540, § 1096, 112<sup>th</sup> Congress, 1<sup>st</sup> Session ..... 2-5, 7, 9, 13

WAC 480-100-213 ..... 14

RCW 80.28.020 .....9

RCW 80.80.060(6) ..... 12

*Other Authorities*

2 Sutherland Statutory Construction (7<sup>th</sup> ed.) ..... 4-6

## I. INTRODUCTION

1 This case involves a tariff filing by Puget Sound Energy, Inc. (“PSE” or the “Company”) to pass-through interest on the unamortized balance of a Treasury Grant received by PSE under Section 1603 of the American Recovery and Reinvestment Act of 2009 (“ARRA”) for the Wild Horse Expansion Project (“WH Project”). PSE proposes to calculate interest starting January 1, 2011, the day after the National Defense Authorization Act for Fiscal Year 2012 (“NDAA”) was enacted. NDAA amended ARRA to eliminate normalization requirements for the Treasury Grant.<sup>1</sup>

2 Staff maintains that interest should be calculated from the time the Treasury Grant was received by PSE on February 23, 2010. Staff’s position implements language in the NDAA stating that the amendment eliminating normalization requirements “shall take effect as if included in Section 1603 of [ARRA].”<sup>2</sup>

3 The dispute between the Company and Staff raises three issues:

- Is Staff’s recommendation permitted by NDAA?
- Does Staff’s recommendation violate the Filed Rate Doctrine or constitute retroactive ratemaking?
- If Staff’s recommendation is permitted by NDAA and is otherwise lawful, is Staff’s proposal supported by public policy warranting Commission approval?

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<sup>1</sup>The Company’s calculation of \$2,405,683 of interest is based on the average unamortized balance of the Treasury Grant for the calendar year 2012, times 6.9 percent, the net of tax overall rate of return from the Company’s 2009 general rate case, grossed up for income taxes and revenue sensitive items. Stipulation of Facts at ¶ 18.

<sup>2</sup> Staff’s calculation of interest is \$7,994,310 based on the average unamortized balance of the Treasury Grant for the period February 23, 2010 through December 31, 2012, times the net of tax overall rates of return from the Company’s 2009 GRC (6.9 percent) and 2007 general rate case (7.0 percent), grossed up for income taxes and revenue sensitive items. Stipulation of Facts at ¶ 19. The 7.0 percent net of tax overall rate of return from the 2007 general rate case is applied only from February 23, 2010 through April 8, 2010, the effective date of rates from the 2009 general rate case. Stipulation of Facts at ¶ 23.

4 Commission Counsel concludes that Staff's recommendation is permitted by the  
express language of NDAA, and by rules of statutory construction and case law that support  
the retroactive application of curative statutes such as NDAA.

5 Commission Counsel also concludes that Staff's recommendation does not violate  
the Filed Rate Doctrine or constitute unlawful retroactive ratemaking because it does not  
challenge or refund any previous rate set by the Commission. Rather, Staff's proposal  
operates prospectively to pass through to ratepayers the interest on unamortized balances of  
Treasury Grant monies received by PSE. That interest was unavailable for disbursement to  
rate payers under prior normalization rules.

6 Notably, ratepayers will fund a return of and on all costs of the WH Project allowed  
in rates by the Commission, including costs deferred before the project went into service.  
Therefore, ratepayers should receive the full benefit of the Treasury Grant from the time it  
was received by PSE. Staff's proposal accomplishes that end. PSE's proposal, on the other  
hand, allows the Company to earn a return on the portion of the cost of the WH Expansion  
Project that was reimbursed by the federal government through the Treasury Grant.

## II. DISCUSSION

### A. **The Express Language of NDAA Allows the Commission to Calculate Interest on the Treasury Grant Beginning February 23, 2010**

7 Section 1603 of ARRA was enacted into law on February 17, 2009. It required the  
United States Department of Treasury ("Treasury") to provide non-taxable cash grants of  
thirty percent (30%) of the eligible cost of a qualifying renewable investment.<sup>3</sup> PSE applied  
for a Treasury Grant for the WH Project on December 22, 2009.<sup>4</sup> Treasury approved PSE's

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<sup>3</sup> Stipulation of Facts at ¶ 1. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Div. B, tit. I, § 1603, 123 Stat. 115, 364 (February 17, 2009).

<sup>4</sup> Stipulation of Facts at ¶ 9.

application on February 19, 2010. PSE received a \$28,674,664 Treasury Grant for the WH Project on February 23, 2010.<sup>5</sup>

8 Through a series of provisions in ARRA and the Internal Revenue Code, and guidance from Treasury, the Federal government required utilities to normalize grants received under ARRA.<sup>6</sup> Normalization allowed PSE to provide customers with either but not both of the following: (1) an offset to rate base for the unamortized balance of the Treasury Grant; or (2) the amortization of the Treasury Grant as a reduction to cost of service.<sup>7</sup> PSE chose the second method.<sup>8</sup> The Commission approved that treatment in December 2009 in Docket UE-091570.<sup>9</sup> However, the Commission stated:

However, the Commission and its Staff reserve the right to provide alternative methodologies for the treatment of the Treasury grants in future proceedings that may differ from the Company's proposed accounting and normalization treatment based on new analysis, new information becoming available, or based on new guidance being provided by the Internal Revenue Service or Treasury.<sup>10</sup>

Amortization of the Treasury Grant began on January 1, 2011 through a tariff revision filed by the Company in Docket UE-101767.<sup>11</sup>

9 The requirement to normalize Treasury grants was eliminated through an amendment in NDAA that was signed into law on December 31, 2011. The amendment stated:

(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".

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<sup>5</sup> Stipulation of Facts at ¶ 10.

<sup>6</sup> Stipulation of Facts at ¶¶ 2-4.

<sup>7</sup> Stipulation of Facts at ¶ 5.

<sup>8</sup> Stipulation of Facts at ¶ 5.

<sup>9</sup> *In the Matter of the Petition of Puget Sound Energy, Inc. for an Accounting Order Regarding the Treatment of U.S. Treasury Grant to be Received Under Section 1603 of the American Recovery and Reinvestment Act of 2009 Associated with the Wild Horse Expansion Project*, Docket UE-091570, Order 01 (December 10, 2009).

<sup>10</sup> *Id.* at ¶¶ 3 and 14.

<sup>11</sup> Stipulation of Facts at ¶ 16.

(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*.<sup>12</sup>

(Emphasis added.) The issue is whether the amendment operates retroactively to permit the calculation of interest from the February 23, 2010, Treasury Grant receipt date, as Staff proposes, or has no retroactive effect by permitting the calculation of interest only from the December 31, 2011, enactment date of NDAA, as PSE proposes.

10           When interpreting congressional statutes, the Commission must first look at the plain language of the statute because that is the best way to determine congressional intent.<sup>13</sup> As the Company acknowledges, a statutory amendment may be applied retroactively if the legislature clearly intended retroactive application.<sup>14</sup>

11           Here, Congress stated expressly that the elimination of normalization requirements is effective “as if included in section 1603” of ARRA. Section 1603 of ARRA became law on February 17, 2009. Thus, Congress clearly intended the elimination of normalization to apply retroactively to February 17, 2009, which encompasses February 23, 2010, the date PSE received the Treasury Grant for the WH Project.

12           As PSE also acknowledges, retroactive application of an amendment is authorized if the amendment is “clearly curative”.<sup>15</sup> A curative act is a statute passed to cure defects in a

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<sup>12</sup> Stipulation of Facts at ¶ 6. Section 1096 of the National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112<sup>th</sup> Congress, 1<sup>st</sup> Session.

<sup>13</sup> *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). Washington courts take a similar approach to statutory construction. *Tracfone Wireless, Inc. v. Dep’t of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010) (“If the statute’s meaning is plain on its face, we give effect to that plain meaning as the expression of what was intended.”)

<sup>14</sup> PSE Initial Brief at ¶ 28, n. 42, citing *Fernandez-Vargas v. Gonzales*, 549 U.S. 30, 37 (2006) and ¶ 29, n. 43, citing, *In re F.D. Processing*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992) and *Scott Paper Co. v. Anacortes*, 90 Wn.2d 19, 35 (1978). See also 2 Sutherland Statutory Construction § 41:4 (7<sup>th</sup> ed.) (“[A] law is not construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended retroactive application.”)

<sup>15</sup> PSE Initial Brief at ¶ 29, n. 43, citing, *In re F.D. Processing*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). See also 2 Sutherland Statutory Construction § 41:4 (7<sup>th</sup> ed.) (“Retroactive operation is more readily ascribed to legislation that is curative or legalizing . . .”)



prior law.<sup>16</sup> PSE effectively concedes that the amendment to ARRA is curative by stating that the normalization requirement was an “unintended consequence” of Congress’s prior invocation of normalization rules and was antithetical to the concept of ARRA to stimulate investment in renewable energy:

The ITC normalization rules would have the effect of significantly reducing the value of the Section 1603 Treasury Grants to PSE’s customers by restricting the regulatory treatment of the unamortized balance of such grants.<sup>17</sup>

According to PSE, the Company initiated a legislative effort to “correct” the law to eliminate normalization requirements for ARRA Section 1603 grants and that “correction” was signed into law as Section 1096 of NDAA.<sup>18</sup> This curative nature of this correction, therefore, supports retroactive application, in accordance with the express Effective Date provision of Section 1096 of NDAA.<sup>19</sup>

13 Notwithstanding that the corrective amendment was curative, the Company argues that the calculation of interest as Staff proposes is unlawful because it would preempt state law prohibiting retroactive ratemaking and impair PSE’s “vested rights” in previously approved tariff rates.<sup>20</sup> The argument misses the point because, as we discuss below, Staff’s recommendation operates only prospectively, without challenge or revision to a prior approved rate.

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<sup>16</sup> 2 Sutherland Statutory Construction § 41:11 (7<sup>th</sup> ed.).

<sup>17</sup> Stipulation of Facts at ¶ 7, Attachment A at Marcellia, 72:11-16 and 73:7-9.

<sup>18</sup> Stipulation of Facts at ¶ 7, Attachment A at Marcellia, 73:12-15 and 74:6.

<sup>19</sup> PSE argues that Effective Date provision of NDAA was intended to ensure that the elimination of normalization requirements would not apply only to projects placed in service after the amendment was passed, which could have included the Lower Snake River Wind project. PSE Initial Brief at ¶¶ 31 and 34. No legislative history or evidence is cited to support that interpretation. Moreover, had Congress intended the result argued by PSE, it could have easily stated that the amendment to ARRA will apply to all eligible projects already in service or under construction at the time of enactment. No such language was used.

<sup>20</sup> PSE Initial Brief at ¶¶ 29, 32 and 35-36, citing, *Gillis v. King County*, 42 W.2d 373, 376, 255 P.2d 546 (1953).

14 The argument is also inconsistent with the Company's own proposal to calculate interest on the average unamortized balance of the Treasury Grant for the period January 1, 2012 through December 31, 2012.<sup>21</sup> However, PSE proposed originally an effective date of April 1, 2012, for the tariff revision implementing its calculation of interest.<sup>22</sup> Thus, PSE itself proposed to pass through interest for a prior period, January 2012 through March 2012.

15 Moreover, as PSE acknowledges, the "vested right" that cannot be impaired by retroactive application of an amendment involves constitutional protections relating to due process and impairment of contract.<sup>23</sup> In a comparable setting, the United States Supreme Court has addressed constitutional challenges to retroactive tax legislation. Most relevant to our case, the Court considered a 1987 amendment to a provision of the federal estate tax statute that limited the availability of a deduction for the proceeds of sales of stock to employee stock-ownership plans.<sup>24</sup> Congress provided that the 1987 amendment was made effective as if it had been included in the statute as originally enacted in 1986.<sup>25</sup>

16 After noting that it "repeatedly has upheld retroactive tax legislation against a due process challenge," the Court clarified that the "harsh and oppressive" substantive due process standard from decisions such as *Welch v. Henry*, 305 U.S. 134, 146-48 (1938), "does not differ from the prohibition against arbitrary and irrational legislation that applies generally to enactments in the sphere of economic activity."<sup>26</sup> If a statute's retroactive application "is supported by a legitimate legislative purpose furthered by rational means,

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<sup>21</sup> Stipulation of Facts at ¶ 18.

<sup>22</sup> Advice No. 2012-04 (February 29, 2012).

<sup>23</sup> PSE Initial Brief at ¶ 29, citing, *In re F.D. Processing*, 119 Wn.2d at 460 and *Scott Paper Co.*, 90 Wn.2d at 35. See also, *Gillis*, 42 Wn.2d at 376. See also 2 Sutherland Statutory Construction § 41:12 (7<sup>th</sup> ed.) ("Curative laws are subject to the same constitutional limitations which apply to other legislation.")

<sup>24</sup> *United States v. Carlton*, 512 U.S. 26 (1994).

<sup>25</sup> *Carlton*, 512 U.S. at 31-32.

<sup>26</sup> *Carlton*, 512 U.S. at 30.

judgments about the wisdom of such legislation remains within the exclusive province of the legislature and executive branches.”<sup>27</sup>

17           The 1987 estate tax amendment was adopted as a “curative measure” to correct significant and unanticipated revenue loss created by the 1986 original statute.<sup>28</sup> Thus, the Court upheld the 1987 amendment because it was justified by a rational legislative purpose and its retroactive application to estate transactions occurring in 1986.

18           Likewise, Section 1096 of NDAA is a curative enactment “in the sphere of economic activity” and is supported by the legitimate and rational legislative purpose of eliminating normalization requirements for Treasury Grants for ratepayer benefit. Retroactive application of that amendment to the date PSE received the WH Project Treasury Grant does not violate PSE’s constitutional rights.

**B.     The Calculation of Interest on the Treasury Grant from February 23, 2010, Does Not Constitute Retroactive Ratemaking and Does Not Violate the Filed Rate Doctrine**

19           PSE argues that Staff’s proposal violates the Filed Rate Doctrine (which requires a utility to charge only those rates in effect at the time service is rendered), and its corollary, the prohibition against retroactive ratemaking.<sup>29</sup> The Commission defines retroactive ratemaking as “surcharges or ordered refunds applied to rates which had previously been paid, constituting an additional charge applied after service was provided or consumed.”<sup>30</sup>

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<sup>27</sup> *Carlton*, 512 U.S. at 30-31. A similar standard applies in Washington. See *W.R. Grace & Co. v. Dep’t of Revenue*, 137 Wn.2d 580, 601, 973 P.2d 1011 (1999) and *Home Depot USA, Inc. v. Dep’t of Revenue*, 151 Wn. App. 909, 926, 215 P.3d 222 (2009) (state tax statute does not violate substantive due process unless it is “arbitrary and irrational,” citing *Carlton*), review denied, 168 Wn.2d 1088 (2010).

<sup>28</sup> *Carlton*, 512 U.S. at 31-32 and 34.

<sup>29</sup> PSE Initial Brief at ¶¶ 21-27.

<sup>30</sup> The Commission first enunciated this definition in *Utilities and Transp. Comm’n v. Puget Sound Power & Light Co.*, Docket U-81-41, Sixth Supplemental Order at 17 (December 19, 1988). The Commission restated this definition in several subsequent cases. See, e.g., *Utilities and Transp. Comm’n v. US WEST Communications, Inc.*, Docket UT-970010, Second Supplemental Order at 10 (November 7, 1997), and *In Re*

To determine if a proposal results in retroactive ratemaking, the Commission asks whether the proposal “seeks to change the past effect of a tariffed rate, contrary to the terms of the tariff in effect at the time.”<sup>31</sup>

20 Under the Commission’s standards, Staff’s recommendation does not violate the Filed Rate Doctrine and does not constitute retroactive ratemaking because:

- Staff is not challenging any rate set by the Commission in a prior docket;
- Staff is not recommending any refund of a rate previously charged;
- The rate credit proposed by Staff would be provided prospectively only; and
- The interest calculated by Staff is applied to unamortized balances of Treasury Grant monies and has not yet been returned by PSE to ratepayers.

Moreover, the Treasury Grant for the WH Project was received by PSE during the 2010 test year at issue in PSE’s pending general rate case, Docket UE-111048. Absent Schedule 95A, the rate of return on the Treasury Grant should have been addressed in that general rate case,<sup>32</sup> along with all other test period expenses, revenues and rate base there at issue without any retroactive ratemaking effect. Thus, there can be no retroactive ratemaking to address the rate of return on the Treasury Grant from a point in time during the 2010 test year, now that the rate of return on the Treasury Grant is treated separately in Schedule 95A.

21 PSE suggests that Staff is being inconsistent with its position in Docket UE-010410 by allegedly seeking to “unwind the Treasury Grant credits that flowed back to customers under the Schedule 95A tariff that was previously on file with the Commission.”<sup>33</sup> In fact,

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*Puget Sound Energy, Inc.*, Docket UE-010410, Order Denying Petition to Amend Accounting Petition at ¶ 7 (November 9, 2001).

<sup>31</sup> *In Re Puget Sound Energy, Inc.*, Docket UE-010410, Order Denying Petition to Amend Accounting Petition at ¶ 8 (November 9, 2001).

<sup>32</sup> PSE Response to Bench Request 23 at 2, Docket UE-111048.

<sup>33</sup> PSE Initial Brief at ¶¶ 26-27.

the two cases are substantially different and justify different treatments. In Docket UE-010410, PSE's Tariff 125 provided a rate credit of five cents. Later, PSE proposed to defer amounts collected under Schedule 125, and then charge that amount back to customers via another tariff (Schedule 120). The Commission agreed with Staff that the Company's proposal should be rejected as retroactive ratemaking because it required that "[t]he collective pool of ratepayers would pay back the full \$.05 [credit previously received]."<sup>34</sup>

22           The same result does not flow from Staff's recommendation here. Prior to this case, the requirement to normalize the Treasury Grant prevented the Company from crediting ratepayers with interest on the unamortized balances of the Treasury Grant. Thus, to date, ratepayers have not received one cent of interest on those balances. Section 1096 of NDAA corrects that inequity by eliminating normalization requirements and allowing ratepayers to be credited with interest on the unamortized balances of the Treasury Grant. Staff's recommendation fully implements that authority. There can be no unlawful retroactive ratemaking or violation of the Filed Rate Doctrine on these facts.

23           PSE states that the prohibition against retroactive ratemaking is statutorily based in RCW 80.28.020 and, therefore, the only exceptions to this rule are those that are likewise authorized statutorily.<sup>35</sup> This argument has several deficiencies. First, Staff's proposal is authorized by a statute: Section 1096 of NDAA. Thus, even if Staff's proposal had a retroactive ratemaking effect, which it does not, it would be lawful under the very standard espoused by PSE.

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<sup>34</sup> *Re Application of Puget Sound Energy for Authorization Regarding the Deferral of the Net Impact of the Conservation Incentive Credit Program*, Docket UE-010410, Order Denying Petition to Amend Accounting Order at ¶ 8 (November 9, 2001).

<sup>35</sup> PSE Initial Brief at ¶ 33, n. 33.

Second, the Company has currently in place a multitude of regulatory mechanisms that implement significant retroactive elements, without any complaint from PSE. For example, PSE has Power Cost Adjustment and Purchased Gas Adjustment mechanisms that compare actual costs to costs underlying a tariff rate previously set by the Commission, and recovers (or credits) the difference through future adjustments to rates (subject to sharing bands in the case of the Power Cost Adjustment). Another example is the special treatment afforded extraordinary storm damage and environmental remediation costs, which PSE defers for later recovery from ratepayers. Each of these mechanisms provides for the recovery of costs incurred in a prior period, but none of them are authorized explicitly by statute. Consistently applied, PSE's argument would jeopardize all of these mechanisms.

PSE's argument is also inconsistent with the regulatory treatment of the WH Project Treasury Grant. On September 30, 2009, PSE filed a petition for an accounting order in Docket UE-091570 to provide for normalization as then-required. PSE requested that the Treasury Grant, once received, would be amortized over ten years as a credit to customers through Schedule 95A.<sup>36</sup> Staff supported the proposed treatment, and the Commission granted PSE's petition. Importantly, the Commission stated:

However, the Commission and its Staff reserve the right to provide alternative methodologies for the treatment of the Treasury grants in future proceedings that may differ from the Company's proposed accounting and normalization treatment based on new analysis, new information becoming available, or based on new guidance being provided by the Internal Revenue Service or Treasury.<sup>37</sup>

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<sup>36</sup> Stipulation of Facts at ¶¶ 11-12. PSE proposed that the Treasury Grant would be recorded as a liability in Account 228.4, Accumulated Miscellaneous Operating Provisions, and amortized over ten years through Account 242, Miscellaneous Current and Accrued Liabilities. The amortized amount would be credited to customers through Schedule 95A.

<sup>37</sup> *In the Matter of the Petition of Puget Sound Energy, Inc. for an Accounting Order Regarding the Treatment of U.S. Treasury Grant to be Received Under Section 1603 of the American Recovery and Reinvestment Act of 2009 Associated with the Wild Horse Expansion Project*, Docket UE-091570, Order 01 at ¶¶ 3 and 14 (December 10, 2009).

Thus, from the outset, possible changes to the accounting methodology of Schedule 95A were contemplated, and PSE was explicitly aware of that fact. On this record, the only “vested right” PSE could have had in any prior published tariff addressing the Treasury Grant is a “right” that was explicitly subject to different treatment.

26           In fact, courts have rejected retroactive ratemaking challenges of the sort the Company alleges, when changes in accounting methodology are at issue, even when they alter the treatment of prior gains or losses realized already by the utility. In one case, a utility had previously been allowed to include in retained earnings for the benefit of shareholders, gains earned on the reacquisition of long-term debt over a twenty-year period.<sup>38</sup> The commission altered that methodology for the benefit of ratepayers by ordering the utility to amortize all gains realized from the repurchases of debt over the life of each issuance retired during that twenty-year period, and to offset the overall cost of debt by the amortized amounts.

27           The utility challenged the commission’s order as unlawful retroactive ratemaking, arguing that the commission was denying shareholders their “vested entitlement” to all gains realized prior to the test year that the company had included in retained earnings under the then-accepted method of accounting. The court rejected that argument, noting that ratepayers, not shareholders, had been burdened with the payment of the income taxes on the realized gains, as well as the cost of financing new debt issued by the company to replace retired debt.<sup>39</sup>

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<sup>38</sup> *Washington Gas & Light Co. v. Public Service Comm’n*, 450 A.2d 1187 (D.C. 1982).

<sup>39</sup> *Washington Gas*, 450 A.2d at 1218-19.

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In another case, a utility filed a general rate case in 1983 and the commission ordered the company to list all investment tax credits taken since 1971.<sup>40</sup> The commission then amortized each credit over the life of the property that produced the credit against federal income tax liability in the test year. The utility alleged unlawful retroactive ratemaking and noted that the money saved from the tax credits over the 12-year period had already been spent on dividends to shareholders, other investments, or expenses.<sup>41</sup> The court rejected the argument, noting that in past years the utility had included in rate base all property that had produced the tax credits and sought a return on total rate base including the portion attributable to credits paid with ratepayer funds. Thus, “the [c]ommission’s treatment does no more than to return to ratepayers a portion of the customers’ [sic] funds to them.”<sup>42</sup>

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As discussed in the next section, Staff’s recommendation in this case rests on a similar policy to ensure that ratepayers receive all of the benefits resulting from the costs of the WH Project that ratepayers funded.

**C. The Calculation of Interest on the Treasury Grant from February 23, 2010, Implements Important Public Policy**

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On October 27, 2009, in Docket UE-091702, PSE filed with the Commission pursuant to RCW 80.80.060(6) a notice of intent to defer costs associated with the WH Expansion Project. The WH Project is a renewable resource that was eligible for deferral of costs under that statute.<sup>43</sup>

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On April 2, 2010, the Commission issued Order 11 in the Company’s 2009 general rate case, Docket UE-090704, determining that PSE’s acquisition of the WH Project was

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<sup>40</sup> *Southern Union Gas Co. v. Railroad Comm’n*, 701 S.W. 2d 277 (Tex. Ct. App. 1985).

<sup>41</sup> PSE makes a similar argument here. PSE Initial Brief at ¶ 30 (“... the funds that Commission Staff now asks PSE to disgorge have been used for operational purposes in lieu of additional borrowing or additional equity. To pay out this additional amount now unfairly burdens the Company, causing it to borrow or seek funds elsewhere it had already committed to other uses.”)

<sup>42</sup> *Southern Union Gas*, 701 S.W. 2d at 280.

<sup>43</sup> Stipulation of Facts at ¶ 20.



prudent.<sup>44</sup> New rates then took effect April 8, 2010. The rates included recovery of the following costs of the WH Project: (1) construction work in progress through September 2009; and (2) deferred costs once the plant became operational on November 9, 2009.<sup>45</sup>

32 Thus, ratepayers have provided all of the funds necessary for PSE to recover both the operating expenses of the WH Project, and a return of and on the Company's investment in the WH Project. Therefore, it is fair and reasonable for ratepayers to receive the full benefit of the Treasury Grant from the moment the grant became available to PSE on February 23, 2010. Those benefits now include interest on the unamortized balance of the Treasury Grant, calculated from that same point of time, as proposed by Staff. Staff's methodology, therefore, matches costs and benefits in accordance with fundamental principles of ratemaking.<sup>46</sup>

33 In contrast, the Company seeks to keep the return on the portion of the WH Project investment that PSE was reimbursed by the federal government through the Treasury Grant, in addition to recovering all costs of the WH Project from the date the facility went into service on November 9, 2009. In doing so, PSE's proposal fails to match costs and benefits, in the favor of shareholders.

34 The Company argues that Staff's proposal is "extremely poor public policy" because it, allegedly, would "claw back" a previously filed tariff rate.<sup>47</sup> The argument rests on PSE's misinterpretation of Section 1096 of NDAA and its failed allegation that Staff's recommendation is unlawful retroactive ratemaking. Thus, the Company's public policy attack on Staff lacks merit.

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<sup>44</sup> *Utilities and Transp. Comm'n v. Puget Sound Energy, Inc.*, Docket UE-090704, Order 11 at ¶¶ 343-44 (April 2, 2010).

<sup>45</sup> Stipulation of Facts at ¶¶ 21-22.

<sup>46</sup> Staff Open Meeting Memorandum at 2, Docket UE-120277 (March 29, 2012).

<sup>47</sup> PSE Initial Brief at ¶¶ 38-39.

35 PSE supports its proposal by arguing that it expended considerable time, effort and money working with Treasury and members of Congress to effect the change in the law that eliminated the requirement for normalization of Treasury grants.<sup>48</sup> The Company should be commended for those efforts.

36 However, the Commission has established a public policy that expenditures for legislative activities are not allowed for ratemaking purposes.<sup>49</sup> PSE's proposal to calculate interest on the Treasury Grant only from January 1, 2012 violates that public policy because it effectively allows PSE to recover funds expended for legislative efforts (in the form of a smaller Schedule 95A credit) that it cannot otherwise collect in rates. Moreover, the Company provided no evidence that the cost of its legislative activities, including time spent by PSE employees, exceeded overhead costs already recovered from ratepayers in base rates. Thus, no basis exists to "reward" the Company for its legislative efforts.

37 Finally, the Company argues that Staff's recommendation imposes new "burdens" on PSE because it would be required to pay customers a larger credit of the difference between the Company's calculation of interest of \$2.4 million and Staff's calculation of interest of \$8 million.<sup>50</sup> However, what PSE characterizes as a "burden" is actually a denial of benefits for ratepayers. PSE's proposal would allow it to shift those benefits from ratepayers to shareholders. Staff's proposal properly returns those benefits to ratepayers.

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<sup>48</sup> PSE Initial Brief at ¶ 34. This effort, according to PSE, began in May 2009. Stipulation of Facts at ¶ 7, Attachment A at Marcelia, 72:17. At that time, the Company had not made a decision to build the Lower Snake River Wind Project. This undermines its statutory interpretation of Section 1096 of NDAA that the amendment was intended to apply to that facility.

<sup>49</sup> WAC 480-100-213.

<sup>50</sup> PSE Initial Brief at ¶ 37.

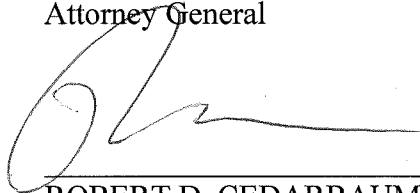
### III. CONCLUSION

38 For the reasons set forth above, the Commission should adopt the Staff recommendation in this proceeding. Staff's recommendation is lawful, and supported by important public policy and sound principles of ratemaking.

DATED this 4<sup>th</sup> day of May 2012.

Respectfully submitted,

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