BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BELLINGHAM COLD STORAGE COMPANY and GEORGIA-PACIFIC WEST, INC., Complainants, v. PUGET SOUND ENERGY, INC., Respondent.;	NO. UE-001014 NO. UE-000735 ANSWER TO COMPLAINANTS' EMERGENCY MOTION FOR IMPLEMENTATION OF OPTIONAL PRICE STABILITY PROVISION OF SPECIAL CONTRACTS AND, IF NECESSARY, FOR A RETAIL-ACCESS PILOT PROGRAMPUGET SOUND ENERGY, INC.'S ANSWER TO MOTION

1. Puget Sound Energy, Inc. ("PSE") answers the above-referenced motion ("Motion") of Bellingham Cold Storage Company ("BCS") and Georgia-Pacific West, Inc. ("GP"), dated July 21, 2000, regarding their special contracts with PSE ("Special Contracts"). BCS and GP are sometimes collectively referred to herein as the "Complainants."

2. The Commission has jurisdiction over the Special Contracts, which were filed and approved by the Commission in accordance with WAC 480-80-335. The Commission is authorized to hear complaints arising under the purview of RCW 80.04.110. This Answer also brings into issue the following rules or statutes: RCW 80.28.010, RCW 80.04.110, RCW 80.04.120; WAC 480-09-426, WAC 480-09-500, WAC 480-09-510, WAC 480-80-335.

I. ISSUES PRESENTED BY THE EMERGENCY MOTION

3. The Motion filed by Complainants presents the following issues for resolution by the Commission:

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A. The Motion seeks relief on the basis of the pleadings and supporting affidavits. The Motion is an inartfully pled motion for summary determination subject to WAC 480-09-426. However, the Motion turns upon disputed issues of material fact. The Motion cites no authority authorizing the Commission to order the requested emergency relief, including, in particular, retail wheeling. Therefore, as a matter of law, Complainants' motion must be denied.

B. The Motion attempts to characterize circumstances of Complainants' own making as an "emergency." As discussed below, Complainants have over the course of their contracts rejected offers to hedge at prices below 20 mills/kWh (1997 through 2002) and 28 mills/kWh (Nov. 1999 through 2004), and rejected an offered Summer 2000 price cap of 70 mills/kWh. The "emergency" is Complainants' disappointed business expectations, which are consequences of Complainants' own business decisions.

C. The Motion urges the Commission to find the Special Contracts to be unjust, unreasonable and contrary to the public interest. The Special Contracts have the same effect as a filed tariff, with the full force and effect of law, and are presumptively just and reasonable. It is Complainants' burden to offer sufficient evidence to rebut this presumption, a burden Complainants have not carried. In particular, Complainants have failed to establish that a rate that they agreed to a few months ago is now unjust and unreasonable.

D. The Motion urges the Commission to order retail wheeling, contrary to the terms of the Special Contracts and applicable state law. Complainants introduce this "remedy" under the auspices of a so-called exhibit to the Special Contracts that was manufactured by Complainants, an exhibit Complainants would have the Commission unilaterally impose (rather than negotiate, as the Special Contracts expressly require). Were the Commission to order retail wheeling, it would invoke the exclusive jurisdiction of the Federal Energy Regulatory Commission (the

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"FERC") over the transmission by PSE for such retail wheeling. The Special Contracts do not provide a basis for the Commission to order this relief, nor have Complainants identified any legal authority that would support imposition of such a remedy. The practical and legal consequences of such relief would also entail claims to extend such service to other retail customers (e.g., Intervenors), circumventing the broad public policy debate that should precede state-mandated deregulation.

E. Complainants' pursuit of an order forcing retail wheeling is motivated not by a desire to purchase power at market prices, but by a desire to purchase below market federal power. Complainants' consistent refusal to enter into financial hedges compels the conclusion that their actions are inconsistent with their professed desire for prices based upon a competitive wholesale power market. Facilitating an inequitable allocation of a regional resource promotes a false economy of "haves" and "have nots." Complainants requested relief is not, as they allege, a "tool" to shop the "more stable energy market." Rather, PSE believes it is a subterfuge apparently designed to enable the Whatcom PUD to wheel power to Complainants from BPA.

F. Complainants allege that they are entitled to an "interim" rate pursuant to criteria established by the Commission to provide such relief to utilities when appropriate criteria have been satisfied. Complainants are not a utility, and even if they were, they have not carried the heavy burden to satisfy, and cannot satisfy, those criteria. Moreover, Complainants are not seeking a rate but, rather, are seeking an order forcing PSE to provide retail wheeling, or to incur additional risks and penalties. Indeed, Complainants admit that changing the Mid-Columbia Index as a contract pricing mechanism is not the object of this Motion. Memorandum in Support of Motion, at 3.

G. The Motion seeks relief that would violate past Commission orders and impair PSE's

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rights under the Special Contracts. Complainants would have the Commission upset a decision that carefully balanced the interests of Complainants, PSE and its customers with a "new deal" that subsidizes Complainants. This is unfair to PSE and its customers, and is an impairment of PSE's contractual rights.

H. Under the rate plan approved by the Merger Order,[1] rates are frozen for a period of five years. This rate plan, and reliance on the certainty of this rate plan, were fundamental to the merger and the Merger Order. Complainants now seek to violate this rate plan, without regard to the interests the plan was intended to further and protect. Impairment of the fundamental commitments of the Merger Order would also constitute a taking of PSE's property rights protected by the federal and state constitutions.

II. ARGUMENT

A. Standard on Motion for Summary Determination.

4. Complainants' Motion is fashioned as a motion for summary determination, pursuant to WAC 480-09-426.[2] The rule states that a party requesting summary determination must show that "the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor." The Commission considers motions for summary determination under "the standards applicable to a motion made under CR 56 of the

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[1] Fourteenth Supplemental Order Accepting Stipulation; Approving Merger issued in Docket Nos. UE-951270 and UE-960195 on February 5, 1997.

[2] The relief Complainants are now requesting was not requested in the Complaint, in violation of RCW 80.04.110(2) ("All grievances to be inquired into shall be plainly set forth in the complaint."). PSE objects to the Commission's consideration of a summary determination on an issue that was not raised until last Friday. Moreover, bringing the issue of retail wheeling to the Commission at this time, as this Motion does, violates the letter and the spirit of the bifurcation of issues established by the Prehearing Order. PSE objects to this violation of the Prehearing Order.

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civil rules for superior court." Id. The civil rules provide:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c).

5. The moving party bears the burden of demonstrating an absence of any material fact and entitlement to judgment as a matter of law. Greater Harbor 2000 v. Seattle, 132 Wn.2d 267, 937 P.2d 1082 (1997). A material fact is one of such nature that it affects the outcome of litigation . Magula v. Benton Franklin Title Co., 131 Wn.2d 171, 930 P.2d 307 (1997)

B. The Complainants Are Not Entitled to Summary Determination.

6. The Motion turns on material issues of fact that are clearly and unequivocally in dispute. In this regard, the record in this proceeding contains:

- A broadly framed Complaint that, to the extent it contains factual allegations, are allegations that are specifically denied and/or controverted by PSE's Answer to Formal Complaint, filed on July 7, 2000.
- A Prehearing Order that calls for discovery and a full evidentiary hearing on "market issues," the very same factual issues that the Motion claims are not in dispute.
- A Bench Request, seeking data which are relevant to the Motion, data which the parties have not had an opportunity to review and address, and therefore data that cannot be prospectively characterized as providing an undisputed factual basis supporting summary determination.
- The attached affidavit of William A. Gaines, directly controverting Complainants'

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affidavits submitted in support of the Motion.7. The Motion cites no legal authority that entitles Complainants, as a matter of law, to a revised rate under the Special Contracts, or to retail wheeling. The Motion suggests that the only legal issue relevant to Complainants' request lies "under some stretch of the legal imagination." PSE respectfully points out that it is Complainants' burden, not PSE's, to cite or at least "imagine" some authority that entitles them to the relief they request.

8. Genuine material issues of facts are in dispute, and there is no legal authority that entitles Complainants to the relief they are requesting. The Motion must be denied.

C. The Complainants Are Not Entitled to "Emergency" Relief Due to Circumstances of Their Own Making

9. The "emergency" that Complainants assert is of their own making. It does not provide a legal basis to order extraordinary relief. The facts are as follows:

- In May of 1996, Complainants entered into Special Contracts under which Complainants are entitled to purchase power at market-based prices, which are explicitly set by reference to the Mid-Columbia index. The Special Contracts specifically provide:

The customer bears all the risk for price movements in the market price and will receive non-firm energy service in absence of the election of related optional services.

Special Contract, p. 5 Schedule RTP (Definitions: "Non Firm Energy") (emphasis added).

- From 1997, after the Special Contracts were signed, and up to and through the date Complainants filed its Motion, Complainants have not elected to seek or accept proposals for Optional Pricing Stability service under the Special Contracts. See Affidavit of William A. Gaines, at ¶ 4.

- From 1997 to the spring of 2000, PSE has made proposals to Complainants that would

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have protected them from market volatility, including the following offers:

In 1997, the year after the Special Contracts were signed, Puget offered BCS and GP a fixed price swap that would have provided BCS and GP with a fixed price for five years at a price below 20 mills/kWh. This would have provided GP and BCS with protection against all market price volatility from 1997 through 2002 at a price that would be substantially below market. BCS and GP turned down Puget's 1997 proposal for price stability.

In late 1999, Puget offered BCS and GP a fixed price of 28 mills/kWh flat for five years. Again, this would have provided BCS and GP with protection against all future market volatility for five years at a price that would have been well below current market prices. Again, BCS and GP turned down Puget's 1999 proposal for price stability.

Earlier this year, with markets beginning to tighten and with predictions of increased price volatility, Puget offered BCS and GP a Summer price cap of 70 mills/kWh, which would have reduced price volatility to a level that has turned out to be below Summer market prices. BCS and GP rejected the price stability proposal.

Gaines Aff. at ¶ 4.

10. The "emergency" that Complainants claim is a financial circumstance of their own making. Market volatility was a risk Complainants accepted at the inception of the Special Contracts. Similarly, a decision not to hedge against market volatility was a decision voluntarily made by the Complainants.

11. Contrary to Complainants' assertions, these facts do not constitute an "emergency" that entitles Complainants to rate relief pursuant to RCW 80.28.010 and WAC 480-09-510.[3] In the

[3] Complainants cite to WAC 480-09-500, a provision that concerns brief adjudicative proceedings. PSE assumes, from the references to emergency proceedings and imminent danger to the public health, safety, or welfare, that Complainants are actually referring to WAC 480-09-510, concerning emergency adjudicative

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code, the Commission lists examples of situations that may constitute "immediate dangers." The examples provided do not arise from a customer's fiscal mismanagement of its business. The Commission's examples--dangerously inadequate service, and violations of the law that cause immediate dangers--are not the types of emergencies that equate to the fiscal instability of a customer's business caused by a customer's business decision not to hedge.

12. In summary, the "emergency" presented in this case is a consequence of Complainants' own making. It does not entitle Complainants to emergency relief, and certainly does not entitle Complainants to retail wheeling.

D. The Rate Established by the Special Contracts Is Presumptively Valid

13. Special Contracts filed and approved by the Commission have "the same effect as filed tariffs and are subject to enforcement, supervision, regulation, and control as such." WAC 480-80-335(3). "Once a utility's tariff is filed and approved, it has the force and effect of law." General Tel. Co. v. City of Bothell, 105 Wn.2d 579, 585 (1986); Air Liquide America Corp. et al. v. Puget Sound Energy, Inc., Docket No. UE-981410, Fifth Supplemental Order Granting Complaint, Ordering Refunds and Other Relief, 1999 Wash. UTC LEXIS 591 at *10-11 (Aug. 3, 1999). Thus, when a rate is filed, published and permitted to become effective, it is the only lawful rate until challenged in the manner provided by statute. See Puget Sound Navigation Co. v. Department of Public Works, 157 Wash. 557, 561-62 (1930), aff'd, 160 Wash. 703 (1931).

14. Where a complaint challenges the reasonableness of an approved rate, such rate may only be changed if the Commission, after notice and hearing, finds that the approved rates are unjust or unreasonable. See RCW 80.04.110(1); RCW 80.04.120. The complainants in a

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challenge brought pursuant to RCW 80.04.110 bear the burden of proving that the actions complained of violate the tariff or that the challenged rate is unreasonable. See, e.g., In re Complaint of AT&T Communications of the Northwest, Inc. v. U S WEST Communications, Inc., Docket No. UT-991292, Tenth Supplemental Order, Order Granting Motion to Dismiss (May 19, 2000) at 5; Kimberly-Clark Tissue Co. v. Puget Sound Energy, Inc., Docket No. UG-990619, Fourth Supplemental Order Denying Complaint (May 18, 2000) at 15 ("Kimberly-Clark has failed to show by substantial competent evidence . . . .").

15. The Complainants not only fail to carry this burden, they fail to address it. Complainants claim they seek a "limited summary determination" that the Special Contracts are unjust, unreasonable and contrary to the public interest. This finding, Complainants' argue, authorizes the Commission to "implement" the Optional Price Stability provisions of the Special Contracts. This leap to remedy, without engaging the merits, overlooks the following key points:

- The Optional Price Stability provision is part of the very rate (Schedule RTP) that the Complainants would have the Commission strike down. The Option Price Stability provision is available and has been offered to Complainants in accordance with its terms. However, the Optional Price Stability does not include the Complainants' so-called "Implementation Exhibit," by which Complainants seek to force PSE to enter into "buy-sell" transactions constituting retail wheeling subject to the FERC jurisdiction.

- In seeking to force retail wheeling, Complainants are not merely seeking a new rate. Complainants are seeking a different type of service that is not available from PSE under the Special Contracts.

- Complainants provide some evidence of the adverse consequences of their own decision-making upon their businesses, their employees, and their customers. Complainants provide no

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evidence that retail wheeling is in the public interest, or that the consequences thereof would be in the interest of PSE's core customers. As another point of reference, in a detailed letter to Senator Finkbeiner, addressing issues bearing upon the public market, the Commission stated:

In short, both of the issues for which we raised concerns during the 1997 session continue to present real problems. For that reason, we believe that a general deregulation of electricity pricing and the establishment of a common carrier function for distribution is ill advised and not currently in the interests of Washington consumers.

Letter to the Honorable Bill Finkbeiner, Chairman, Washington State Energy and Utilities Committee, page 3 of 13 (emphasis added). A copy of this letter is attached to PSE's Answer to Formal Complaint, as Exhibit B.

● Complainants do not explain or even address the fact that Optional Price Stability has been and is available under transactions such as those described as financial swap transactions in the Affidavit of William A. Gaines. These transactions do not involve the "Customer Nominations" and contracts between PSE and power offerors nominated by Complainants, which would constitute retail wheeling subject to the FERC jurisdiction.16. The threshold question before the Commission is whether there is sufficient evidence to support a finding that the Special Contracts are unjust and unreasonable. Little, if any, evidence has been so provided. The allegation that the rate "is broken" is material to any determination whether the existing rate is unjust or unreasonable, and facts regarding whether the rate is "broken" are clearly disputed. Thus, the issues raised in the Motion are not matters to be resolved on summary determination . Until the Complainants meet their burden, it is premature to discuss any remedies.

E. Complainants Not Entitled to Retail Wheeling

17. Complainants' Motion erroneously asserts that the Special Contracts entitle them to retail

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wheeling. Complainants erroneously contend that such entitlement arises under the Optional Price Stability provision of the Special Contracts. The Special Contracts incorporate Schedule RTP, which includes an "Optional Price Stability" provision, as follows:

Price of these Optional Price Stability services will be customized to customer's needs. These services could include guarantee on an average commodity price, price caps on non-firm prices, or collars on the non-firm price.

Special Contracts, p. 6 of 8. Section III of the Schedule expressly states that the price for this service is "Negotiated".

18. Giving this language its plain meaning, the Optional Price Stability provision does not call for or envision PSE's being forced to take one of two unacceptable alternatives: (i) enter into a power purchase contract "with the offeror" selected by a Complainant at prices, terms and conditions decided by a Complainant or (ii) be subject to additional risks, and costs. Alternative (i), as discussed below, constitutes a buy-sell transaction subject to the FERC's jurisdiction, and alternative (ii) is punitive, shifts costs and risks away from Complainants to PSE and its core customers and is contrary to the Special Contracts. These alternatives were never contemplated under the Optional Price Stability provisions of the Special Contracts. These alternatives would certainly do more than "customize" the price of Optional Price Stability.

19. In sharp contrast to Complainants' proposal, Optional Price Stability as intended by the Special Contracts has been implemented by PSE for at least one other customer under market-based pricing. A copy of one example of an appropriate implementing exhibit is attached to the Affidavit of William A. Gaines as Attachment A, entitled "Swap Transaction Fixed/Floating." This is an example of a type of transaction actually entered into by PSE to provide a fixed price

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to a retail customer in lieu of a price based on a Mid-C index. Such a transaction does not entail buy-sell arrangements (retail customer selection of a power purchaser or price for power purchases by PSE) and is the type of transaction contemplated under the Optional Price Stability provisions of the Special Contracts.

20. Nor is it the case that retail wheeling was a matter left to subtle inference under the Special Contracts. The Special Contracts specifically address retail wheeling as an election, at the end of the first five (5) years of the term of the Special Contracts, contingent upon conditions that have not occurred. Specifically, the Special Contracts state:

. . . [I]f and to the extent that retail wheeling is generally made available by the Company to retail customers in the State of Washington, the Company will offer wheeling for retail power supply to the customer at applicable rates under authorized tariffs or contracts.

Power Sales Agreement, § 3.3. To date, retail wheeling has not been made "generally available" by PSE in the State of Washington. In no way do the Special Contracts commit PSE to provide unbundled transmission service at this time.[4]

21. The consequence of Complainants' desire for retail wheeling extend beyond the parties to the Special Contracts. Provision of such service to Complainants only would appear unduly discriminatory in violation of applicable law. Customers taking service under Schedule 48, a tariff patterned closely after the Complainants' Special Contracts, would surely argue for non-discriminatory treatment, and other customers may seek open access as well. However, movement to open access through this proceeding would lack necessary legislative guidance or the orderly process that will be required to address industry restructuring.

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[4] Schedule RTP contains a price for each component of service provided to the customer. Under the terms of the agreement, the "Non-Firm Energy" price for power stays in effect for the first five years and thereafter, unless and until legislation is enacted making retail wheeling generally available.

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22. Any decision to make retail wheeling "generally available" carries broad policy implications and is a decision for the Legislature, not an issue for resolution in this "emergency" proceeding. Certainly, Complainants have not even begun to address these issues, which they leave, like the law, to the imagination.

23. Complainants seek to rewrite the Special Contracts and become the only retail customers of PSE in the State of Washington to receive retail wheeling. Implementation of Complainants' proposal would strip this Commission of its jurisdiction over transmission of power under the Special Contract and would expose PSE's retail distribution system to requests for unbundled transmission service from other Washington retail customers.

24. The Motion states that a special arrangement for the Complainants might "under some stretch of the legal imagination, be deemed equivalent to retail wheeling and that this customer service might legally expose the company to providing the service to a broader range of customers." Motion at 2. The Complainants have identified but erroneously sought to trivialize one of the problems with the Motion. The "stretch of the legal imagination" referred to by the Complainants is in fact federal law. Complainants' proposal includes a "buy-sell" contract. Under this "agreement," the Complainants would have the ability to nominate a supply of electrical energy from a third party. See Section 1.3 of the Complainants' proposal.

25. Although unclear, the Complainants' proposal contemplates (i) retail wheeling, in which the Complainant purchases power from a third party for delivery by PSE and (ii) "buy-sell" transactions, in which Complainant arranges for power that is purchased by PSE and which are considered by FERC to be retail wheeling. FERC's jurisdiction over retail wheeling, including the proposed "buy-sell" arrangements, is clear. It is well-established that FERC has "exclusive jurisdiction over the rates, terms and conditions of unbundled retail transmission in interstate

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commerce by public utilities." New England Power Co., 1998 FERC LEXIS 2205, at *7 (1998). Moreover, this jurisdiction is implicated by transactions, such as "buy-sell" transactions, in which a utility provides unbundled transmission service to an end-user. A "buy-sell" transaction is one in which an end user arranges for the purchase of generation from a third-party supplier, and a public utility transmits that energy in interstate commerce and re-sells it to the end user. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities; Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, IV FERC Stats. & Regs. ¶ 32,514, at 33,082 (April 7, 1995). In Order 888, the FERC held that such an arrangement includes unbundled transmission service subject to FERC's exclusive jurisdiction. See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 1996 FERC LEXIS 778 at *243-44 (April 24, 1996) ("Order 888") ("[W]e have jurisdiction over the interstate transmission component of transactions in which an end user arranges for the purchase of generation from a third party.").

26. In Potomac Edison Co., 1997 FERC LEXIS 910 at *7 (May 16, 1997), FERC set forth some of the indicia of a buy-sell transaction subject to its jurisdiction. These indicia are listed below, with the corresponding sections of Complainants' proposal matching the indicia listed thereafter:

1. The customer selects the source of the energy (Section 1.3 of Complainants' proposal);

2. The customer determines how much energy is to be purchased (Section 1.3 of Complainants' proposal);

3. The customer determines when the transaction is to occur (Section 1.3 of Complainants'

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proposal);

4. The customer decides at what price the energy is to be purchased (Sections 1.3 and 1.5 of Complainants' proposal);

5. The customer arranges for the delivery of the energy to the utility (Sections 1.1 and 1.3 of Complainants' proposal).

The fact that Potomac Edison's arrangement with its end user met these criteria led the Federal Commission "to conclude that Potomac Edison is providing unbundled retail transmission in interstate commerce" subject to FERC jurisdiction. Id. at *7. Application of FERC's criteria to Complainants' proposal would lead to the same conclusion.

27. Such a conclusion would hold true even if this Commission were to take the position that Complainants' proposal falls under WUTC jurisdiction only. See Niagara Mohawk Power Corp., 1997 FERC LEXIS 5 at *6 (Jan. 6, 1997) (FERC rejected arguments of New York State Public Service Commission that Niagara Mohawk's "buy-sell" transaction fell under the exclusive jurisdiction of the PSC). The FERC has consistently refused to consider the arguments of state commissions that the state commissions have exclusive jurisdiction over "buy-sell" transactions. In fact, the FERC has carefully scrutinized such arrangements to see if they could be attempts to avoid federal jurisdiction. As the FERC stated in Order 888-A, "[t]he fact remains that these arrangements could be used by parties to obfuscate the true transactions taking place and thereby allow parties to circumvent regulation of transmission in interstate commerce." Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 1997 FERC LEXIS 463 at *166-67 (March 4, 1997) ("Order 888-A").

28. In exercising jurisdiction over buy-sell transactions, FERC has gone beyond the

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assertions made by the parties to such transactions and state commissions and looked to the substance of the transactions themselves. See New York State Electric & Gas Corp., 1996 FERC LEXIS 1913 at *9 (Oct. 18, 1996), reh'g denied, 1998 FERC LEXIS 1043 (May 27, 1998) ("Although NYSEG [the transmitting utility] characterizes its transactions with [the supplier] and the [end user] as purchases and sales for resale, these transactions actually involve a sale of electric energy by [the supplier] to [the end user] and NYSEG's provision of electric services to [the end user]."). The Complainants here attempt to salvage their argument that their proposal does not constitute a "buy-sell" transaction by including a provision stating that PSE and the Complainants are engaged in a "supplier and customer" relationship. FERC has consistently rejected attempts through contract language to avoid its jurisdiction. PSE would be viewed by FERC as functioning in substance as a transmitter only, and transmission by PSE under the Complainants' proposal would be subject to exclusive FERC jurisdiction and the requirement, under federal law, that such transmission be provided on a not unduly discriminatory basis. Other PSE retail customers would undoubtedly argue that they were entitled to similar unbundled transmission service from PSE.

29. In New York State Electric & Gas Corp., 1998 FERC LEXIS 1043 at *11-12 (May 27, 1998), the Commission rejected NYSEG's attempt to use contract language to avoid FERC jurisdiction. While admitting that the contract is the appropriate starting point for analysis of whether a transaction constitutes a "buy-sell" arrangement, the FERC held that it was bound "to look not just at the contract language, but also at the substance of the transaction and any evidence or indicia that, in fact, [the transmitting utility] is solely the transmission conduit for the power provided by [the supplier] to the retail customers." Here, too, FERC would look

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beyond attempts to avoid its jurisdiction.[5]

30. Complainants request, in the alternative, that the Commission implement Complainants' proposal as "a new retail-access pilot program, limited in scope to BCS, GP and such other non-core customers as the Commission wishes to include." Complainants' retail-access pilot program is notable at the outset for Complainants' admission that its proposal constitutes "retail access" or retail wheeling. Complainants thus concede that their "proposal" is "a . . . retail-access . . . program."

31. The rubric of a pilot program is a disingenuous proposal to provide retail wheeling to some, but not all retail customers. PSE opposes such a suggestion. Further, its long lead time and necessary federal involvement made it impractical. PSE has already conducted a retail wheeling pilot program, which was implemented in August 1997. See "Final Report on the Puget Sound Energy 'Power of Choice' Open Access Pilot Program." The transmission by PSE under any such retail wheeling pilot program is subject to FERC jurisdiction. There is no reason to assume that FERC would permit another PSE retail wheeling pilot program that extends to BCS, GP and perhaps other customers, and that such permission could be obtained and a program put in place in time to address the "emergency" that Complainants assert exists. In any event, such an approach, like Complainants' proposed "implementation exhibit," is not contemplated by the Special Contracts and would constitute a wholesale revision of the Special Contracts.

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[5] It should be noted that the financial swap arrangements contemplated by Attachment A to the Affidavit of William A. Gaines (i) would implement the Optional Price Stability provisions of the Special Contracts; (ii) would provide price stability at very competitive prices (in many circumstances at a savings as compared with arranging for a fixed price physical delivery of power); and (iii) do not raise the difficult buy-sell retail wheeling issues raised by Complainants' proposed Implementation Exhibit.

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32. The Special Contracts and applicable law do not provide a basis for the relief requested by Complainants. Further, the relief Complainants seek with respect to buy-sell arrangements and other retail wheeling would involve transmission by PSE that is clearly and exclusively within FERC's jurisdiction. For these reasons, the Motion should be denied.

Complainants' Seek Below-Market Federal Power

33. Complainants' distaste for market volatility on the one hand (i.e., "volatility is as bad as high prices;" Affidavit of James Cunningham, p. 3) is not borne out by their consistent refusal to accept offers of price stability under the Special Contracts (i.e., Affidavit of William A. Gaines, ¶ 4). This inconsistency strongly suggests that Complainants have yet to reveal their true objective in seeking retail wheeling.

34. Complainants' consistent refusal to enter into financial hedges compels the conclusion that their actions are inconsistent with their professed desire for prices based upon a competitive wholesale power market but are consistent with a desire to obtain below-market federal power. PSE believes that Complainants are looking to Whatcom PUD to deliver BPA power on PSE's transmission system. However, facilitating an inequitable allocation of a regional resource promotes a false economy of "haves" and "have nots."

G. Complainants Are Not Entitled to Interim Rate Relief

35. Interim rate relief is only available based on the application of criteria to utilities, and not to a utility's customers. The line of cases relied upon by the Complainants involve consideration of interim relief for various types of utilities--water, telephone, electricity, etc.--not their customers. The Commission specifically refers to utilities in the criteria for granting relief: "[t]his Commission has authority in proper circumstances to grant interim relief to a utility" and "the financial health of a utility may decline" Pacific Northwest Bell Telephone Company,

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Cause No. U-75-40 at 5, 6 (1975). The Complainants concede that the line of cases upon which they rely only concern utilities. Memorandum in Support of Motion, p. 4.

36. The public policy underlying the opportunity for interim relief ensures that the utility itself is not in jeopardy, and that interim relief is available to avoid detriments that the emergency would cause to the utility's ratepayers and shareholders. See WUTC v. Pacific Northwest Bell Tel. Co., Cause No. U-72-30 (1972). Complainants' Motion turns this justification upside down: in order to prevent a hardship to their business caused by their failure to hedge, Complainants' seek "emergency" relief in order to shift the consequence of their mismanagement to the utility and its customers.

37. Complainants cite the Commission decision of WUTC v. Alderton-McMillan Water Supply, Inc., 1992 Wash. UTC LEXIS 76 (June 3, 1992), but do not discuss the holding of that case. If they wish to "step into the shoes" of a utility for purposes of seeking interim relief from their decision not to hedge, they will find the law less than sympathetic. In Alderton-McMillan, a water utility sought interim rate relief of increased rates. The utility sought such relief based on the fact that the company was in poor financial condition, could not meet its principal and interest payments, and believed it could not refinance its debt. The utility served approximately 1,300 customers. Public counsel argued that interim rates were not needed and were not in the public interest, and that the company was badly mismanaged, causing the "self-inflicted" financial condition. Further, public counsel contended that this poor financial condition did not amount to an emergency and that the company had not taken prudent steps to address its financial problems.

38. In Alderton-McMillan, the Commission applied the public interest standard and criteria established by WUTC v. Pacific Northwest Bell Tel. Co., Cause No. U-72-30, and agreed with

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public counsel that interim relief was not appropriate. The Commission noted that such interim relief is "an extraordinary remedy and should not be granted in a case where a full hearing can be had and the case . . . can be resolved without clear detriment to the utility." Alderton-McMillan, 1992 Wash. UTC LEXIS 76 at *12.

H. The Relief Requested Would Impair Substantial Rights Secured to PSE by the Special Contracts

39. "In setting rates, the Commission is obligated to balance investor and consumer interests." POWER v. WUTC, 104 Wn.2d 798, 819 (1985). In U S WEST Communications v. WUTC, 134 Wn.2d 74, 949 P.2d 1337 (1997), the Court recognized that the Commission "must in each rate case endeavor to not only assure fair prices and service to customers, but also to assure that regulated utilities earn enough to remain in business each of which functions is as important in the eyes of the law as the other."

40. The Special Contracts expressly allocate the risk of market electricity price increases to GP and BCS. Each of the Special Contracts expressly states: "the customer bears all the risk for price movements in the market price . . . ."

41. At the time of the Commission's approval of the Special Contracts, PSE's annual revenues under the Special Contracts were unknown, "since customers are responsible for paying the actual market prices based upon the power cost index." PSE Response to WUTC Staff Data Request No. 5, UTC Docket Nos. UE-960612 and UE-960613. However, the revenue losses to PSE were then estimated at $3.5 to $4 million over the terms of the Special Contracts. See Staff Memo (James W. Miernyk) dated June 7, 1996 UTC Docket Nos. UE-960612 and UE-960613. Until recently, the revenue losses to PSE (and benefits to GP and BCS) have been more than double that estimate. See Gaines Aff. at ¶ 24.

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42. Complainants would have the Commission upset this allocation of risks and benefits, to the detriment of PSE and its customers. Neither PSE nor its customers should be asked to subsidize Complainants. This is not what was intended nor what is provided by the Special Contracts. Complainants proposed remedy would impair PSE's contract rights, and for the reasons noted below, would affect an unconstitutional taking.

I. The Relief Requested Would Impair Substantial Rights Secured To PSE by the Merger Order

43. The rate plan approved in the Commission's Merger Order factors in the risks and potential rewards of a five-year rate freeze. In addressing the rate plan approved in the Merger Order, the Commission found:

considering these costs pressures and the potential for savings associated with the merger, the rate plan reflects the implicit balance struck by the stipulating parties between five years of "rate certainty" for [core] customers, and five years of opportunity for the Company to manage its resource costs pressures.

Merger Order at 21. Selectively altering the balance takes away benefits from PSE and its customers secured by the Merger Order. GP and BCS had enough power and sophistication to demand the benefits and accept the customer risks of Special Contracts. The Merger Order assigns the seller's rate risks of the Special Contracts to PSE and its shareholders. Any change in the pricing principle for these Special Contracts during the Rate Plan without PSE's consent is a violation of the Merger Order.

44. In other contexts, the courts have consistently held that, as between shareholders and ratepayers, the "party that bore the risk of loss is the party entitled to the gain" and that "those who bear the financial burden of the particular utility activity should also reap the benefits

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therefrom." Illinois Public Telecom Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997); accord Montana Power Co. v. FERC, 599 F.2d 295 (9th Cir. 1979). Under the Merger Order, PSE's shareholders have borne and continue to bear the risks of the Special Contracts. In exchange, PSE's shareholders are entitled to the benefits that the Special Contracts provide during periods of upward fluctuations in the market for power.

45. To change that component of the Merger Order is inherently unfair to PSE. PSE relied on the Merger Order and agreed to bear (and has borne) the risk of downward market index fluctuations under these Special Contracts and the other risks inherent in the rate stability plan under the terms approved in the Merger Order. A change that allows the GP and BCS to keep the benefits they have secured to date under the Special Contracts, and then allows them to avoid the (perhaps temporary) burdens of those contracts, is inherently inequitable. See FPC v. Sierra Pacific Co., 350 U.S. 348 (1955) (the Federal Power Commission was not justified in accepting a tariff filing by Pacific Gas & Electric that abrogated a private contract between the generating utility and a distribution company where the generating utility had voluntarily agreed by contract to a rate affording less than a fair rate of return; having voluntarily entering into such a contract, the party is not entitled to be relieved of its improvident bargain).

46. In no way, to date, have these Special Contracts provided a windfall to PSE. On the contrary, prior to the recent market shifts, PSE's revenues under the Special Contracts were far short of the projections used in fashioning the Merger Order. To abrogate GP's and BCS's Special Contract obligations by granting them a new pricing mechanism or mandating that PSE provide them with retail wheeling, after they have reaped enormous benefits under those same contracts for the past four years, would be arbitrary, capricious and confiscatory. It would operate under the current circumstances to unconstitutionally take PSE's property and impair

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PSE's rights under the Merger Order and its Special Contracts with GP and BCS.

47. A taking occurs when government action forces some private persons alone to shoulder affirmative public burdens which, in all fairness and justice, should be borne by the public as a whole. Mission Springs, Inc. v. City of Spokane 134 Wn.2d 947, 954, P.2d 250 (1998). Here, GP and BCS allege they are suffering losses, risking loss of jobs and production due to energy prices under the Special Contracts. Motion at 2. They are arguing that PSE should bear the burden of subsidizing their respective operations so as to protect their (GP's and BCS's) shareholders, employees and customers. If shareholders are to bear the burden, those shareholders should logically be the owners of GP and BCS. If PSE is forced to bear it, a taking will have occurred.

III. CONCLUSION

48. Based upon the foregoing, the Motion must be denied.

Respectfully submitted this _____ day of _____, 2000.

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