

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

Docket UE-190529  
Docket UG-190530  
*(consolidated)*

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In the Matter of the Petition of

PUGET SOUND ENERGY

For an Order Authorizing Deferral Accounting  
and Ratemaking Treatment for Short-life  
UT/Technology Investment

Docket UE-190274  
Docket UG-190275  
*(consolidated)*

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In the Matter of the Petition of

PUGET SOUND ENERGY

For an Order Authorizing Deferred Accounting  
associated with Federal Tax Act on Puget Sound  
Energy's Cost of Service

Docket UE-171225  
Docket UG-171226  
*(consolidated)*

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In the Matter of the Petition of

PUGET SOUND ENERGY

For an Order Authorizing the Accounting  
treatment of Costs of Liquidated Damages

Docket UE-190991  
Docket UG-190992  
*(consolidated)*

**PUGET SOUND ENERGY'S  
SECOND MOTION TO EXTEND  
COMPLIANCE FILING DEADLINE**

## **I. INTRODUCTION**

1. Pursuant to WAC 480-07-110, WAC 480-07-385, and WAC 480-07-880, Puget Sound Energy (“PSE”) respectfully moves the Washington Utilities and Transportation Commission (“Commission”) to extend the time for a compliance filing resulting from the July 8, 2020 Final Order (“Final Order”) and July 31, 2020 Order Granting Motion for Clarification (“Modifying Order”) in the above-referenced dockets (together “Orders”). Good cause exists for the Commission to extend the time for a compliance filing. On August 6, 2020, PSE filed a Petition for Judicial Review of the Orders in King County Superior Court and on August 7, 2020, PSE filed a Motion to Stay portions of the Orders in King County Superior Court, including a request that the Court implement an interim rate increase while PSE’s Petition for Judicial Review is pending. An order on PSE’s Motion to Stay authorizing an interim rate increase would materially impact a compliance filing and therefore, good cause exists to extend the compliance filing deadline until a final decision is made on PSE’s Motion to Stay.

## **II. BACKGROUND**

2. PSE filed its general rate case on June 20, 2019. After a fully-litigated case involving nine parties, testimony, motions, hearings, and briefing, the Commission issued the 215-page Final Order. The Final Order directed PSE to make a compliance filing to effectuate the terms of the Order, and states that the effective date must allow five business days for Commission Staff review.
3. On July 17, 2020, PSE filed a motion seeking clarification on several points from the Final Order. In conjunction with that motion, it filed a motion to extend the compliance filing deadline until ten (10) business after the Commission ruled on the motion for clarification.<sup>1</sup> On July 20, 2020, the Commission granted PSE’s motion to extend the compliance filing deadline.

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<sup>1</sup> PSE’s motions were filed on July 17, 2020. However, due to the Commission being closed on July 17, the motions were entered into the docket on July 20, 2020.

On July 31, 2020, the Commission issued the Modifying Order clarifying several issues in the Final Order.

4. On August 6, 2020, in Case No. 20-2-12279-3 SEA, PSE filed a Petition for Judicial Review in King County Superior Court seeking judicial review of portions of the Orders. Then, on August 7, 2020, in that docket, PSE filed a Motion to Stay portions of the Orders until a decision on the Petition for Judicial Review.<sup>2</sup> Under King County Superior Court Local Rule 7, as modified by court order due to COVID-19, a decision on the Motion to Stay cannot occur until at least nine (9) court days after the motion is filed.<sup>3</sup> Because of this timing, a decision on PSE's Motion to Stay will not be decided by King County Superior Court prior to the compliance filing deadline which is now August 14, 2020, ten (10) business days after the Modifying Order.
5. PSE has conferred with Commission Staff, who preferred PSE request an extension of the compliance filing deadline until a final decision is made on PSE's Motion to Stay. Accordingly, PSE files this motion to extend the compliance filing deadline.

### III. DISCUSSION

6. WAC 480-07-385 allows the Commission to extend the time to comply with an order upon the showing of good cause for the extension.<sup>4</sup> Good cause exists to extend the date for a compliance filing because PSE has filed a Motion to Stay portions of the Orders. The outcome of the Motion to Stay could materially affect the requirements of PSE's compliance filing because pursuant to RCW 80.04.180 and the Washington Supreme Court decision in *General Telephone Co. v. Utilities and Transportation Commission*, 104 Wn.2d 460, 706 P.2d 625 (1985), PSE's Motion to Stay seeks an interim rate of \$54.2 million for electric customers and \$7.8 million for

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<sup>2</sup> Attached as Exhibit A.

<sup>3</sup> See King County Superior Court, Emergency Order #18, at 3 (May 27, 2020) (<https://www.kingcounty.gov/~media/courts/superior-court/docs/COVID-19/FILED-Emergency-Order18-KCSC-200120505.ashx?la=en>).

<sup>4</sup> WAC 480-07-110 also provides that "The commission, in response to a request or on its own initiative, may grant an exemption from, or modify the application of, any of its rules in individual circumstances if the exemption or modification is consistent with the public interest, the purposes underlying regulation, and applicable statutes."

gas customers while PSE's Petition for Judicial Review is pending. This amount is different than the rate authorized by the Orders. If PSE's Motion to Stay is granted, PSE's compliance filing would be different than under the Orders. Accordingly, the timing for PSE to conduct a compliance filing should be extended until after a final ruling is made on the Motion to Stay.<sup>5</sup>

7. No parties will be prejudiced by the Commission granting an extension for a compliance filing. The Orders authorized a rate increase.<sup>6</sup> Customers will not be harmed by a delay in implementing a rate increase.

8. PSE requests the Commission grant an extension of the compliance filing deadline to ten (10) business days after a final decision is issued on the Motion to Stay.

#### IV. CONCLUSION

9. For the reasons set forth above, PSE respectfully requests that the Commission enter an order extending the time for a compliance filing as set forth above.

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<sup>5</sup> See *WUTC v. Cougar Ridge Water Systems*, Docket UW-040367, Order 04 (Dec. 15, 2004) (extended compliance filing deadline for good cause because company filed a motion to stay a tariff filing and petition for judicial review); Docket UW-040367, Order 05 (Feb. 1, 2005) (extending compliance filing deadline until after court rules on motion to stay).

<sup>6</sup> See Final Order ¶ 798; Modifying Order 10 ¶ 40.

DATED this 7th day of August, 2020.

**Respectfully submitted**

**PERKINS COIE LLP**

By 

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# **EXHIBIT A**

THE HONORABLE JUDGE MCHALE  
Hearing Date: August 20, 2020  
Hearing Time: 9:00 AM

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

PUGET SOUND ENERGY,

Petitioner,

vs.

WASHINGTON STATE UTILITIES AND  
TRANSPORTATION COMMISSION,

Respondent.

No. 20-2-12279-3 SEA

PETITIONER'S MOTION TO STAY  
PORTIONS OF FINAL ORDERS  
PENDING JUDICIAL REVIEW

**ORAL ARGUMENT REQUESTED**

**I. RELIEF REQUESTED**

Pursuant to RCW 80.04.180 and RCW 34.05.550(2), petitioner Puget Sound Energy ("PSE") respectfully moves the Court to stay paragraphs 365-383, 419, 699-700, 760-64, and Appendix A of the Final Order 08, which was issued by the Washington Utilities and Transportation Commission ("WUTC" or "Commission") in Dockets UE-190529 and UG-190530, and Final Order 03 in Dockets UE-171225 and UG-171226 ("Final Order").<sup>1</sup> On July 31, 2020, the Commission issued a subsequent order clarifying and modifying its Final Order ("Modifying Order"), and PSE moves to stay paragraphs 23-33 and Revised Appendix A of that order.<sup>2</sup> Pursuant to RCW 80.04.180(2), PSE requests a hearing on this motion.

<sup>1</sup> These dockets were consolidated.

<sup>2</sup> The July 31 order is a final order for purposes of judicial review. *See* WAC 480-07-835(4).

PETITIONER'S MOTION TO STAY PORTIONS OF  
FINAL ORDERS PENDING JUDICIAL REVIEW – 1

149127929.5

**Perkins Coie LLP**  
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1 PSE will suffer great and irreparable harm if a stay is not granted. The Final Order and the  
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3 Modifying Order require PSE to pass back plant-related excess deferred income taxes (“EDIT”) to  
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5 customers in a manner that violates the Tax Cuts and Jobs Act of 2017 (“TCJA”)<sup>3</sup> and will subject PSE  
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7 and its customers to significant penalties. PSE requests the Court stay these portions of the Final  
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9 Orders while the Court considers PSE’s Petition for Judicial Review, which was filed with this Court  
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11 on August 6, 2020. The Final Order and Modifying Order are attached to the Petition for Judicial  
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13 Review (“Final Orders”).

14 Pursuant to RCW 80.04.180 and the Washington Supreme Court decision in *General*  
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16 *Telephone Co. v. Utilities and Transportation Commission*, 104 Wn.2d. 460, 706 P.2d. 625 (1985), this  
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18 Court has the authority to stay the Final Orders to protect PSE and its customers from “great and  
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20 irreparable harm,” which would result, absent a stay. First, the Final Orders require PSE to pass back  
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22 plant-related EDIT in a manner that violates the TCJA. PSE and its customers would be subject to  
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24 substantial penalties from the IRS as a result of this normalization violation. Declaration of Daniel A.  
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26 Doyle in Support of Motion to Stay Portions of Final Orders (“Doyle Decl.”), ¶¶ 7-11. Second, PSE  
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28 will lose annual revenues of \$25.6 million that can never be recovered, absent a stay, due to the  
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30 prohibition on retroactive ratemaking,<sup>4</sup> even if PSE prevails in its petition. Declaration of Susan E.  
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32 Free in Support of Motion to Stay Portions of Final Orders (“Free Decl.”), ¶¶ 4-7. Under RCW  
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34 80.04.180 and *General Telephone*, to protect PSE from this irreparable harm, this Court has the  
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36 authority to implement an interim rate increase temporarily during the pendency of review.  
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38 Accordingly, PSE asks the Court to restrain, in part, the effect of the Commission’s permanent  
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40 suspension of the rate increases filed by PSE and allow an interim annual increase of \$54.2 million for  
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42 electric customers and \$7.8 million for gas customers while this appeal is pending.<sup>5</sup> Free Decl. ¶ 5. The  
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44 interim rate increase reflects the appropriate pass back of plant-related EDIT to customers, as filed in  
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49 <sup>3</sup> Tax Cuts and Jobs Act, Pub. L. 115-97 (131 Stat 2054).

50 <sup>4</sup> WAC 480-80-132.

51 <sup>5</sup> This is an increase of \$20.9 million for electric and \$4.8 million for gas as compared to the rate increase authorized by the Commission in the Modifying Order. Free Decl. ¶ 5.



1 PSE’s tariffs, which complies with the TCJA and incorporates long-standing normalization and  
2 consistency rules that PSE has followed since the Tax Reform Act of 1986.<sup>6</sup> A stay will allow PSE to  
3 appeal the Final Orders without risk of IRS penalties and without a risk of losing annual revenues of  
4 \$25.6 million of which it would never be able to recover retroactively. The stay will further allow PSE  
5 to seek a Private Letter Ruling (“PLR”) from the IRS, so that the IRS can provide guidance in response  
6 to this dispute between the Commission and PSE over the proper treatment of EDIT. Without a stay,  
7 the harm would be great and irreparable to PSE and its customers. Importantly, customers will not be  
8 harmed during the stay because if PSE does not prevail, PSE will refund the amounts to customers.  
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## 10 11 12 13 14 15 16 17 **II. STATEMENT OF FACTS**

### 18 19 **A. Procedural Background**

20 PSE is a regulated utility company that serves approximately 1,157,000 electric customers and  
21 837,000 gas customers. PSE’s rates and tariffs require the approval of the WUTC. Free Decl. ¶ 2.  
22

23 On December 22, 2017, the TCJA was signed into law; as a result, the federal income tax  
24 structure was significantly modified. Declaration of Matthew R. Marcellia in Support of Motion to Stay  
25 Portions of Final Orders (“Marcellia Decl.”), ¶ 4. Among the most notable changes is a reduction in the  
26 federal corporate income tax rate from 35 percent to 21 percent for tax years beginning after December  
27 31, 2017. *Id.* Section 13001(d) of the TCJA defines and provides the normalization requirements for  
28 the EDIT resulting from the TCJA tax reduction. Using language identical to the Tax Reform Act of  
29 1986, the TCJA allows the utility to pass through EDIT to customers no more quickly than over the  
30 remaining book life of the underlying asset. Marcellia Decl. ¶¶ 16-17.  
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33 On December 29, 2017, PSE filed an accounting petition with the WUTC in Dockets UE-  
34 171225 and UG-171226, requesting deferred accounting treatment from the impacts of tax reform as a  
35 result of the TCJA.<sup>7</sup> Final Order ¶ 1.  
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<sup>6</sup> Pub. L. 99-514 (100 Stat. 2085).

<sup>7</sup> PSE amended its accounting petition on November 26, 2018.

1 On June 20, 2019, in Dockets UE-190529 and UG-190530, PSE filed with the Commission a  
2 general rate case to update its electric and natural gas rates and selected tariff sheets. PSE requested an  
3 increase in rates to recover increased electric and gas revenue requirements of approximately \$139.5  
4 million and \$65.5 million respectively. *Id.* ¶ 3. The tariffs filed by PSE provided for the reversal of the  
5 plant-related EDIT in a manner that complies with the TCJA, which incorporates long-standing  
6 normalization and consistency requirements set forth by the IRS. Marcellia Decl. ¶¶ 20-24. These rules  
7 have been in place since the passage of Section 203(3) of the Tax Reform Act of 1986 addressing  
8 EDIT attributable to that rate cut, and which PSE has followed since the passage of that law. *Id.* ¶¶ 2,  
9 20-24. On February 5, 2020, the Commission consolidated PSE’s deferred accounting petition in  
10 Dockets UE-171225 and UG-171226 with PSE’s general rate case. Final Order ¶ 18.

11 On July 8, 2020, the WUTC issued the Final Order in the consolidated dockets. In its Final  
12 Order, the WUTC required PSE to pass back to customers plant-related EDIT in a manner that violates  
13 the TCJA. *Id.* ¶¶ 365-383, 419, 699-700, 760-64, and Appendix A. On July 31, 2020, the WUTC  
14 issued the Modifying Order which corrected calculation errors in the revenue requirement in its Final  
15 Order for passing back plant-related EDIT to customers but did not change its methodology which  
16 violates the TCJA. Modifying Order ¶¶ 23-33 and Revised Appendix A. Together, the Final Orders  
17 would cause PSE to violate the TCJA because they require PSE to pass back plant-related EDIT to  
18 customers more quickly than the corresponding depreciation expense, tax expense and rate base,  
19 contrary to the plain language of the TCJA. Marcellia Decl. ¶¶ 2, 25-30; Doyle Decl. ¶¶ 6-11.

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21 **B. PSE Is Returning EDIT to Customers in a Manner that Complies with the TCJA**

22 PSE has passed back the reversal of EDIT to customers in the same manner since the passage  
23 of the Tax Reform Act of 1986, and PSE has continued to pass back the reversal of EDIT to customers  
24 in this manner after the TCJA was passed, in accordance with the requirements of the TCJA. Marcellia  
25 Decl. ¶ 20. Accordingly, in its 2019 general rate case filing, PSE followed this same practice and  
26 appropriately used a historical test year that reflected twelve full months of EDIT using the average  
27 rate assumption method. *Id.* ¶¶ 21-22. PSE used the values recorded in the test year as the basis for its  
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1 deferred tax calculation, with routine adjustments to ensure that the rate base, accumulated deferred  
2 taxes, book depreciation, and tax expense remained consistent. *Id.* As has been PSE's practice for  
3 decades, PSE will continue passing back this level of reversal of EDIT and other related components in  
4 rates each year until the rate effective date in its next general rate case. *Id.* PSE's approach was  
5 reviewed and accepted by its outside auditors, PricewaterhouseCoopers, as part of its annual audit. *Id.*

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10 ¶ 24. In contrast, the Final Orders violate the TCJA because they require PSE to pass back plant-  
11 related EDIT to customers differently from the book depreciation, rate base, accumulated deferred  
12 income tax and tax expense to which it is tied, which is prohibited under the TCJA. *Id.* ¶¶ 25-30.

### 16 C. The Effects of the Final Orders Without a Stay From this Court

#### 17 1. Adhering to the Final Orders would subject PSE to significant IRS penalties

18 Implementing the rates ordered by the Commission in the Final Orders, which improperly pass  
19 back plant-related EDIT, would cause PSE to violate the TCJA and would subject PSE to significant  
20 penalties. Doyle Decl. ¶¶ 7-8. The TCJA penalizes taxpayers by increasing the taxpayer's tax by the  
21 amount that the utility has passed back to customers beyond the amount allowed. *Id.* ¶ 7. Thus, the  
22 penalty prevents utility customers from ever benefitting from the unlawful pass back of EDIT. *Id.* ¶¶ 7-  
23 8. The \$25.6 million of additional plant-related EDIT that the Commission has ordered to be passed  
24 back through a tracker, beyond what PSE has included in base rates, would increase PSE's tax expense  
25 that is included in its cost of service and would be borne by customers. *Id.* ¶ 8.

26 Additionally, the violation of normalization requirements in the TCJA would result in PSE  
27 losing its ability to use accelerated tax depreciation; PSE would be required to use book depreciation in  
28 its place, under IRC §168(f)(2). *Id.* This would represent a huge cost increase to PSE and its  
29 customers, especially when this effect is extrapolated to all of PSE's depreciable assets. *Id.* Moreover,  
30 the normalization violations that would result if PSE complies with the Final Orders are not  
31 inadvertent violations because PSE is aware of the normalization violation and has apprised the  
32 Commission repeatedly that the approach ordered by the Commission violates the TCJA. *Id.* ¶ 9. This  
33 is significant because PSE will not be able to use the safe harbor of Revenue Procedure 2017-47 that is  
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1 available for inadvertent violations to avoid harsh sanctions associated with normalization violations.  
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3 *Id.* Congress intends for penalties to apply to normalization violations where, as here, “a regulatory  
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5 body has required or insisted upon such treatment by a utility.” *Id.*; Marcella Dec., Exh. E at 4.  
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7 **2. The effect of the Final Orders subjects PSE to a significant loss of revenue, a**  
8 **significant portion of which PSE could never recover, even if it prevails on appeal**  
9

10 In addition to significant IRS penalties, the results of the Final Orders will cost PSE \$25.6  
11 million in reduced revenues in the first year. Free Decl. ¶ 7. Even if PSE’s appeal of the Final Orders is  
12 successful, without a stay from this Court, these funds can never be recovered and will irreparably be  
13 lost to PSE due to the prohibition on retroactive ratemaking. *Id.*  
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18 **D. PSE Requests the Court Stay Portions of the Final Orders and Set Interim Rates to**  
19 **Preserve the Status Quo**  
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21 To offset the lost revenue that PSE otherwise would incur during the appeal of the Final  
22 Orders, and to prevent PSE from violating the TCJA in the manner it passes back plant-related EDIT in  
23 rates, PSE requests an order from this Court authorizing an interim revenue requirement pending its  
24 appeal and pending receipt of a PLR from the IRS on this dispute, which PSE is in the process of  
25 requesting. Doyle Decl. ¶¶ 16-19. PSE requests an interim revenue requirement that reflects the  
26 revenue associated with the appropriate pass back of plant-related EDIT in base rates, consistent with  
27 PSE’s filing in its general rate case. *Id.* Staying the EDIT portion of the Final Orders and authorizing  
28 an interim revenue requirement will result in an estimated average residential monthly bill increase of  
29 \$1.06 for electric customers and \$0.32 for gas customers. Free Decl. ¶ 6.  
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39 **III. STATEMENT OF ISSUES**

40 Whether the Court should grant a stay pursuant to RCW 80.04.180 and RCW 34.05.550(2), to  
41 preserve the status quo and restrain portions of the Final Orders that require PSE to pass back plant-  
42 related EDIT to customers in a manner that violates the TCJA and will subject PSE and its customers  
43 to great and irreparable harm, including the imposition of harsh penalties by the IRS.  
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**IV. EVIDENCE RELIED UPON**

PSE relies on the Declarations of Matthew R. Marcelia, Daniel A. Doyle, Susan E. Free, and the exhibits attached thereto, and the Final Orders.

**V. AUTHORITY AND ARGUMENT**

**A. Applicable Standard and Legal Authority**

PSE’s request that this Court stay portions of the Final Orders to preserve the status quo during judicial review and while PSE seeks a PLR from the IRS is consistent with Washington law and should be granted. RCW 80.04.180 authorizes the Court to stay the Final Orders, upon a showing that “great or irreparable damage” will otherwise occur to PSE.<sup>8</sup> Washington courts have granted stays of Commission orders and allowed interim rate increases to take effect during the pendency of the appeal where the Commission rejects the proposed increase. In *General Telephone Co. v. Utilities and Transportation Commission*, 104 Wn.2d. 460, 706 P.2d. 625 (1985), the Washington Supreme Court upheld, under RCW 80.04.180, the stay of a Commission general rate case order and allowed the utility to implement an interim rate increase equal to the amount it “would be entitled during the appeal period if its appeal succeeded.” *Id.* at 462.

In that case, General Telephone Company of the Northwest (“GTNW”) sought judicial review and a stay of a WUTC order that had (1) rejected GTNW’s proposed \$49.3 million rate increase, and (2) allowed an increase of \$4.8 million. Under RCW 80.04.180, GTNW sought a supersedeas order to allow it to put into effect an interim rate increase during the pending appeal because otherwise, even if it were successful on appeal, it would not be able to recover the lost rates due to the prohibition on retroactive ratemaking. The King County Superior Court stayed the WUTC’s order and granted GTNW’s request for the implementation of an interim \$8.3 million annual rate increase. *Id.* at 462.

The Washington Supreme Court affirmed. The Court rejected an argument by the WUTC that the statute does not authorize an interim rate increase:

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<sup>8</sup> Additionally, the Washington Administrative Procedures Act (“APA”) allows a reviewing court to stay enforcement of an agency’s order. RCW 34.05.550(2).

1 The Commission's theory does not consider the entire utility rate increase procedure  
2 and the actual effect of the order in that scheme. The utility commences the  
3 ratemaking process by filing with the Commission for a rate increase. RCW  
4 80.04.130(1). The Commission has the power to suspend the rate increase for up to  
5 10 months while hearings are pending. . . . If the Commission fails to vacate the  
6 increase, or fails to act within the 10-month period, the full increase takes effect.  
7 Thus, the Commission's order in this case has two components: (1) the permanent  
8 elimination of the \$49.3 million increase and (2) a substitute increase of \$4.8 million.  
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10 The Superior Court, therefore, had the power to "restrain or suspend" *either or both*  
11 actions that comprised the Commission's order. The court chose to restrain, in part,  
12 the effect of the permanent suspension of the \$49.3 million increase. It allowed an  
13 interim annual increase of \$8.3 million while the appeal is pending. The statute  
14 clearly authorizes such an action if the other requirements are met.

15 104 Wn.2d at 465-66 (emphasis in original; citations omitted). The Court reasoned that "[t]he interim  
16 rate increase is not ratemaking, but the creation of a pool of funds during the appeal period [which] . . .  
17 will be returned to customers, with interest, if the appeal fails [but if GTNW] is successful on the  
18 merits, it is entitled to these funds but would be unable to recoup them retroactively." *Id.*  
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23 In setting the interim rate during the appeal, the Court determined that the status quo to be  
24 preserved is the tariff filing made by the utility at the start of the rate case, not the amount that  
25 customers were being charged prior to the rate increase filing, or prior to the WUTC order:  
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29 The question then becomes the measuring point for the status quo ante.  
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33 [T]he *rate increase represents the status quo ante in this case*. . . . [T]he status quo  
34 ante is with the \$49 million rate increase in effect."  
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36 The rate increase is effective unless the Commission acts. . . . *Thus, the proper*  
37 *measuring point is with the \$49.3 million rate increase in place.*  
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39 104 Wn.2d at 466-69 (emphasis added). The Court's order affirming a stay and interim rate is  
40 consistent with other jurisdictions. *See, e.g., id.* at 468 n. 5; *Utah Power & Light Co. v. Idaho Public*  
41 *Util. Comm'n*, 685 P.2d 276 (1984); *Sw. Bell Tel. Co. v. State Corp. Comm'n*, 597 P.2d 633 (1979).  
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45 The Court also rejected the WUTC's argument that RCW 80.04.180 required proof of the  
46 likelihood of success on the merits because the supersedeas order is governed by statute, not by the  
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1 requirements for an equitable injunction, and the statute does not require the establishment of success  
2 on the merits. *Id.* at 470.<sup>9</sup>  
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5 The Court held that a utility makes a sufficient showing that “great or irreparable damage”  
6 under RCW 80.04.180 will result if it can show that “a substantial sum will be irretrievably lost.” *Id.* at  
7 466. Because GTNW would not have been able to collect the disputed portion of the requested rate  
8 increase retroactively, it established that the rate increase would be irreparably lost during the appeal  
9 period. The Court noted that because irreparability can be easily met due to the bar against retroactive  
10 rate making, the utility must also show that the loss will be “material and considerable” which the  
11 Court defined as (1) substantial in absolute terms or (2) significant to the company given the  
12 circumstances. *Id.* at 472. To make this determination,<sup>10</sup> the superior court “should balance a  
13 combination of the following factors in its analysis of the ‘greatness’ requirement”:  
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- 16 1. The nature of the damage;
- 17 2. The size of the damage in absolute terms;
- 18 3. The certainty that the damage will occur;
- 19 4. The effect that the damage will have on the petitioner;
- 20 5. The petitioner’s ability to recover from or minimize the damage;
- 21 6. Any potential harm to nonparties; and
- 22 7. Other factors that may be unique to the case.

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37 *Id.* at 470. The superior court is to exercise its discretion “to apply *any or all* of these factors to reach  
38 its decision.” *Id.* at 472 (emphasis added).  
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41 In *General Telephone*, the Court affirmed the superior court, based on affidavits provided by  
42 GTNW that the loss of \$8.3 million during the pendency of the appeal was “great,” and that GTNW  
43 would be irreparably harmed were it not able to recover those funds. *Id.* at 462.  
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49 <sup>9</sup> See also RCW 34.05.550(3), which only requires the applicant to show a likelihood of success on the merits if  
50 the stay is “based on public health, safety, or welfare grounds,” none of which apply here.

51 <sup>10</sup> This determination must be made “on the evidence before” the court. 104 Wn.2d at 472.

1 **B. PSE Will Suffer Great and Irreparable Harm If the Stay Is Not Granted**

2 PSE's declarations demonstrate that it meets the *General Telephone* factors, and PSE will  
3 suffer great and irreparable harm if a stay is not granted.  
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6 First, the nature of the damage is the irreparable loss of approximately \$25.6 million caused by  
7 the loss in revenue resulting from the Final Orders, due to the retroactive ratemaking prohibition in  
8 Washington and the substantial IRS penalties that PSE and its customers will face due to the violation  
9 of the TCJA that will result from the Final Orders.  
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12 Second, the size of the damage in absolute terms is vast. In addition to the certain loss in  
13 revenues, the TCJA imposes a penalty on PSE and its customers in the amount unlawfully passed back  
14 to customers, which would be approximately \$25.6 million in the first year. Doyle Decl. ¶¶ 7-8 (citing  
15 TCJA § 13001(d)(4)). Additionally, the general penalties for normalization violations would apply  
16 which would prohibit PSE from using accelerated tax depreciation for federal income tax purposes. *Id.*  
17 (citing IRC § 168(f)(2)). PSE's deferred tax liability of \$1.1 billion, which represents accumulated  
18 accelerated depreciation tax benefits, would become payable to the IRS because of PSE's failure to use  
19 a normalization method of accounting. *Id.* The loss of PSE's deferred tax liability of \$1.1 billion means  
20 that PSE would no longer reduce rate base by that amount. *Id.* Therefore, PSE's revenue requirement  
21 would increase by approximately \$110 million, which amount would be borne by customers. *Id.*  
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25 Third, the certainty that the damage will occur is plainly satisfied here. Due to the bar against  
26 retroactive ratemaking, *any* amount that the Court finds should have been allowed to PSE will be  
27 irreparably lost during the appeal period. Likewise, without a stay, the Final Orders will go into effect  
28 and will require PSE to pass back plant-related EDIT to customers in a manner that violates the TCJA  
29 and be subject to penalties set forth in the statute. The losses are not speculative. The revenues  
30 requested and denied, the reduced rates ordered, and the significant IRS penalties, will cause "certain"  
31 damage to PSE.  
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35 Fourth, the effect that the damage will have on PSE and its customers is substantial. In addition  
36 to lost revenue and the grave IRS penalties described above, a violation of the normalization  
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1 requirements would require PSE to disclose in its SEC-compliant financial statements, uncertain tax  
2 matters regarding the efficacy of using accelerated depreciation for calculating income tax expense as  
3 well as the potential IRS penalties. Doyle Decl. ¶¶ 10-11. This would create significant uncertainties  
4 with the broader financial markets and undermine PSE’s financial reputation, impair PSE’s ability to  
5 access capital and liquidity, and substantially detract from PSE’s ability to cost-effectively finance its  
6 operations for the benefit of its customers. *Id.*

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12 Fifth, PSE’s inability to recover from or minimize the damage is evident here. Because of the  
13 magnitude of the amount at issue and the fact that PSE cannot recover it retroactively, PSE has no  
14 ability to minimize the revenue loss. Additionally, without a stay, PSE has no way to shield itself from  
15 the harsh IRS penalties, discussed above, that would result, even if the Final Orders are later  
16 determined to be in error. Moreover, there is no safe harbor provision for this tax violation because this  
17 is not an inadvertent violation. *See id.* ¶ 9. PSE has warned the Commission of the ramifications of this  
18 method of passing back EDIT throughout the course of this case and the normalization violation has  
19 been directly considered by the Commission. *Id.*

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28 Sixth, a stay will not harm nonparties. In fact, the stay will help shield customers from the  
29 negative impact of an IRS penalty that would adversely affect customers. Moreover, should PSE’s  
30 position on deferred tax pass back ultimately be rejected, PSE will refund any amount in excess of that  
31 to which this Court finds PSE is entitled, with interest. *Id.* ¶ 21.

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44 In sum, under a balancing of the factors described above, PSE has plainly established that it  
45 will suffer “great or irreparable damage” under RCW 80.04.180 to justify a stay of the Final Order. A  
46 stay is also separately warranted under the court’s equitable powers “to ensure the effectiveness of the  
47 review process.” *General Telephone*, 104 Wn.2d at 469.

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**C. PSE’s Promise to Refund Customers Is Sufficient Security**

The Court has discretion to provide for such security as may be necessary to protect others in  
the event that PSE’s appeal is not successful. RCW 80.04.180(4) provides that a bond is not required,  
but that security “in lieu” of bond is sufficient. In *General Telephone*, the security offered was

1 GTNW's promise to refund to consumers the interim rate increase if its appeal failed which the Court  
2 affirmed. 104 Wn.2d at 474. As noted above, PSE offers the same security that GTNW made in that  
3 case and there is no question here that sufficient security is in place to ensure that no one is harmed by  
4 the stay should PSE not prevail on its appeal. See Doyle Decl. ¶ 21.  
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9 **VI. CONCLUSION**

10 For these reasons, PSE respectfully requests that the Court enter an immediate stay and order  
11 superseding and restraining, in part, the effect of the Final Orders and their permanent suspension of  
12 PSE's rate increase, specifically with respect to passing back plant related EDIT, pending judicial  
13 review and the receipt of a PLR from the IRS addressing the pass back of plant-related EDIT benefits  
14 to customers. PSE further requests the Court preserve the status quo and set an interim rate of \$54.2  
15 million for electric and \$7.8 million for gas, pending judicial review.  
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21 Respectfully submitted this 7th day of August, 2020.  
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27 I certify that this motion/memorandum  
28 contains 4,182 words, in compliance with the  
29 Local Civil Rules.  
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