BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of **Revisions to Puget Sound Energy Inc.'s Electric Schedule 95A – Federal Incentive Tracker**	**Docket No. UE-120277**

REPLY BRIEF OF PUGET SOUND ENERGY, INC.

MAY 14, 2012

PUGET SOUND ENERGY, INC.

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I. INTRODUCTION

1. The briefs of Commission Staff and the Industrial Customers of Northwest Utilities ("ICNU") are flawed in fact and logic. First, Commission Staff improperly disregards the ambiguity in the "effective date" language in section 1096 of the National Defense Authorization Act For Fiscal Year 2012 ("NDAA"), which is susceptible to multiple interpretations. Commission Staff ignores that Puget Sound Energy Inc.'s ("PSE") interpretation of the statutory language does in fact give meaning and retroactive effect to the amendment. Second, Commission Staff and ICNU mistakenly focus on cases involving changes to tax law, which are not dispositive or even informative. The amendment at issue here does not change tax law; it eliminates the requirement to normalize Treasury Grants. It does not preempt the Filed Rate Doctrine, the rule against retroactive ratemaking, or other well-established principles and practices of ratemaking and accounting treatment. Third, in their efforts to sidestep the Filed Rate Doctrine and the rule against retroactive ratemaking, Commission Staff and ICNU cite to cases from other jurisdictions that are dissimilar and irrelevant. Fourth, Commission Staff and ICNU misapply the benefits and burdens test, which cannot be used to overturn past filed tariff rates or second-guess Congressional purpose.

2. In section 1096 of the NDAA, Congress removed the normalization requirement that applied at the time the Wild Horse Expansion Project ("WH Expansion Project") was placed in service and received a Treasury Grant. The retroactive effective date language in the NDAA removes mandatory normalization from grants received prior to the date of the amendment. However, the language does not *require* unwinding of normalization for the past period; it simply removes the normalization mandate that previously existed. Sound ratemaking and legal principles militate against reading this language more broadly to require unwinding the financial consequences of a previously-authorized accounting treatment and unconditional filed tariff. PSE's proposal avoids this harsh result while providing customers with an additional $2.4 million

in benefits for 2012 beyond what they otherwise would have been credited, as well as continuing additional benefits through 2020.

II. THE EFFECTIVE DATE LANGUAGE MAY BE READ IN TWO WAYS AND MUST BE INTERPRETED IN A WAY THAT DOES NOT VIOLATE VESTED RIGHTS

3. Commission Staff misses the key issue in this case when framing the dispute.[1] The primary issue is the interpretation of ambiguous language in the NDAA. There are two interpretations of the effective date language in the statute—both of which have retroactive effect. Commission Staff does not acknowledge or even attempt to rebut PSE's interpretation of the retroactive language in the statute, erroneously stating that PSE's interpretation of the effective date language in the amendment has no retroactive effect.[2] To the contrary, PSE's interpretation of the statute does operate retroactively, by exempting from normalization those Treasury Grants received prior to the enactment of the amendment in the NDAA.

A. PSE's Interpretation of the Effective Date Language In NDAA Complies with Washington Law and Federal Law, and Results In Sound Public Policy

4. PSE interprets the amendment to section 1603 of ARRA to apply to Treasury Grants received on plant placed in service *prior* to December 31, 2011, the date of the amendment, as well as plant placed in service after the amendment. In this respect, PSE's interpretation gives meaning to the retroactive effective date:

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[1] *See* Commission Staff Resp. Br. at ¶ 3 (defining key issues as "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?"

[2] Commission Staff Resp. Br. at ¶ 9 ("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 December 31, 2011, enactment date of NDAA, as PSE proposes.").

> (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.[3]

5. Rather than eliminating normalization *only* for Treasury Grants received *after* the effective date of the Act, as would be the usual procedure with changes in accounting treatment, the retroactive "effective date" language allows for the elimination of normalization for *all* plant eligible for section 1603 Treasury Grants—even those placed in service prior to the enactment of the NDAA. However, as discussed in PSE's opening brief, the mere fact that mandatory normalization was retroactively eliminated for Treasury Grants received prior to the passage of the NDAA does not mean that Congress intended to also undo the financial consequences of the previous accounting and ratemaking treatment that had been required between the passage of the American Recovery and Reinvestment Act ("ARRA") in 2009 and the amendment to ARRA in December 2011. Particularly in light of Congress' failure to expressly state that it intended to unwind the financial consequences of utilities' previous accounting and ratemaking treatment, as well as the harsh penal effects it would have on utilities that complied with the prior law, it is most reasonable to interpret the retroactive language as meaning simply that the normalization mandate is eliminated, on a going forward basis, for all section 1603 Treasury Grants—including those grants received on plant placed in service prior to the enactment of the NDAA.

6. PSE's interpretation of the amendment is the only interpretation that complies with both Washington law and federal law and makes sense from a public policy perspective. PSE's interpretation of the ambiguous statute aligns with the Filed Rate Doctrine and the rule against retroactive ratemaking because it does not change the credit that was paid to customers in 2011 in compliance with the tariff then on file with the Commission. PSE's interpretation comports with the general process by which utilities manage changes in accounting and ratemaking procedures over time, as discussed in more detail below. PSE's interpretation is consistent with

[3] Section 1096 of the National Defense Act for Fiscal Year 2012, H.R. 1540, 112th Congress, 1st Session; Stipulated Facts ¶ 6.

the purpose of the American Recovery and Reinvestment Act—to stimulate business reinvestment[4]—while also providing significant benefits to customers. Under PSE's interpretation, customers benefit from an additional $2.4 million beyond what they otherwise would have been credited for the Treasury Grant in 2012, and they will continue to receive additional benefits each year that are greater than would have been allowed if the normalization requirement remained. At the same time, PSE's interpretation balances the interests of utilities and their customers by not unfairly penalizing utilities for complying with the required normalization of the Treasury Grant prior to the amendment.

7. In contrast, Commission Staff and ICNU interpret the statute in a manner that requires the Commission to alter a tariffed rate previously filed with the Commission in violation of the Filed Rate Doctrine. Their interpretation retroactively changes that filed rate. They ask the Commission to imply federal preemption where no evidence of such intent can be found. Their interpretation fails to properly balance the interests of utilities and customers and punishes utilities for complying with the mandatory normalization requirement prior to the amendment.

B. PSE Was Concerned About Treasury Grants For LSR in Addition To WH Expansion

8. As PSE stated in its opening brief, PSE sought to ensure that Treasury Grant-eligible projects placed in service prior to the date of the amendment would not be precluded from taking advantage of the favorable change in law on a going forward basis. PSE was particularly attuned to this need because it had been trying for 33 months to effect a change in law and faced the specter of its Lower Snake River Wind Project ("LSR") beginning commercial operation in the near future, potentially before an amendment could be passed. Thus, it was important that the

[4] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 § 3 (2009) (stating that purposes of ARRA include "[t]o preserve and create jobs and promote economic recovery" and "[t]o invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits").

amendment retroactively eliminate the normalization mandate for grants received before Congress amended the law.

9. Commission Staff argues that LSR could not have been a factor in PSE's attempts to change the law because PSE began efforts to change the law in 2009 but did not formally decide to build LSR until May 2010. Commission Staff's stilted view of history ignores the significant planning and analysis involved in the development of a wind project such as LSR. While it is true PSE had not made a *decision* to build LSR in May 2009 when it began its efforts to change the law, PSE had acquired the wind development rights from RES America Development, Inc. several months earlier, as Commission Staff is well aware.[5] The availability of Treasury Grants was an important consideration for PSE in terms of the feasibility of the project as well as the timing. Moreover, PSE continued working with Congress to effect a change in law for more than two years, during which time PSE made the decision to build LSR and came near to completing the construction of the project.

III. NORMALIZATION IS A RATEMAKING ISSUE, NOT A TAX ISSUE

10. Commission Staff and ICNU improperly focus on constitutional issues involving tax law changes, rather than the accounting and ratemaking treatment at issue in this case. Normalization, at its core, is a ratemaking requirement, not a tax issue. Normalization is a Congressional requirement imposed on a regulated company for ratemaking purposes. While normalization might be considered a tax attribute of the underlying asset (only because the requirement is part of the Internal Revenue Code), it has no impact on the company's tax return. Its only impact is for ratemaking purposes. It only requires the provision of deferred taxes or establishes the rate at which the benefit can pass-through to customers.

[5] *WUTC v. PSE*, Docket Nos. UE-111048 and UG-111049, Order 08 ¶ 378 (May 7, 2012) (stating that PSE acquired wind development rights to LSR beginning in November 2008).

11. The parties' misguided focus on tax law perhaps is illustrated best by ICNU's mistaken assertion that "Congress has now retroactively changed the *tax rules* concerning the accounting treatment" of deferred amortized funds.[6] Neither section 1603 of ARRA nor the amendment in section 1096 of the NDAA changed tax law. In section 1603, Congress imposed normalized accounting treatment for regulatory purposes for a Treasury Grant; in section 1096 of NDAA, Congress removed the requirement to use that accounting treatment for the federal grant. Tax law was never at issue.

A. Normalization and Flow-Through Accounting Focus on Plant In-Service Date

12. It is important to recognize what the normalization change in the NDAA does and does not do. The normalization change instructs the Treasury not to invoke the ITC normalization rules when considering the ratemaking treatment of the Treasury Grants, but it does not require any particular outcome.[7] It simply removes one limitation (mandatory normalization) from consideration in setting customer rates. The Commission is free to continue the current ratemaking treatment if it wishes. No action is mandated as suggested by ICNU.[8]

13. Historically, legislation authorizing a change of normalization method has applied solely to post-enactment property.[9] For this reason it was important that the amendment to ARRA be

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[6] ICNU Resp. Br. at ¶ 17 (emphasis added).

[7] *See* Section 1096(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.'"). Section 50(d)(2) of the IRC requires the use of the ITC normalization rules. Stipulated Facts ¶ 2.

[8] ICNU Resp. Br. at ¶ 13.

[9] *See, e.g., FPC v. Memphis Light, Gas and Water Div.*, 411 U.S. 458, 467 (1973) (noting that under 1969 Tax Reform Act "a utility using straightline depreciation with respect to its pre-1970 property could not switch to accelerated depreciation"). The 1986 Tax Reform Act similarly required utilities to continue using the normalization method of accounting for all pre-1987 public utility property:

> TRA 1986 leaves intact (i.e. without any modifications) the provisions of prior tax law that required public utilities to use the normalization method of accounting for the tax benefits of accelerated depreciation on all assets placed in service before January 1, 1987 (see IRC Section 168(i)(9)). Thus, under TRA 1986, public utilities must continue to use the normalization method of accounting for the tax benefits of accelerated depreciation for both old ACRS

made clearly applicable to plant placed in service prior to the amendment. The "as if" language in NDAA section 1096 does just that: by making the amendment applicable "as if" it had been included in the original section 1603, the amendment eliminates the possibility that the IRS could continue to require normalization of Treasury Grants for eligible plant placed in service prior to the amendment date. Without the retroactive effective date, this was a very real possibility considering how changes in accounting treatment have traditionally been applied (i.e., to post-enactment plant only).

B. Tax Law Cases Cited By Commission Staff Are Inapposite

14. Contrary to Commission Staff's assertion, *United States v. Carlton,*[10] is not "comparable" to the circumstances presented here. As the Supreme Court expressly noted in that case, retroactive tax legislation is "customary congressional practice," and "Congress 'almost without exception' has given general revenue statutes effective dates prior to the dates of actual enactment."[11] This is due to the particular nature of taxation:

> Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumed by contract. It is but a way of apportioning the cost of the government among those who in some measure are privileged to enjoy its benefits and must bear its burdens.[12]

> (post 1980 through pre-1987) and pre-ACRS (pre-1981) public utility property. Congress was intent on continuing this rule for all pre-1987 public utility property, as was plainly demonstrated throughout the legislative history of the 1986 Act.
>
> For post-1986 property (i.e., property generally covered under the MACRS), TRA 1986 continued the normalization requirements that were applicable to ACRS assets under the prior tax law. Thus, public utilities are required to use the same normalization method of accounting for) that they used for ACRS public utility property under prior tax law.

Hahne, Robert L., Accounting for Public Utilities § 17.03[5][b] (2011).

[10] 512 U.S. 26 (1994).

[11] *Id.* at 32–33.

[12] *Id.* at 33.

Accordingly, "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."[13] Here, in contrast, under the Commission's regulatory framework and well-established principles of regulatory law, both PSE and its customers had the right, by law, to rely on the published rate in Schedule 95A, and it would be unconstitutional under Washington law to retroactively deprive PSE of its vested right to rates previously charged, for services previously rendered, pursuant to a lawful, unconditionally approved tariff.[14] Such an action by the Commission would be an unprecedented and improper expansion of the Commission's authority to establish "'fair, just, reasonable and sufficient' rates for *prospective* application."[15]

15. Commission Staff also overlooks key factual distinctions between *Carlton* and this case. In *Carlton*, the legislative intent was unmistakably clear. Among other things, the retroactive amendment was expressly titled "Congressional Clarification of Estate Tax Deduction for Sales of Employer Securities."[16] The legislative history also included a Committee Report statement that specifically set forth the purpose and intended consequence of the amendment:

> As drafted, the estate tax deduction was significantly broader than what was originally contemplated by Congress in enacting the provision. The committee believes it is necessary to conform the statute to the original intent of Congress in order to prevent a significant revenue losses under the [Tax Reform Act].[17]

16. Further, in *Carlton*, there was only one way to interpret the statute to give effect to Congress's stated intent: the only way the statute could operate retroactively was to disallow the

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[13] *Id.*

[14] *See Scott Paper Co. v. Anacortes*, 90 Wn.2d 19, 35 (1978) (holding that city could not impose after-the-fact surcharge for prior electric deliveries without running afoul of *Gillis* rule); *Gillis v. King Cnty*, 42 Wn.2d 373, 376 (1953) ("[a] statute may not be given retroactive effect, regardless of the intention of the legislature, where the effect would be to interfere with vested rights").

[15] *WUTC v. PSE*, Docket Nos. UE-111048 and UG-111049 (consolidated), Order 08 ¶ 21 (May 7, 2012) (citing RCW 80.28.010(1) and 80.28.020) (emphasis added).

[16] *Carlton v. United States*, 972 F.2d 1051, 1055 n.2 (9th Cir. 1992), *rev'd* 512 U.S. 26 (1994) (citing Pub.L. No. 100-203 § 10411, 101 Stat. 1330, 1330-432 (1987)).

[17] *Id.* at 1055 (citing H.R., Rep. No. 100-391(II), 100th Cong., 1st Sess. 1045 (1987), *reprinted in* 4 U.S.C.C.A.N. 2313-1, 2313-661 (1987)).

one-time deduction, in its entirety, for all individuals who qualified, whether before or after the amendment. Here in contrast, there are two possible interpretations of the retroactive scope of the amendment, and there is no statement of legislative intent indicating which interpretation Congress intended. Given Congress' failure to expressly state—in the law or in legislative history—that it was taking the unprecedented step of retroactively unwinding the financial consequences to utilities and ratepayers of having complied with the previously authorized accounting and ratemaking treatment, it would be improper for the Commission to attribute this meaning to the ambiguous language in the amendment.[18]

17. Notably, Commission Staff and ICNU have provided no cases in which an accounting change from normalization to flow through was applied retroactively in a manner that required undoing the financial consequences of the previous accounting and ratemaking treatment for the period in which it had been used and before the new treatment was authorized, as would be the case here. In contrast, there are numerous examples where an accounting treatment was erroneously or improperly undertaken, and even in those situations, the general practice has been to change the accounting and ratemaking treatment going forward for plant previously placed in service, but not to retroactively unwind the effect of the erroneous accounting or ratemaking treatment.

18. In 2008, for example, PSE faced a potential normalization issue due to the historical use of end-of-period deferred tax balances in rate base calculation, while all of the other components of rate base were calculated using average-of-monthly averages. PSE was concerned that this treatment may have violated the consistency requirements of the normalization provisions. PSE requested a private letter ruling from the IRS, explaining that if a normalization violation has

[18] *See INS v. Cyr*, 533 U.S. 289, 317 (2001) ("[T]he mere promulgation of an effective date for a statute does not provide sufficient assurance that Congress specifically considered the potential unfairness that retroactive application would produce."); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

occurred it was unintentional and inadvertent. The IRS ruled that the inconsistency violated the normalization requirements. However, the IRS agreed that it was not necessary for PSE to "recapture" the amounts prematurely flowed through to ratepayers. In other words, no change to customer rates was made to recoup the benefit that they should not have received.[19] PSE was required to treat its deferred tax balances consistent with its treatment of other components or rate base (e.g., use average-of-monthly averages for all components of rate base) on a go-forward basis; something it had already begun doing. This ruling is consistent with numerous other IRS normalization rulings providing that utilities with inadvertent normalization violations should begin complying going forward, while treating the past as having been properly stated.[20]

IV. RETROACTIVELY CHANGING A FILED TARIFF RATE FOR A PREVIOUS PERIOD OF TIME VIOLATES WASHINGTON LAW AND IS NOT REQUIRED BY FEDERAL LAW

19. Commission Staff and ICNU both claim that Commission Staff's proposed tariff revisions would not violate the Filed Rate Doctrine or rule against retroactive ratemaking. They are wrong. Both Commission Staff and ICNU rely on dissimilar and irrelevant cases from other jurisdictions, and they fail entirely to acknowledge and apply the Commission's binding precedent on this issue. Commission Staff also fails to recognize that retroactively altering the past effect of PSE's unconditional tariffed rate contravenes underlying considerations of notice and fairness.

[19] PLR 200824001, 2008 WL 2391068 (June 13, 2008).

[20] *See, e.g*, PLR 201107002, 2011 WL 560477 (Feb. 18, 2011) (utility erroneously failed to extend amortization period for Accumulated Deferred Investment Tax Credit (ADITC) and flowed ITC to customers more rapidly than allowed; no disallowance or recapture of improperly flowed through amounts required where neither utility nor commissions intentionally violated normalization requirements; ensuring that future rates would be determined correctly); PLR 200933023, 2009 WL 2482009 (May 7, 2009) (same result for erroneous failure to provide full normalization for ITCs and deferred taxes associated with Contributions in Aid of Construction, which flowed through benefits to customers too quickly); PLR 200802026, 2008 WL 109493 (Jan. 11, 2008) (same result for normalization violation due to erroneous use of net salvage value when amortizing of ITC, which flowed ITC to customers too quickly); PLR 200802025, 2008 WL 109491, (Jan. 11, 2008) (same).

A. ICNU's and Commission Staff's Legal Analyses Are Unsupported and Inaccurate

20. ICNU suggests that this case simply involves "deferred accounting," which ICNU claims is a "longstanding exception to the Rule Against Retroactive Ratemaking, because a deferred account allows for true-ups of legally imposed costs or benefits."[21] This argument demonstrates a fundamental miscomprehension of the legal basis for the Commission's deferred accounting and true-up orders. The use of deferred accounting and a subsequent true-up mechanism is not an "exception" to the prohibition against retroactive ratemaking—it is not retroactive ratemaking at all. The Commission has repeatedly made this clear, including in the case law cited by ICNU.

21. For example, in the Commission's 1988 order involving PSE's Energy Cost Adjustment Clause ("ECAC"), the Commission rejected Commission Staff's argument that the true-up aspect of the ECAC constituted retroactive ratemaking just because the formula rate included a true-up component that would factor in historical performance.[22] In reaching this conclusion, the Commission contrasted the ECAC mechanism's true-up—which involved a rate to be applied only prospectively and only after a hearing—with other situations that the Commission stated would constitute retroactive ratemaking such as "surcharges or ordered refunds applied to rates that had previously been paid, constituting an additional charge after the service was provided or consumed."[23]

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[21] ICNU Resp. Br. at ¶ 15.

[22] *WUTC v. Puget Sound Power and Light Co*., Docket No. U-81-41, Sixth Supp. Order, 1988 Wash. UTC Lexis 146, *29–33 (Dec. 19, 1988).

[23] *Id.* at *31–33. The Commission explained:

> A cost adjustment clause is prospective and not retroactive. It authorizes a fixed mathematical formula and is valid against a charge of retroactivity. That an element of the rate involves a factor for actual historical performance does not make the rate retroactive. The potential evil in such a rate is not that it is retroactive, which technically speaking it is not, but that as an adjustment to reflect actual performance it might move the company toward a guaranteed achieved financial performance. . . .

Id. at 32.

22. Here, the position endorsed by Commission Staff and ICNU falls within the band of activity that the Commission defined as retroactive ratemaking in the 1988 ECAC case cited by ICNU. Commission Staff and ICNU ask the Commission to order additional credits to customers beyond the amounts that PSE paid in 2011 under the filed tariff. Such revision of a previously filed tariff is a "surcharge[] or ordered refund[] applied to rates that had previously been paid, constituting an additional charge applied after the service was provided or consumed."[24]

23. Commission Staff's attempt to instead compare its proposed unwinding of the tariffed rate to existing deferrals and adjustment mechanisms such as the Power Cost Adjustment ("PCA") mechanism, the Purchased Gas Adjustment ("PGA") and the major storm damage deferral makes no sense. These mechanisms bear little resemblance to the filed tariff at issue in this case, and it is perplexing that Commission Staff would ignore or overlook the Commission's express holding in PSE's ECAC case and similar proceedings confirming that the mere inclusion of retroactive elements in a regulatory mechanism (such as the ECAC, the PCA, the PGA and the storm damage deferral mechanism) does *not* constitute retroactive ratemaking.[25]

24. Further, there are express limits to each mechanism and deferral by which the Commission must abide. For example, "the Commission absolutely requires a company that

[24] *Id.* ICNU also cites to PSE's recent REC accounting order for the proposition that "Washington, like many other states, provided for deferred accounting and trackers that serve as the exception to these rules [regarding retroactivity and the filed rate doctrine] and are often used to ensure that benefits follow burdens and reward follow risks." ICNU Resp. Br. at ¶ 15 & n.28 (citing *Amend. Pet. of Puget Sound Energy, Inc. for an Accounting Order Authorizing the Use of the Proceeds from the Sale of Renewable Energy Credits and Carbon Financial Instruments*, Docket No. UE-070725, Order No. 3 ¶ 41 (May 20, 2010)). A review of this citation, however, reveals no support for this assertion whatsoever. Nor do any of the other Commission decisions cited by ICNU appear to provide support for this mistaken view of the law, or for ICNU's bald assertion that the Treasury Grant deferral account creates a "properly authorized and a legal exception to the Rule Against Retroactive Ratemaking and the Filed Rate Doctrine. *Id.* at ¶¶ 15–16.

[25] *See, e.g., WUTC v. Puget Sound Power and Light Co.*, Docket No. U-81-41, Sixth Supp. Order, 1988 Wash. UTC Lexis 146, *29–33 (Dec. 19, 1988); *WUTC v. Puget Sound Power and Light Co.*, Docket No. UE-901183-T, *et al.*, Wash. UTC Lexis 40, *18–21 (April 1, 1991) (rejecting Commission Staff arguments that Periodic Rate Adjustment Mechanism constituted retroactive ratemaking). The Commission does not need express statutory authorization for these types of mechanisms because they do not constitute retroactive ratemaking and do not need any specially-authorized exception.

wishes to book costs to a deferral account for treatment as a regulatory asset to *first* apply for and obtain express authority to do so."[26] Although the Commission has on occasion allowed costs to be deferred following the filing of an accounting petition but prior to Commission authorization; the Commission does not allow deferral of costs dating *prior* to the date deferral authority was requested. And, contrary to ICNU's suggestion, the "extraordinary circumstances" standard the Commission has applied to certain deferrals does not constitute an exception to retroactive ratemaking.[27] Because the advance notice provided by the deferral application satisfies the "underlying concerns of notice, a legal consideration, and fairness, an equitable consideration," retroactive ratemaking is not implicated.[28]

25. Further, the argument ICNU and Commission make here is the same argument that PSE made in the CIC proceeding, which the Commission rejected at Commission Staff's urging. There, PSE disputed Commission Staff's suggestion that PSE's proposed change in accounting treatment for the CIC would result in retroactive ratemaking:

> Commission Staff seems to suggest in its memo that it believes that approval of an accounting deferral would also violate the doctrine against retroactive ratemaking because PSE seeks to include in the deferred account costs that have already been incurred. However, accounting deferrals are not ratemaking at all, but rather provide a mechanism for tracking costs or revenues.

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[26] *WUTC v. Puget Sound Energy, Inc.*, Docket Nos. UG-040640, et al., Order No. 06 ¶ 170 (Feb. 18, 2005) (emphasis added).

[27] *See, e.g., In re PacifiCorp v. WUTC*, Docket No. UE-020417, 2002 Wash. UTC Lexis 364 *4 (Sept. 27, 2002).

[28] *See id.* ICNU again conflates accounting treatment with ratemaking treatment in alleging that "[t]his deferred account prevented the grant from entering or affecting regular rates." ICNU Resp. Br. at ¶ 16. The rule against retroactive ratemaking and the Filed Rate Doctrine have never been limited to "general rates" or "regular rates"—whatever those might be. Whether or not the Treasury Grant entered "regular rates" is irrelevant. ICNU's argument is also undermined by the Commission's determination that an amendment to a previously approved accounting order relating to PSE's Conservation Incentive Credit (CIC) constituted retroactive ratemaking because it would similarly have altered the past effect of a tariffed rate. *In re Puget Sound Energy, Inc.*, Docket No. UE-010410, Order Denying Petition to Amend Accounting Order ¶¶ 7–8 (Nov. 9, 2001). Presumably, this tariff was not a part of "regular rates," yet the Commission nonetheless found the proposed retroactive amendment to the accounting order to be unlawful. *See id.*

> The question of how the Commission treats such costs or revenues with respect to rates is an entirely different matter.[29]

As Commission Staff should be aware, the Commission disagreed:

> The Commission determines that it is legally barred from granting PSE's petition to amend the accounting order in Docket No. UE-010410 under the doctrine of retroactive ratemaking. PSE's petition, if approved, would result in unlawful retroactive ratemaking. The $.05 credit rate is an unconditional tariffed rate under Schedule 125. From May 1, 2001, to present, the tariff has been implemented as written, and as approved and made effective by the Commission on May 1, 2001. Revenues have been credited to customers at the Schedule 125 credit rate of $.05. PSE now proposes to retroactively change that rate by deferring amounts paid to customers under Schedule 125 and charging those amounts back to customers through the Schedule 120 Conservation Rider. Those who have received a credit of $.05 per kWh would now stand to lose a portion of that credit, since they would be members of the class of ratepayers paying the deferred expense. . . . Approval of PSE's petition would constitute unlawful retroactive ratemaking because the petition seeks to change the past effect of a tariffed rate, contrary to the terms of the tariff in effect at the time, and the corresponding accounting order in effect at the time.[30]

26. Similarly here, for the period February 2010 through December 2011, the Treasury Grant credit was passed back to customers in a tariffed rate, with the amount of the credit determined in part by the normalization requirement then in effect. Commission Staff now seeks additional credits to customers for part of that period, beyond the amounts that PSE paid in 2011 under the filed tariff, due to a change in accounting method. The only material difference between the circumstances in this case and the circumstances presented in PSE's CIC proceeding is that here, it is ratepayers—rather than shareholders—who stand to benefit from the retroactive unwinding of a previously approved accounting method and associated tariffed rate credit. According to Commission Staff's argument, this fact alone makes the cases "substantially different and

[29] *In re Puget Sound Energy, Inc.*, Docket No. UE-010410, PSE response comments (Nov. 7, 2001).

[30] *In re Puget Sound Energy, Inc.*, Docket No. UE-010410, Order Denying Petition to Amend Accounting Order ¶¶ 7–8 (Nov. 9, 2001).

justif[ies] different treatments."[31] Commission Staff's argument is flatly inconsistent with binding state and federal law, which prohibits retroactive ratemaking regardless of whether it is ratepayers or shareholders that would benefit from the retroactive rate adjustment.[32]

27. It is also remarkable that Commission Staff relies on a Texas Court of Appeals case, *Southern Union*,[33] to support its argument that retroactively unwinding the financial consequences of Schedule 95A does not violate the prohibition against retroactive ratemaking.[34] Not only is that case distinguishable—it involved tax credits the utility had wrongfully obtained—but the case is no longer good law for the points cited by Commission Staff. The Texas Supreme Court expressly rejected *Southern Union's* holding in *GTE-Southwest*,[35] concluding that tax credits of the sort involved in *Southern Union* did *not* inure to the benefit of ratepayers. Further, on a separate but related issue, the court held that the Texas PUC had improperly engaged in prohibited retroactive ratemaking by attempting to establish retroactive effective dates for rate changes.[36]

28. Commission Staff's and ICNU's reliance on *Washington Gas & Light*,[37] an older D.C. Circuit case, is similarly misplaced. Once again, that case did not involve unwinding a previously-approved tariffed rate in the manner advocated by Commission Staff here.[38] More

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[31] *See* Commission Staff Resp. Br. at ¶ 21.

[32] *See* RCW 80.28.020 (empowering the Commission to order only the just and reasonable rates "to be *thereafter* observed and in force") (emphasis added); *Puget Sound Navigation Co. v. Dep't of Pub. Works*, 157 Wash. 557, 561–62 (1931) (rejecting retroactive ratemaking that would have benefited ratepayers); *Bd. of Pub. Util. Comm'nrs v. New York Tele. Co.*, 271 U.S. 23, 31–32 (1926) ("[T]he law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future.").

[33] *S. Union Gas Co. v. RR Comm'n of Texas*, 701 S.W.2d 277 (Tex. Ct. App. 1985).

[34] Staff Resp. Br. at ¶¶ 26–28.

[35] *PUC of Texas v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 410–11 (Tex. 1995).

[36] *Id.* at 407–08.

[37] *Wash. Gas & Light Co. v. Pub. Serv. Comm'n*, 450 A.2d 1187 (D.C. Cir. 1982).

[38] *See id.* at 1215–19 (past gains realized on repurchases of long-term debt should have been used to offset utility's overall cost of debt savings).

importantly, as in *Southern Union*, the financial treatment at issue had never been endorsed by the state commission, and the financial treatment was determined to have been inequitable and improper *at the time it was used*.[39] There can be no comparison to PSE's Commission-approved Schedule 95A rates, nor to the normalization accounting method that the rates implemented—which, far from being improper, was *required* by the law in effect at that time.

In sum, the fact that the Commission has (1) established limited deferral and true-up mechanisms, and (2) authorized utilities to defer extraordinary costs when deferral is requested prior to the incurrence of the costs, in no way diminishes the prohibition against retroactive ratemaking, the Filed Rate Doctrine or longstanding normalization-ratemaking procedures.[40] None of the authorized deferral mechanisms cited by Commission Staff are analogous to Commission Staff's proposal in this case, which would retroactively change a tariffed rate that was previously filed, unconditionally allowed to go into effect, and paid out to customers.

B. Notice and Fairness Considerations Support PSE's Proposal

29. As the Commission has recognized, the policy concerns underlying the prohibition against retroactive ratemaking are "notice, a legal consideration, and fairness, an equitable consideration."[41] Commission Staff is incorrect in suggesting that the reservation of rights

[39] *See id.* at 1217 (retroactive ratemaking prohibition not violated by Commission decision requiring offset to cost of debt savings based on past debenture repurchases because "[t]he Commission's decision does not deprive stockholders of any *past gains to which they were entitled prior to our decision in this case*.") (emphasis added).

[40] ICNU's citations to cases from other jurisdictions recognizing an exception to the rule against retroactive ratemaking for extraordinary gains and losses are not persuasive. Washington has never adopted such an exception, and it is Washington's "statutory standards alone [that] govern the agency's available choices of rate policy." Leonard Saul Goodman, *The Process of Ratemaking* 156 (1998). As noted by the Commission in PSE's recent general rate case, "[i]n the words of our governing statutes, we are required to determine results that establish 'fair, just, reasonable and sufficient' rates for *prospective* application." *WUTC v. PSE*, Docket Nos. UE-111048 and UG-111049 (consolidated), Order 08 ¶ 21 (May 7, 2012) (citing RCW 80.28.010(1) and 80.28.020) (emphasis added). Further, in at least two of the cases cited by ICNU, the jurisdiction used a future test year, which creates equitable reasons justifying an exception for retroactive recovery of unanticipated extraordinary gains or losses. *See Popowsky v. Pa. Pub. Util. Comm'n*, 868 A.2d 606, 608 (Pa. Commw. Ct. 2004); *Pike County Light & Power Co. v. Pa. Pub. Util. Comm'n*, 487 A.2d 118, 119 (Pa. Commw. Ct. 1985). It would be surprising if either Commission Staff or ICNU would support opening Pandora's Box by endorsing such a standard here in Washington.

[41] *See id.* at *18.

contained in the WH Expansion Treasury Grant accounting order constituted sufficient "notice" to PSE that the tariffed rate could be retroactively changed.

30. The reservation of rights that Commission Staff relies on states as follows:

> This order does not preclude the Commission or its Staff, or any other parties, from advocating alternative methodologies that may impact the accounting and normalization of Treasury grants in future proceedings based on new information, new analysis, or federal guidance rulings.[42]

While this reservation of rights certainly put PSE on notice that the Commission or other parties could advocate for alternative accounting methodologies to be applied in the future, it in no way provided notice to PSE that its separate, subsequently filed and unconditionally approved tariff implementing the authorized accounting treatment could be retroactively altered in subsequent rate years. Nothing in this language requires, or even implies, retroactivity. Commission Staff's proposal should be rejected: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[43]

31. Commission Staff also errs in arguing that PSE somehow waived its right to rely on the Filed Rate Doctrine and the rule against retroactive ratemaking because PSE's current tariff revision was submitted in February 2012 and proposed to credit customers with the additional interest beginning in January 2012. The NDAA was enacted into law on December 31, 2011, providing PSE notice that a new accounting method could legally be utilized. PSE filed tariff revisions to pass through additional benefits shortly thereafter, in February 2012, within the 60-day time period set forth in the tariff. That PSE proposed to provide benefits dating back one month earlier, to the date that PSE learned the law had been changed and the benefits became available, does not support Commission Staff's proposal to reach much farther back and to

[42] *In re Puget Sound Energy, Inc., Pet. for Accounting Order*, Docket No. UE-091570, Order 01 ¶ 14 (Dec. 10, 2009).

[43] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

recalculate credits over a two-year period. Commission Staff provides no authority for the proposition that a utility can "waive" the prohibition against retroactive ratemaking for periods in which the utility had no notice rates would be changed. Imputing such a waiver to PSE is arbitrary and unfair.

V. ICNU AND COMMISSION STAFF MISAPPLY THE BENEFITS AND BURDENS ANALYSIS

32. Commission Staff and ICNU's weighing of the benefits and burdens in this case is misplaced. The benefits and burdens test does not trump a filed tariff rate as Commission Staff proposes. Neither Commission Staff nor ICNU have pointed to cases supporting such a use of the benefit and burden weighing. The sale of utility property cases and REC accounting order cited by Commission Staff and ICNU[44] do not support such an application of the benefit-burden standard.

33. Commission Staff uses the benefits and burdens calculus to argue that its recommendation is supported by public policy. The Commission's weighing of benefits and burdens cannot override the public policy behind the Congressional mandate requiring normalization of Treasury Grants that was in effect prior to December 31, 2011. The very fact that Congress required normalization demonstrates that Congress imposed its own weighing of benefits and burdens as relates to Treasury Grants and the reinvestment in business that these grants—and ARRA in general—were intended to stimulate.

34. The purpose of ARRA was to preserve and create jobs and promote economic recovery in the near term and to invest in infrastructure that will provide long-term benefits.[45] The mandated

[44] *See, e.g., Amend. Pet. of Puget Sound Energy, Inc. for an Accounting Order Authorizing the Use of the Proceeds from the Sale of Renewable Energy Credits and Carbon Financial Instruments*, Docket No. UE-070725, Order 3 ¶ 41 (May 20, 2010).

[45] *See* ARRA § 3 (stating that purposes of ARRA include "[t]o preserve and create jobs and promote economic recovery" and "[t]o invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits").

normalization in ARRA was designed to promote that purpose.[46] Even with the elimination of mandatory normalization as set forth in the NDAA, Congress did not state that its original purpose was wrong. Nor did it forbid normalization. Rather, Congress allowed for a change in accounting treatment for Treasury Grants and used the effective date language to permit this change to apply retroactively to Treasury Grants on plant that was placed in service prior to the enactment date, beginning January 2012.

35. Thus, Commission Staff and ICNU are also wrong in suggesting that the Commission must adopt their desired interpretation because the amendment is "curative" in nature. The traditional justification for allowing retroactive application of "curative" legislation is because the curative and ameliorative nature of the legislation "fulfills rather than defeats reasonable expectations."[47] Commission Staff's and ICNU's interpretation would do exactly the opposite—defeating, not fulfilling, the reasonable expectations of utilities who had no reason to believe that complying with existing law could result in a retroactive "recapture" of the benefits of the Treasury Grant at some undetermined future date. Commission Staff and ICNU have made no attempt to argue that they had any expectation of recapturing Treasury Grant benefits from utilities who complied with the existing law.

36. Nor can they identify any evidence that Congress desired such a result. Indeed, ICNU expressly acknowledges it is "unaware of any evidence in the bill file that indicates what members of Congress were thinking when they voted for this amendment."[48] To the extent that

[46] Commission Staff laments that PSE "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." Commission Staff Resp. Br. at ¶ 33. But this is precisely what the normalization mandate for the Treasury Grant required, and, as stated above, this is consistent with the Congressional intent (and the title of the act)—to encourage reinvestment in business. Commission Staff also hypothesizes about the consideration of the rate of return on the WH Expansion Project Treasury Grant if Schedule 95A did not exist, speculating that absent Schedule 95A, the rate of return on the Treasury Grant should have been addressed in the recent PSE general rate case. But, of course, Schedule 95A does exist, and the Commission expressly authorized the Treasury Grant benefits to be passed through to customers by means of this tariff. Commission Staff's hypothesizing is of no import.

[47] 2 Sutherland Statutory Construction § 41:5 (7th ed.).

[48] ICNU Resp. Br. at ¶ 9.

the amendment may be curative, the most reasonable interpretation is simply that Congress intended, through the retroactive effective date, to ensure that the IRS would not require normalization of Treasury Grants for eligible plant already in service. In the absence of any evidence that Congress intended to unwind the financial consequences of utilities' previous accounting and ratemaking treatment, it would be unreasonable and improper to conclude otherwise.

37. Finally, considering the benefits and burdens in this case support PSE's position as a matter of policy. In this regard, there are two important points to remember. First, customers are not paying for the full cost of WH Expansion, due to historical ratemaking and stringent interpretations of pro forma adjustments applied in PSE's 2009 general rate case.[49] Second, PSE's shareholders, not its customers, bore the burden of seeking elimination of the normalization requirement. This was not a burden shareholders were required to bear. The Company could have accepted the status quo and not spent 33 months pursuing the elimination of mandatory normalization through twelve pieces of legislation. PSE does not raise this issue in an effort to seek backdoor recovery of its federal relations costs, as Commission Staff suggests but as an equitable consideration for the Commission. In contrast, Commission Staff's and ICNU's positions to retroactively apply this accounting and ratemaking change and to punish PSE for its good work and successful efforts on behalf of customers sends a poor message from a policy perspective.

VI. CONCLUSION

38. Section 1096 of the NDAA eliminates mandatory normalization for plant eligible for section 1603 Treasury Grants, but the effective date language in the act is disputed as to interpretation. The Commission should adopt PSE's interpretation of the effective date language, which allows for the elimination of normalization effective January 1, 2012 on Treasury Grants

[49] *See WUTC v. PSE,* Docket Nos. UE-111048 and UG-111049 (consolidated), Order 08 ¶ 305 n.411 (May 7, 2012) (noting $1.2 million impact on revenue requirement in 2009 general rate case for failure to include plant balance closed to in-service in December 2009).

received for plant placed in service dating back to the enactment of ARRA in 2009. This interpretation gives meaning to the retroactive nature of the amendment without treading on long-standing ratemaking law and policy. Further, it is a fair approach from a public policy standpoint because it allows customers to reap the benefits of the law change beginning immediately with the change in law but does not penalize PSE for its successful efforts in effecting this change in law.

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