BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PROOF OF SERVICE

DOCKET NO. UE-001952

KNOW ALL PERSONS BY THESE PRESENTS That the undersigned, an employee of the Washington Utilities and Transportation Commission at Olympia, Washington, hereby certifies that a copy of the document referred to below was served on the parties of record in said proceeding in the following manner:

On the 22ND day of JANUARY, 2001, a true copy of SIXTH SUPPLEMENTAL ORDER: ORDER REQUIRING FURTHER PROCEEDINGS TO IMPLEMENT TARIFF CHANGES NECESSARY TO ENSURE FAIR, JUST, AND REASONABLE RATES, TERMS, AND CONDITIONS OF SERVICE.

in the above-entitled cause now pending before the Commission was enclosed in an envelope addressed to each of the parties of record as set forth below. Each envelope was addressed to the address shown in the official files attached hereto, sealed with the required first-class postage thereon, and deposited on said date in the United States mail in the City of Olympia, County of Thurston, State of Washington.

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P. 01

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	05:02 PM	8-543934-3603844849	16' 05"	49	SEND	OK		796	
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	05:20 PM	8-543934-2063867500	25' 55"	49	SEND	OK		796	
	05:46 PM	8-543934-4254623300	15' 29"	49	SEND	OK		796	
	07:32 PM	8-543934-4253396196	26' 39"	83	SEND	OK	(01)	796	
	07:25 PM	8-543934-5032412300	**' **"	0	SEND	BUSY		796	
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Docket No. UE-001952 et al

Date: January 22, 2001

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Date: January 22, 2001

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84476	Trotter, Don	WUTC; Attorney General Section; State Mail Stop 40128			
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FORMAL UTILITY ORDERS & LETTERS

Date Served: 01/22/01 Docket No: UE-001952

Document: SIXTH SUPPLEMENTAL ORDER: ORDER REQUIRING FURTHER PROCEEDINGS TO IMPLEMENT TARIFF CHANGES NECESSARY TO ENSURE FAIR, JUST, AND REASONABLE RATES, TERMS, AND CONDITIONS OF SERVICE.

___ Cathy Kern (hand deliver 2 copies)
___ Utility Industry Support Person water - 5 copies, telecom & energy 3 copies
___ Vicki Elliott
___ ALJ assigned? if not, 1 copy ALD
___ Penny Hansen
___ Rachel Porter (1 copy) **(No Protective Orders and No Consent Open Meeting Orders)**
___ Comm. AAG's (AG assigned - & one copy to Jeff Goltz - **do not send copies of Open Meeting orders to the AG's**
___ Krista Linley (scheduling orders, notices, changes to schedules)
___ Financial Svcs. (Instituting Invest. & penalty assessment)
___ Mary Mendoza

___ Policy Planning
___ Paul Curl
___ Final Util. Sub. File
___ Public Affairs
___ Team members - inc. Reg Svcs. (check in-house distribution list too)
___ Dept of Health (Ethan Moseng & Gregg Grunenfelder) **Water Orders Only!**
___ Mike Sommerville (Protective Orders Only)

SERVICE DATE

JAN 2 2 2001

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Air Liquide America Corporation, Air Products and Chemicals, Inc., The Boeing Company, CNC Containers, Equilon Enterprises, LLC, Georgia-Pacific West, Inc., Tesoro Northwest Company, and The City of Anacortes, Washington	)	
Complainants,	)	DOCKET NO. UE-001952 (consolidated)
v.	)	
Puget Sound Energy, Inc.	)	
Respondent.	)	
. . . .	)	
In re: Petition of Puget Sound Energy, Inc. for an Order Reallocating Lost Revenues Related to any Reduction in the Schedule 48 or G-P Special Contract Rates	)	DOCKET NO. UE-001959 (consolidated) SIXTH SUPPLEMENTAL ORDER: ORDER REQUIRING FURTHER PROCEEDINGS TO IMPLEMENT TARIFF CHANGES NECESSARY TO ENSURE FAIR, JUST, AND REASONABLE RATES, TERMS, AND CONDITIONS OF SERVICE
. . . .	)	

SYNOPSIS: The Commission acts under its general statutes, Chapter 80 RCW, to order Phase Two proceedings to establish a temporary soft cap as an additional term under the Optional Price Stability provisions of Schedule 48 and the PSE/Georgia-Pacific Special Contract, pending further proceedings to determine a final disposition of Schedule 48 in this or other pending dockets. The Commission declines to act under the provisions of the Emergency Adjudicative Proceedings statute, RCW 34.05.479.

Stan Berman, Heller Ehrman White & McAuliffe, LLP, Seattle, Washington, and James M. Van Nostrand, Stoel Rives, Seattle, Washington, represent Puget Sound Energy, Inc. (PSE). John A. Cameron and Traci Grundon, Davis Wright Tremaine LLP, Portland, Oregon, represent Bellingham Cold Storage Company (BCS). Brian Walters and Tom Anderson provided *pro se* representation for Public Utility District No. 1 of Whatcom County (Whatcom PUD). Frank Prochaska appeared *pro* se to represent the Association of Western Pulp and Paper Workers (AWPPW). Simon ffitch, Assistant Attorney General, Seattle, Washington, represents the Public Counsel Section, Office of Attorney General (Public Counsel). Robert D. Cedarbaum and Donald Trotter, Assistant Attorneys General, Olympia, Washington, represent the Commission's regulatory staff (Staff).

6 **COMMISSION:** The Commission finds and concludes that Complainants failed to demonstrate the existence of an immediate danger to the health, safety, or welfare requiring immediate agency action under RCW 34.05.479, but also finds that expedited action under RCW 80.04.110 is required. The Commission further finds and concludes that PSE's retail rates under Schedule 48 and the Special Contract that are pegged via Mid-Columbia index pricing to Western wholesale power markets that are volatile and exceedingly high are not fair, just, and reasonable because customers do not have effective options to achieve price stability and reasonable rates under the Optional Price Stability provisions of Schedule 48 and the Special Contract. The Commission orders that there shall be immediate further proceedings to establish a temporary "soft cap" as an additional term under the Optional Price Stability provisions of Schedule 48 and the PSE/Georgia-Pacific Special Contract, pending further proceedings to determine a final disposition of Schedule 48 in this or other pending dockets.

MEMORANDUM

I. Background and Procedural History.

7 Air Liquide, *et al.* filed their original Formal Complaint Requesting Emergency Adjudicative Proceeding in Docket No. UE-001952 on December 12, 2000. PSE filed its Petition in Docket No. UE-001959 on December 13, 2000.

an index other than the Mid-Columbia non-firm index from the time that index first was published in June 1998.

11 Since its determination in the 1998 customer-initiated complaint case in Docket No. UE-981410, the Commission has conducted adjudicative proceedings concerning the operation of Schedule 48 in at least five dockets, either on customer complaint or on its own complaint, and has addressed Schedule 48 and Special Contract matters in several open public meetings.[2] In short, controversies of one type or another, and proposals intended to avoid further controversy, have surrounded Schedule 48 and the Special Contracts more or less continuously for more than two years.

12 All of this controversy arises in one fashion or another from, or at least relates to, the wholesale market-based pricing provisions in Schedule 48 and the Special Contracts. Most recently, events in the wholesale markets on the interconnected Western power grid have brought matters to a critical state, at least from the perspectives of the customers who are Complainants in this proceeding. Volatility in the Western wholesale power markets during the first half of 2000 were reflected in price spikes at the Mid-Columbia trading hub, spikes that became particularly acute in June 2000. Those price spikes led Bellingham Cold Storage Company and Georgia-Pacific to file their Formal Complaint, Request for Expedited, Emergency Action Including Waiver of Regular Notice Periods, Relating to Special Contract Transmission Obligations and Pricing Provisions in Docket No. UE-001014 on June 29, 2000. BCS and Georgia-Pacific characterized their Complaint as "an emergency petition" requiring expedited action by the Commission to prevent employee lay-offs, plant closings, and related adverse impacts on the broader economic sectors served by the industrial operations of the complaining parties. Among other things, BCS and Georgia-Pacific urged that the Commission take action to "relieve [BCS and Georgia-Pacific] from direct

[2] These include Docket No. UE-981238, concerning the price for optional firming service under Schedule 48; Docket No. UE-000735, a formal complaint by Georgia-Pacific under its Special Contract with PSE; Docket No. UE-001014, a formal complaint by Bellingham Cold Storage Company and Georgia-Pacific under their essentially identical Special Contracts with PSE; Docket No. UE-001616, another formal complaint by Georgia-Pacific under its Special Contract with PSE; and Docket No. UE-001521, a Commission-initiated complaint concerning the Georgia-Pacific and Bellingham Cold Storage Special Contracts with PSE. Some of these matters have been resolved; others remain pending. Open meeting matters have included Commission approval of amendments to the energy pricing provisions of the Georgia-Pacific and Bellingham Cold Storage Special Contracts; PSE's refiling of Schedule 48 on January 1, 2001, in Docket No. UE-960696, as required under the terms of the Commission's Order approving Schedule 48; and PSE's filing of a new tariff, Schedule 448, which it proposes as an alternative tariff for these, and other, industrial customers.

15 On December 13, 2000, PSE filed its Petition in Docket No. UE-001959, asking that the Commission "issue an order reallocating lost revenues related to any reduction in the Schedule 48 or G-P Special Contract rates." The Petition, albeit not PSE's formal answer, responds generally to the Complaint and asserts that to the extent the Commission acts to reduce the revenues PSE otherwise would obtain under Schedule 48 and the Special Contract, the Commission should allow PSE to establish a deferral account and determine whether "such deferred revenue requirement should be paid by the industrial customers who have chosen market-based prices or reallocated among other customer classes."

16 The Commission, on shortened notice, conducted a prehearing conference on December 14, 2000, before Chairwoman Marilyn Showalter, Commissioner Richard Hemstad, and Administrative Law Judge Dennis J. Moss. Among other things, the Commission determined it would consolidate the Complaint in Docket No. UE-001952 with the Petition in Docket No. UE-001959, established a procedural schedule, and invoked the discovery rule (WAC 480-09-480). The Commission entered its Order Consolidating Proceedings; Prehearing Conference Order and Notice of Hearing on December 18, 2000. Evidentiary hearing proceedings were scheduled for December 29, 2000. To facilitate discovery, the Commission entered a Protective Order (First Supplemental Order, December 19, 2000).

17 During our first prehearing conference, we urged the Parties to consider entering into mediated settlement negotiations and offered the services of Administrative Law Judge C. Robert Wallis to act as facilitator. Complainants accepted our offer and agreed to commence such discussions at the Commission on December 19, 2000. Complainants requested, however, that the Commission simultaneously move forward with the complaint action. PSE agreed to the mediation and did not object to proceeding in parallel with the adjudication. Following several days of discussion, the Parties reported that "[s]cheduled mediation talks among Puget Sound Energy and several industrial customers about the effects of recent market conditions on electricity rates paid by the industries have concluded without producing an agreement among parties that resolves the rate issue." *Agreed Statement on Mediation (12/21/00).*

18 In its first Prehearing Conference Order, the Commission established the scope of the proceedings as follows:

of protection from disclosure, of certain documents claimed to be especially sensitive. According to arguments by the Parties at various times, many thousands of pages of documents were exchanged among them during the course of discovery.

21 Complainants filed a Second Amended Complaint on December 28, 2000. PSE filed its Motion To Strike Second Amended Complaint, and its Answer to the Amended Complaint on January 2, 2000. The Commission granted PSE's Motion To Strike Second Amended Complaint and went forward on the first Amended Complaint and PSE's Answer. We note that the basic substance of the three Complaints remained the same throughout. The first Amended Complaint simply added the City of Anacortes as a Complainant, added a few factual assertions, and corrected an arguable technical deficiency in the original Complaint. The Second Amended Complaint merely sought to add Intel Corporation as a Complainant and to withdraw two of the affidavits filed as part of the first Amended Complaint. Later, Complainants were granted leave to withdraw the same two affidavits from the Amended Complaint.[5]

22 The Parties filed lengthy and detailed prehearing briefs on January 4, 2001. Evidentiary hearing proceedings were conducted on an expanded hearing-day basis on January 8 (8:00 a.m. – 10:05 p.m.), January 9 (9:00 a.m. – 11:59 p.m.), January 12 (9:00 a.m. –10:55 p.m.), and January 15 (9:30 a.m. – 10:00 p.m.), 2001, before Chairwoman Marilyn Showalter, Commissioner Richard Hemstad, and Administrative Law Judge Dennis J. Moss. These 55 hours of evidentiary hearings produced a transcript of more than 1550 pages reflecting the direct- and cross-examination of 10 witnesses. Approximately 175 exhibits were introduced into the record. The Commission heard oral argument from Complainants, Staff, Public Counsel, and PSE on January 16, 2001.[6]

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[5] The withdrawn affidavits had been filed by Mr. Keith C. Warner for The Boeing Company, and Mr. Mark C. Darnell for Air Liquide as attachments E and G to the Amended Complaint. *See* TR. 351.

[6] The Commission also allowed Parties who elected to not participate actively in the evidentiary proceedings to submit a written closing statement in lieu of oral argument. One Intervenor, AWPPW, made such a filing.

misjoinder of complaints or grievances or misjoinder of parties; and in any review of the courts of orders of the commission the same rule shall apply and pertain with regard to the joinder of complaints and parties as herein provided: PROVIDED, All grievances to be inquired into shall be plainly set forth in the complaint. No complaint shall be dismissed because of the absence of direct damage to the complainant.

(3) Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting as herein provided. The commission shall enter its final order with respect to a complaint filed by any entity or person other than the commission within ten months from the date of filing of the complaint, unless the date is extended for cause. Rules of practice and procedure not otherwise provided for in this title may be prescribed by the commission. Such rules may include the requirement that a complainant use informal processes before filing a formal complaint. . . .

80.28.010 Duties as to rates, services, and facilities . . ..

(1) All charges made, demanded or received by any gas company, electrical company or water company for gas, electricity or water, or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient.

(2) Every gas company, electrical company and water company shall furnish and supply such service, instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable.

(3) All rules and regulations issued by any gas company, electrical company or water company, affecting or pertaining to the sale or distribution of its product, shall be just and reasonable. . . .

(5) After entering an order under this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

(6) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(7) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.

(8) This section shall not apply to agency action taken pursuant to a provision of law that expressly authorizes the agency to issue a cease and desist order. The agency may proceed, alternatively, under that independent authority.

WAC 480-09-510 Emergency adjudicative proceedings. (1) The commission may use emergency adjudicative proceedings pursuant to RCW 34.05.479 to suspend or cancel authority, to require that a dangerous condition be terminated or corrected, or to require immediate action in any situation involving an immediate danger to the public health, safety, or welfare requiring immediate action by the commission. Such situations include, but are not limited to:

(a) Failure to possess insurance;

(b) Inadequate service by a gas, water, or electric company when the inadequacy involves an immediate danger to the public health, safety, or welfare; and

(c) Violations of law, rule, or order related to public safety, when the violation involves an immediate danger to the public health, safety, or welfare.

(2) The commission shall hear the matter and enter an order. If a majority of the commissioners is not available, a commissioner shall

> complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telecommunications service, or at least twenty-five percent of the consumers or purchasers of the company's service . . ..

26 The original Complaint did not name as a complainant any city or town in which PSE is engaged in business. The entire class of PSE customers to whom market-based rates are available (*i.e.,* Schedule 48 and certain Special Contract customers) includes fewer than 25 customers. Arguably, the third test for standing stated in the statute means 25 percent of PSE's total customer base, not simply 25 percent of the customer class. Thus, there was the prospect of a challenge to Complainants' standing to bring a formal complaint against PSE's rates under our standard complaint procedures as set forth in RCW 80.04.110.

27 By stating their cause as one permitting Commission action under the Emergency Adjudicative Procedures statute, RCW 34.05.479, Complainants might have avoided the standing issue, but faced the burden to show "an immediate danger to the public health, safety, or welfare requiring immediate agency action." *RCW 34.05.479(1).* By filing the Amended Complaint, which adds the City of Anacortes as a Complainant and includes the signature of H. Dean Maxwell, Mayor, Complainants clearly met the standing requirements under RCW 80.04.110, thus expanding the procedural options available to the Commission for considering the merits of their claims.

28 By filing their Amended Complaint, Air Liquide, *et al.* cured the alleged deficiencies in their original Complaint that arguably would have precluded the Commission from considering the dispute under its "standard complaint procedure," as specified in RCW 80.04.110. Nevertheless, the Amended Complaint continued to urge us to proceed under the Emergency Adjudicative Proceedings statute and our related procedural rule.

29 It is useful to analogize the procedural options available to the Commission under the Amended Complaint to those in civil court where a petitioner may seek injunctive relief. The Administrative Procedure Act allows an agency to grant relief analogous to a preliminary injunction. *See RCW 34.05.479(1)-(4), (6), and (7) ("Emergency Adjudicative Proceedings").* Thus, the Commission may hold a brief hearing, or perhaps even proceed *ex parte,* to develop and consider a record that consists of "any

31 We considered that the Emergency Adjudicative Proceedings statute itself requires that if relief analogous to a preliminary injunction is granted, the agency must then consider more deliberately on the basis of a more fully developed record, as would a court, whether some form of permanent relief should follow. *RCW 34.05.479(5).* Consistent with that principle, we recognized from the outset that whether or not we granted relief analogous to a preliminary injunction following an abbreviated process, it was our obligation to continue to proceed as quickly as feasible to complete proceedings to address any matters that obviously require expedited action even though they do not involve an immediate danger to the public health, safety, or welfare.

32 At its first prehearing conference in this proceeding, the Commission determined that a hearing would be required to determine, among other things, whether circumstances confronting the Complainants constituted an immediate danger to the public health, safety, or welfare. Thus, at the earliest phase of this proceeding, relief analogous to a preliminary injunction was not granted. Nevertheless, the Commission recognized that the circumstances facing Complainants were urgent and required expedited process. Accordingly, the Commission ordered that it would conduct an evidentiary hearing as quickly as possible, consistent with all Parties' rights to due process, to determine whether price caps or other emergency rate relief should be implemented for PSE's Schedule 48 customers, and under Georgia-Pacific's special contract with PSE. The Commission determined that it should provide Complainants an early opportunity to carry their burden to show that such relief is warranted and legally permissible. *Air Liquide, et al. v. PSE, Order Consolidating Proceedings; Prehearing Conference Order; and Notice of Hearing, Docket No. UE-001952 (December 18, 2000) at 3.*

33 Thus, on and after December 18, 2000, this proceeding was conducted in a fashion consistent with the requirements of both the Emergency Adjudicative Proceedings statute, RCW 34.05.479(5), and the Commission's Complaint statute, RCW 80.04.110. As related above, in Section I of this Order, the Parties were afforded the opportunity to conduct extensive discovery, including both document discovery via data requests and through depositions, to prepare prehearing briefs, and to present extensive evidence and argument during nearly 60 hours of hearing.

34 We conclude, for reasons discussed below in Section II.C.1 of our Order, that Complainants did not show the existence of an emergency in the sense that term is

immediate danger to the Puget Sound area economy, and therefore, the public welfare." *Amended Complaint at 2.*

37 Complainants acknowledge in their prehearing brief that "[w]hile the impact of high rates on an individual customer may not threaten the public welfare, when those high prices threaten the viability of the largest industrial facilities in PSE's service territory, the threat to the public welfare is self evident." *Complainants' Prehearing Brief at 48.* This statement begs the question of what evidence in our record shows that the viability of the largest industrial facilities in the Puget Sound region are in immediate jeopardy. In addition, we must consider what effect that situation, if shown, has on the broader public.

38 PSE, Public Counsel, and Staff all advocate that Complainants failed to show the existence of an emergency within the meaning of RCW 34.05.479. PSE, through its prehearing brief and subsequent development of the record, and Staff, in closing arguments, provide us with useful guidance to the evidence relative to each Complainant's circumstances and any effect those circumstances may be having on the broader public.

i. Air Liquide

39 Air Liquide presented no direct evidence that it has suffered any harm to its operations in Washington or to its national or international corporate operations as a result of increased costs under Schedule 48. Although Air Liquide submitted an affidavit in support of the original Complaint and Amended Complaint, it subsequently withdrew its affidavit. PSE asserts in its prehearing brief that Air Liquide provided no response to discovery requests "for data related to Air Liquide's alleged injury by Schedule 48." *PSE Prehearing Brief at 17.* The assertion is undisputed on the record. Staff cites to Exhibit No. 1542, a press release by Air Liquide America announcing a nationwide surcharge on its products "in the face of rising fuel and power related costs [in 2000]." The press release goes on to relate that "[p]ower shortages and curtailments *across the country* have driven costs to extremely high levels over the past months." *Exhibit No. 1542 (emphasis added).* In response to Bench Request No. 8, an inquiry concerning the impact on the labor force of Complainants, the collective response for Air Liquide, CNC, and Air Products is that these companies "have reduced operations or have resorted to intermittent operations, which *could affect* labor force compensation and morale. Other facilities

iii. The Boeing Company

41 The Boeing Company presented no direct evidence that it has suffered any harm to its operations in Washington or to its national or international corporate operations as a result of increased costs under Schedule 48. Like Air Liquide, Boeing submitted an affidavit in support of the original Complaint and Amended Complaint, but subsequently withdrew its affidavit. In response to Bench Request No. 12, Boeing states that

> in this proceeding, Boeing is not claiming that the production of its products in Washington State currently are threatened with curtailment or closure as a result of the high charges for electricity. Nonetheless, Boeing notes that Co-complainants Air Products, Air Liquide and Equilon are Boeing suppliers. *If* Boeing's Washington State suppliers are forced to shut down or curtail operations, Boeing *may* have to procure its supplies from facilities located outside Washington State. Boeing believes that such diversion of business outside of Washington State is not in the interest of the public welfare of Washington State.
>
> Despite the high energy costs and the possibility of further curtailment of operations by its Washington State suppliers, Boeing has no current plans to close or reduce operations in response to high energy charges under Schedule 48.

Exhibit No. 5 (page 4—emphasis added); see also Exhibit No. 8 (page 3).

Exhibit 1549 is an Internet version of a "State of the Company" news conference delivered by Boeing Chairman and CEO Phil Condit on December 13, 2000. Mr. Condit reported to the press that "[t]ogether our employees have produced a year of excellent financial performance. We had powerful cash flow. We have improved earnings and margins . . .." Mr. Condit also reported that while Boeing stock opened the year at just over $41 a share, it closed 67 percent higher for the year, at $69 a share, on the day the Complaint was filed in this proceeding. According to the document, in light of the company's performance, Boeing's Board of Directors authorized a 21 percent increase in the dividend and authorized repurchase of "an additional 85 million shares of stock."

contractual obligations to its customers, even though its contracts do not permit it to pass through increased electric costs. *TR. 436-437* (Franz). Despite its high electric power costs, Mr. Franz expects that CNC Containers will have positive earnings for 2000 in the range of $1-2 million through November. *TR. 452-53 (Franz).* He also testified that there is no shortage of bottles in the region and that 2000 was a record year in bottle production. *TR. 469 (Franz).* Although Mr. Franz testified at some length to his view that an emergency exists for CNC Containers, the critical situation he describes is prospective and assumes prices during 2001 in the range of $260. *TR. 439-44 (Franz).* If such prices eventuate, however, "that will be a death sentence for our company," according to Mr. Franz. *TR. 444 (Franz).*

*v. **Equilon Enterprises***

44 Equilon Enterprises is another Complainant that presented no direct evidence that it has suffered any harm to its operations in Washington or to its national or international corporate operations as a result of increased costs under Schedule 48. In response to Bench Request No. 5, Equilon stated that

> Equilon's Puget Sound Refinery produces a full slate of refined petroleum products, including various grades of gasoline, diesel fuel, fuel oils, lubricants, kerosene, and jet fuels. Equilon's products are essential to public health, safety and welfare. Equilon's refinery is one of only four refineries in the Pacific Northwest. *If* production from Equilon's refinery were interrupted or curtailed due to the high price of electricity—which is essential to production—the adverse effects on the state of Washington *would be* immediate. . . . Electricity Prices at current levels are driving Equilon *to consider curtailing* its operations, *which would result* in substantial harm to the state of Washington and public health, safety and welfare.

Exhibit No. 5 (page 5, emphasis added).

Somewhat curiously, in a response to Bench Request No. 15 provided on the same day as the response quoted from above, Equilon states that it "has temporarily shut down one of its alkylation units at the Puget Sound Refinery as a result of the high electricity prices." *Exhibit No. 8 (page 3).* The response goes on to state that no

> thousands. When those numbers clearly exceeded our ability to cover our variable costs, we shut the facility down on or about December 7.

TR. 803 (Cunningham). Since then, Georgia-Pacific has installed portable diesel generators capable of producing approximately 15 megawatts of power and has reopened its tissue mill and a portion of its chemical operation. *TR. 803-804 (Cunningham).* Georgia-Pacific has brought back approximately one-half of its 500 hourly-wage employees. *TR. 807-808 (Cunningham).* At the conclusion of his direct testimony, Mr. Cunningham stated that:

> I would simply like to reinforce the fact that we have a tremendous amount of uncertainty in our Bellingham community, both at our own facility with our hundreds of employees who are affected by this shutdown and curtailment, the uncertainty about the future of their employment, and of course the impact it has on our whole community. And we're looking for some relief in terms of pricing and looking for a way to get ourselves to a reasonable cost structure and back in operation.

TR. 818 (Cunningham).

vii. Tesoro Northwest

46 Tesoro Northwest presented evidence through live testimony of Mr. Russell Crawford who is the process engineering manager at the company's Anacortes refinery. *TR. 488-541; Exhibit Nos. 301-C - 303.* Mr. Crawford also was deposed by PSE. *Exhibit No. 304-C (Deposition Transcript 12/28/00).* Mr. Crawford testified that Tesoro's average electric load is about 20 MWh at its Anacortes facility. *TR. 489 (Crawford).* The refinery produces propane, gasoline, jet fuel, diesel, marine fuel, and road asphalt. *Id.* Mr. Crawford testified that reduced throughput of crude oil at the refinery in response to high electric prices has resulted in reduced production of these fuels, particularly propane, which is "used to heat many homes in the Northwest and Skagit County." *TR. 495 (Crawford).* Nevertheless, Mr. Crawford testified that he is not aware of any shortage of propane in the region due to the impact of high prices for electricity. *TR. 508 (Crawford).* Mr. Crawford also testified to the importance of Tesoro's production of jet fuel to supply demand at SeaTac International Airport, but stated that he does not know of any shortage of jet fuel in the Northwest region at this

2001 time frames, respectively. *Exhibit 101 (page 2).* Corresponding prices under Schedule 49, which is a fixed-price schedule, were indicated to be $42 per MWh. *Id.* Mayor Maxwell testified that as things turned out, Anacortes has paid approximately $987,000 more under Schedule 48 through year 2000 than it would have paid had it stayed on Schedule 49. *TR. 362 (Maxwell).*

48 Significantly, as previously noted, 70 percent of the water treatment plant's excess costs are passed through to Equilon and Tesoro under the City's contracts with those customers. *TR. 383 (Maxwell); Exhibit No. 20 (Anacortes's Contracts with Equilon and Tesoro).* Mayor Maxwell testified that excess costs incurred by the City's water utility are "passed on to our customers typically." *Exhibit No. 107 (Deposition Transcript at 20).* PSE developed the point on cross-examination, that the remaining "excess costs" could be passed through to the City's 35,000 residential customers with an annual rate increase of approximately $10 per customer. *TR. 401-403 (Maxwell).* Although Mayor Maxwell was unable to testify to the proportion of commercial to residential water consumption in his community, assuming that some portion of the total excess would be charged to commercial customers, the suggested charge for a residential customer would be even less. *Id.*

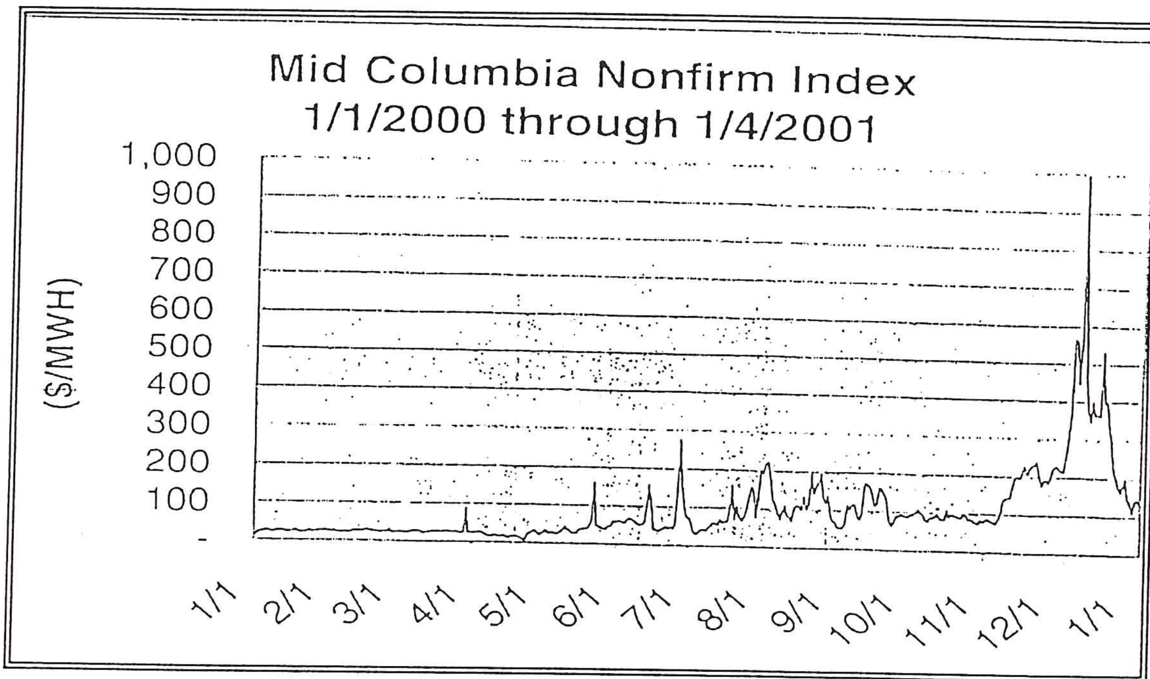
ix. Other Schedule 48 and Special Contract Customers

49 Although there are a number of Schedule 48 customers other than Complainants, we note that none of these customers intervened in our proceeding. The Second Amended Complaint, which was stricken on PSE's motion, would have added Intel Corporation, but Intel did not furnish an affidavit or other evidence in support of its proposed participation as a party Complainant. Intel did not seek to intervene.

50 In addition to Georgia-Pacific, there are other PSE Special Contracts customers whose retail energy rates are tied to the Mid-Columbia indices. One of these, Bellingham Cold Storage did intervene, but did not participate actively. BCS presented no evidence, did not participate in the cross-examination of witnesses, and did not file a brief or make a closing statement.

b. Commission Decision

51 We cannot find on the basis of this body of evidence that Complainants have demonstrated the existence of an immediate danger to the public health, safety, or



Such extraordinarily high and volatile prices for electricity are neither appropriate for these customers to pay, nor in the public interest, unless there are provisions in the subject tariffs that provide a certain and practical means for these customers to achieve price stability in the face of unanticipated volatility in the markets.

54 Schedule 48 and the Special Contract do include optional price stability provisions. Schedule 48's Optional Price Stability clause provides:

> Available optional price stability services may include guarantee on an average commodity price, price caps on the non-firm prices, or collars on the non-firm price. Rates for these Optional Price Stability services will be determined according to market conditions.

Exhibit No. 1528 (Schedule 48, Second Revised Sheet No. 48-c). The corresponding provision in the Georgia-Pacific Special Contract states:

> Price of these Optional Price Stability services will be customized to the customer's needs. Those services could include guarantee on an

57 The customers' expectations were realized during the first several years following Schedule 48's approval. *TR. 623-24 (Canon).* Indeed, prior to June 2000, rates based on the non-firm prices at Mid-Columbia never exceeded $60 per MWh. With prices remaining in the range expected, most Schedule 48 customers elected not to hedge or purchase other price stability mechanisms that might have been available. Some customers, however, did hedge even in the stable market environment. As previously noted, for example, CNC Containers elected to hedge under the Optional Price Stability provision of Schedule 48 for the period March 1997 through mid-1999. *TR. 431 (Franz).* Mr. Franz testified that as the company gained experience and recognized that markets remained stable over longer periods, CNC elected to not continue hedging. *Id.* In addition, Mr. Franz testified that he was influenced by PSE's projections of continued "low and stable" Schedule 48 prices and the recommendation of "our key account manager at that time . . . who said he believed we didn't need to hedge anymore." *Id.*

58 Beginning in June 2000, however, the Western wholesale power markets began behaving in a markedly different fashion from what was observed during the prior several years. *TR. 613-14 (Canon).* According to Mr. Canon, the customers who had taken the risk of market-index prices, and had not protected themselves via whatever options were available under the Price Stability provisions of Schedule 48 and the Special Contract, viewed the early summer price spikes as "just a temporary, you know, two or three month excursion, and they were looking at prices going down." *TR. 614-15 (Canon).* This helps explain why even after June 2000, the utility of financial hedging against Mid-Columbia indices as a price stability mechanism was viewed with skepticism by at least some customers. *See, e.g., TR. 799-801 (Cunningham); TR. 432, 472-74 (Franz).*

59 Prices remained volatile, however, after June 2000. Mr. Schoenbeck, an expert on energy markets who has advised industrial electricity and gas customers for more than 20 years, testified to his astonishment over prices in the Western wholesale power markets in the range of $150 per MWh. *TR. 890 (Schoenbeck).* Mr. Schoenbeck described such prices in the Pacific Northwest as "unconscionable." *Id.* He observed that prices in the Pacific Northwest "have generally been in the $20 to $30 per megawatt hour range" and expressed his opinion that "[m]ost industries have located here, have located here over the years because of the historic low prices." *Id.* Wholesale market prices continued on average to exceed $100 per MWh through July and August, spiking dramatically higher from time-to-time during that period.

pay more for a hedge. With price projections going lower, it's a much more sound course of action to purchase a hedge at the end of the first quarter, beginning of second quarter, because you will get a better deal." *Id.; TR. 472-74 (Franz).* According to Mr. Franz, he intended to follow this advice. *Id.* Asked again on cross-examination about the hedges PSE communicated to CNC Containers in August 2000 Mr. Franz testified:

> You know, hindsight is 20/20 on all of these things. Obviously in retrospect knowing what we know now, you know, it was a terrible decision. We should have hedged. But, you know, the data we had to make that information came from PSE, and it was bad, and the recommendations we had from PSE were wrong. So yeah, we made a bad decision, no doubt about that. It was a terrible decision, but you know, we had a lot of help getting there.

TR. 478 (Franz); see also TR. 481-82 (Franz).

63 When prices did not decrease after August 2000 and, in fact, increased, Mr. Franz again investigated the possibility of hedging. Exhibit No. 202 is a communication CNC Containers received from Enron Corporation offering a hedge for all of 2001 at a flat rate of $260 per MWh. Mr. Franz testified that CNC Containers did not purchase this hedge "[b]ecause we could not afford it. At $260 a megawatt hour with our load [we'd] have paid approximately $18 million a year for electricity . . . we can't do that." *TR. 433 (Franz).* This compares to approximately $2.1 million CNC Containers paid for electricity under Schedule 48 in 1999. *TR. 438 (Franz).* Even with the high prices experienced in 2000, Mr. Franz estimates CNC Containers' total electric costs paid to PSE for the year are $6.4 million. *Id.*

64 Mr. Crawford, for Tesoro, also testified on cross-examination with respect to hedges. He stated that he has not pursued financial hedges because "I really don't understand hedging real well, and it's hard for me to find a good reasonable point in time to buy or even recommend a hedge." *TR. 524 (Crawford).* Mr. Crawford went on to testify that he is unaware of the fact that Tesoro, at the corporate level, acquires financial derivative products to protect itself from variability in market valuation of crude oil and other products. *TR. 524-26 (Crawford); Exhibit No. 304-C (attachment to Deposition Transcript-Tesoro Response to PSE DR-5).*

TR. 799-800 (Cunningham). As previously discussed in Section II.C.1. of this Order, the hoped-for buy-sell arrangement was not successfully negotiated with PSE due to the company's concern at the time over its legal implications.

67 Physical hedges in the form of alternative supplies of non-utility power are another option available to customers faced with high, volatile prices. CNC Containers, for example, leased and installed nine 1.25 megawatt diesel generators and disconnected from PSE on December 10, 2000. *TR. 436 (Franz).* These generators power CNC Containers' facility at a cost of approximately $120-$140 per MWh. *TR. 483 (Franz).* Mr. Franz testified that this form of physical hedging is working out as a marginal solution "at best." *TR. 437 (Franz).* He testified that there are environmental issues associated with burning approximately 440,000 gallons of diesel fuel a month, and a number of operational difficulties associated with the use of multiple generation units. *TR. 437-38 (Franz).* CNC Containers' current permit that allows it to operate diesel generators expires at the end of April 2001, and it requires the company to remove the generators by May 1, 2001. *TR. 476, 484-85 (Franz).* Mr. Franz testified that based on "lots of discussions with the Olympic Air Pollution Control Authority . . . their position is now it's highly unlikely that they will extend the air permit." *TR. 485 (Franz).*

68 Tesoro is another Schedule 48 customer that is beginning to use physical hedges in the form of temporary diesel generators. *TR. 495 (Crawford).* Mr. Crawford testified that Tesoro is "pursuing installing, I think, up to 12 of these temporary emergency generators to help supplement most of the power for the refinery, not all of it." *Id.* Like Mr. Franz, Mr. Crawford testified to operational and maintenance issues associated with using diesel generators. *TR. 495-96 (Crawford).* The cost of the electricity produced by Tesoro's generators is between $133 to $144 per MWh. *TR. 504 (Crawford).* Mr. Crawford understands that Tesoro can operate its generators without an emissions permit for 90 days; after that, a permit will be required. *TR. 504 (Crawford).* In addition to diesel generators, Tesoro has effected physical hedging by implementing "emergency power curtailment procedures where we actually put on our steam emergency drive pumps in a lot of our units." *TR. 494 (Crawford).* Tesoro also has effected demand side reductions by curtailing approximately 20 percent of its throughput of crude petroleum. *Id.* Mr. Crawford describes these measures as "very extraordinary moves that we have taken in an emergency basis." *TR. 498 (Crawford).* He does not consider diesel generation to be a viable, long-term solution. *TR. 498-99 (Crawford).*

the Optional Price Stability provision of its Special Contract with PSE during the summer of 2000 failed, as we discussed above in this section and in Section II.C.1. of our Order. Lately, PSE has filed for approval of Schedule 448, which it presents as a tariff PSE hopes will largely, if not entirely, replace Schedule 48. Proposed Schedule 448 provides for buy-sell arrangements. The filing has been suspended by the Commission. WUTC v. PSE, *Complaint and Order Suspending Tariff Revisions, Docket No. UE-010038 (January 16, 2001).*

b. Commission Decision

72 We find that the available price stability options, either those that might be offered by PSE under the Optional Price Stability provisions of Schedule 48 and the Special Contract, or those available from independent sources are, under current and foreseeable circumstances, inadequate to the task they were intended to perform. Regardless of whether Complainants could have or should have secured hedges in the past, the tariff on a going-forward basis must allow reasonable methods of securing reasonable prices. In light of the unexpected volatility that has developed in the wholesale power market, financial hedges either are unavailable, or are available only at exceedingly high prices. Physical hedges in the form of alternative supplies of non-utility power (*i.e.*, temporary diesel generators) suffer from various operational problems, are inefficient, are not adequate in all cases to supply sufficient power to keep larger facilities up and running, and pose significant environmental risks for the communities in which they are operated. Physical/financial hedges in the form of buy-sell options are not yet available. On balance, we find that the tariffs that provide for market-index based rates under Schedule 48 and the Special Contract are no longer just and reasonable unless customers are afforded terms and conditions of service that include meaningful optional price stability under the Optional Price Stability provisions of the subject tariffs.

3. What Remedy Is Required?

73 Our findings of fact, discussed in the preceding sections of this Order and summarized in the Commission's Findings of Fact below, lead us to make three essential conclusions of law. First, Complainants have not shown there exists an

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available from independent financial markets, or physical options such as leased generators, do not depend on PSE's participation or cooperation and could have been effected even were there no Optional Price Stability provisions in the tariffs.

77 It is, then, entirely consistent with the "deal" memorialized in Schedule 48 and the Special Contract that we now simultaneously have under consideration not only the customers' Amended Complaint, but also PSE's re-filed Schedule 48. *WUTC v. PSE, Complaint and Order Suspending Tariff Filing, Docket No. UE-010046 (filed under Docket No. UE-960696).* We note, too, that PSE also has filed another market-based tariff proposal in the form of Schedule 448, a buy-sell tariff that PSE describes as the economic equivalent of open access.

78 In light of our findings and conclusions in Phase One of this proceeding, and pending further review in this docket and/or our review of PSE's re-filing in Docket No. UE-960696, our statutes require that we effect a temporary remedy to establish rates, terms, and conditions of service that are fair, just, reasonable, and sufficient. The Commission intends to conduct further proceedings immediately in this proceeding, and expeditiously in Docket No. UE-960696. In Phase Two of this proceeding, we will hear evidence and determine the details of temporary remedies proposed in Phase One. Following that we will consider, either in a Phase Three proceeding in this docket or in Docket No. UE-960696, what permanent disposition should be made with respect to Schedule 48 specifically, and PSE's market-based tariffs generally. Proceedings in the related docket concerning PSE's request for approval of Schedule 448 also will be undertaken expeditiously.

79 Three forms of temporary relief were proposed and described with varying degrees of detail by Complainants and other Parties in the Phase One proceedings. Complainants originally proposed that PSE be required to serve them based on Schedule 49 at a rate "to be subject to refund, or surcharge, as the case may be, with interest, to reflect the difference between such Schedule 49 rate and the cost-based just and reasonable rate." *Amended Complaint at 10.* In the alternative, Complainants requested that the Schedule 48 and Special Contract rates "include an interim price cap based on Schedule 49 subject to refund or surcharge or another interim price cap level which the Commission considers to be just and reasonable." *Id.*

80 Complainants did not provide at hearing any additional detail concerning their proposals based on Schedule 49 rates. Instead, they proposed through their expert witness, Mr. Schoenbeck, to replace the Mid-Columbia indices under Schedule 48 and the Special Contract with a new index based on the forward-market price of

1. When the Mid-C Index is at or below $125 per MWh, the energy price is the Mid-C Index.

2. When the Mid-C Index is above $125 per MWh, the billing rate is the greater of a) $125 per MWh or b) PSE's demonstrable costs plus a margin equal to $25 per MWh, subject to a maximum billing rate equal to the Mid-C Index amount.

Id.

83 In other words, the billing rate for the energy component of the Schedule 48 and Special Contract rates is capped at $125/MWh unless PSE can demonstrate that the costs it actually incurred to serve the customers exceeds that amount up to the level of the Mid-Columbia index. If PSE demonstrates that it has incurred costs in excess of $125/MWh, the energy rate is set equal to PSE's demonstrated costs plus a margin of $25/MWh, so long as the sum does not exceed the Mid-Columbia index. If the Mid-Columbia index is at or below $125/MWh the energy component of the rate is set equal to the index, regardless of PSE's costs. The level of the soft cap is set at $125 per MWh because that is Staff and Public Counsel's estimate of the approximate cost to obtain and operate on-site diesel-fueled generation units. *TR. 1234 (Buckley).*

84 Staff and Public Counsel represent that their proposal provides a reasonable level of price protection and stability for the customers, yet ensures that PSE will be able to recover its costs, and will retain the opportunity to earn a reasonable margin. *TR. 1265-66 (Lazar).* According to Staff and Public Counsel, their joint proposal preserves aspects of the original Schedule 48 and Special Contract pricing because when the index is below the cap the customers face the risk of market-price fluctuations. Since the energy cost component is set by the Mid-Columbia index when it is less than $125 per MWh, regardless of PSE's costs, PSE is placed at no more risk for cost recovery than it faces today.[13] Under the proposal, only when the market price indicated by the Mid-Columbia index exceeds the $125 per MWh cap is the customers' rate tied to PSE's actual cost to provide service. In that circumstance, PSE is entitled to demonstrate its actual cost and recover those costs plus a $25 margin but never more than the Mid-Columbia index price. According to Staff and

[13] We note that under these circumstances PSE should be able to control its risk since power presumably is available to PSE at the Mid-Columbia index price. PSE thus would not need to incur costs in excess of the index.

for Schedule 48 and Special Contract service at the Schedule 49 rate.[14] This Commission will not impose any remedy that impair, PSE's ability to recover reasonable costs.

87 Complainants' alternative proposal for rates based on natural gas index prices does maintain the market-based pricing concept of Schedule 48 and the Special Contract. However, the natural gas market in the West has become closely tied to volatility in the electricity markets and has itself demonstrated unprecedented price spikes and volatility over the last year. In addition, the proposal to use Sumas as the pricing point under this proposal is risky, at best, considering supply and transmission capacity constraints at the U.S./Canada border. Mr. Schoenbeck testified that using an index derived from natural gas market prices poses risks, just as does using the Mid-Columbia indices. *TR. 1010, 1038 (Schoenbeck).* Simply replacing the instability of pricing based on an electricity index with instability in pricing based on a natural gas index does not enhance the customer's ability to obtain practical or effective price stability. Further, it does nothing to ensure that PSE will have an adequate opportunity to recover its prudently incurred costs and earn a reasonable return. We find for these reasons that the proposal for tying Schedule 48 and Special Contract customers' rates to an index based on natural gas does not meet the tests by which we measure what constitutes an appropriate remedy under the facts of this case.

88 We turn finally to the joint proposal presented by Staff and Public Counsel. As we understand the proposal, it has, in principle, the following features. When the applicable Mid-Columbia price index is below the cap, PSE can realize net benefits if it manages its power portfolio so that its costs fall below the market. When Mid-Columbia index prices exceed the cap, the risk faced by the customers is moderated because they will only pay the capped rate unless PSE demonstrates that its actual costs exceed $125. In that event, the rate to customers is tied to PSE's actual costs, rather than to the index. PSE recovers its demonstrated costs and has the opportunity to earn a reasonable margin so long as its costs and margin do not exceed the index price. The risk to PSE is the same as under the current pricing arrangement in Schedule 48 and the Special Contract. As we noted previously, PSE's risk in this regard can be mitigated because PSE presumably can always acquire power at the

[14] This is based on a comparison of columns "b," showing estimated revenue for applicable rate schedules, and "d," showing estimated incremental cost of service, in Exhibit No. 617-C, which Mr. Schoenbeck presented for Complainants.

and the Federal Energy Regulatory Commission has under consideration a Western wholesale market-wide cap?

We expect to hear from the Parties with respect to these issues in Phase Two of our proceeding.

91 With respect to the level of the soft cap in the Staff/Public Counsel proposal, we are concerned about the potential inconsistency between any soft or hard cap that may be applied in the Western wholesale power market and those applied to the retail power market. We are inclined to prefer consistency throughout the markets, retail and wholesale, when retail rates are pegged in one fashion or another to wholesale rates. Again, we expect to hear from the Parties on this issue during Phase Two, but we direct Staff to include as at least one option a soft-cap at $150.

92 Finally, considering that the requirement for a soft cap in Schedule 48 and Special Contract customers' rates reduces those customers' market risks even though they expressly assumed such risks in agreeing to service under market-indexed tariff rates, we find that it is appropriate to consider removing the risk faced by PSE should Mid-Columbia index prices again fall below the level of billing rates in Schedule 49 or otherwise applicable tariffs. Setting those billing rates as a floor for the energy cost under the capping mechanism on the low side appears to be an appropriate complement to the soft cap proposal. We expect in Phase Two of our proceeding to hear from the Parties on this issue.

93 To resolve the implementation issues we discuss above, and others that may not be immediately apparent given the seminal nature of Staff and Public Counsel's presentation during Phase One, we direct the Staff to work with PSE, Complainants, and Public Counsel to develop a fully detailed soft-cap mechanism that follows the framework of the joint Staff and Public Counsel proposal. We expect the level of detail to include proposed tariff sheets that would make the proposal ready for immediate implementation at the conclusion of Phase Two. The proposed tariff sheets should be framed as an option to be made available to Schedule 48 and Special Contract customers under the "Optional Price Stability" clauses of the tariffs. We direct Staff to make a filing with the Commission no later than January 26, 2001, to initiate Phase Two of our proceeding. If such a filing is not possible by that date, Staff is directed to inform the Commission of that fact by January 25, 2001.

CONCLUSIONS OF LAW

94 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

100 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and all parties to, these proceedings. *Title 80 RCW.*

101 (2) Puget Sound Energy, Inc. is a "public service company" and an "electrical company" as those terms are defined in RCW 80.04.010, and as those terms otherwise may be used in Title 80 RCW. Puget Sound Energy, Inc. is engaged in Washington State in the business of supplying utility services and commodities to the public for compensation.

102 (3) Under the evidence presented in this proceeding, there is not an immediate danger to the public health, safety, or welfare requiring immediate agency action. *RCW 34.05.479.*

103 (4) Schedule 48 and the Special Contract, which include retail rates that are pegged via Mid-Columbia index pricing to Western wholesale power markets that are volatile and exceedingly high, are not fair, just, and reasonable because, under current conditions, customers do not have effective options to achieve price stability and reasonable rates under the Optional Price Stability provisions of Schedule 48 and the Special Contract. *RCW 80.28.010 and RCW 80.28.020.*

104 (5) The Commission having found, after a hearing had upon the Amended Complaint of certain PSE customers, that the rates or charges demanded, exacted, charged or collected by PSE and the rules, regulations, practices or contracts affecting such rates or charges are unjust and unreasonable, must determine the just, reasonable, and sufficient rates, charges, regulations, practices or contracts to be hereafter observed and in force, and must fix the same by order. *RCW 80.28.020.*