WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AIR LIQUIDE AMERICA CORPORATION, AIR PRODUCTS AND CHEMICALS, INC., THE BOEING COMPANY, EQUILON ENTERPRISES LLC, and TESORO NORTHWEST CO.,	)	
Complainants,	)	DOCKET NO. UE-981410
v.	)	FIFTH SUPPLEMENTAL ORDER GRANTING COMPLAINT, ORDERING REFUNDS AND OTHER RELIEF
PUGET SOUND ENERGY, INC.	)	
Respondent.	)	
.....	)	

PROCEEDINGS: This is a formal complaint brought by customers of Puget Sound Energy, Inc. (PSE) that receive service under PSE's Schedule 48 tariff. The customers allege PSE fails to comply with certain tariff provisions, and request an order to require compliance and refunds. Administrative Law Judge Dennis J. Moss conducted a prehearing conference on January 8, 1998, at the Commission's offices in Olympia, Washington. The Commission denied PSE's Motion for Summary Determination on May 7, 1999. Evidentiary hearings were conducted before ALJ Moss on May 11, 12, and 14, 1999. The customers, PSE, and Staff filed initial briefs on June 8, 1999, and reply briefs on June 22, 1999. The parties waive an initial decision and agree this matter should be submitted directly to the Commission for decision.

APPEARANCES: Matthew Harris, attorney, Seattle, Washington, represents Puget Sound Energy (PSE). Bradley Van Cleve and Melinda Davison, attorneys, Portland, Oregon, represent Complainants Air Liquide America Corporation, Air Products and Chemicals, Inc., The Boeing Company, Equilon Enterprises LLC, and Tesoro Northwest Company. Simon ffitch, Assistant Attorney General, Seattle, Washington, represents the Office of Public Counsel; Public Counsel did not participate actively in the evidentiary or post-hearing phases. Robert Cedarbaum, Assistant Attorney General, Olympia, Washington represents Commission Staff (Staff).

COMMISSION: The Commission finds and concludes that PSE charged lawful rates in accordance with Schedule 48 from November 1, 1996, through May 31, 1998, but that after May 31, 1998, PSE continuously has charged unlawful and excessive rates for which it now must account through refunds, with interest. The Commission further finds and concludes that PSE must obey the requirements of Schedule 48 prospectively and charge lawful rates in accordance with this Order.

MEMORANDUM

I. Procedural History.

The customers, who are large industrial users, filed their complaint on November 6, 1998. The complaint alleges PSE has violated, and continues to violate, provisions of its Schedule 48 tariff. In particular, Complainants allege that Schedule 48 requires PSE to calculate energy prices using the Dow Jones Mid-Columbia Non-Firm Index price rather than using a blended price (*i.e.,* pricing by reference to an index that includes both firm and non-firm transactions, as Dow Jones defines those terms). PSE answered the complaint, denying the allegations, and filed a Motion for Summary Determination on November 30, 1998. Commission Staff responded in opposition to the Motion on December 18, 1998, and the Complainants filed their Memorandum in Opposition to PSE's Motion on December 21, 1998. PSE filed for leave to reply and filed its Reply on December 29, 1998. The Commission granted leave and considered PSE's reply. The Commission denied PSE's Motion for Summary Determination on January 19, 1999.

Administrative Law Judge Dennis J. Moss conducted a prehearing conference on January 8, 1998, at the Commission's offices in Olympia, Washington. Among other things, a schedule was determined for further process, including formal hearing proceedings.

The parties conducted discovery, filed direct and rebuttal testimonies and exhibits sponsored by a dozen witnesses, offered additional testimony by deposition, and otherwise prepared extensively for the evidentiary hearing. Evidentiary hearings were conducted before ALJ Moss on May 11, 12, and 14, 1999.

The record consists of 715 transcript pages and 151 exhibits, including prefiled direct and rebuttal testimony given by 11 witnesses, and 5 deposition transcripts. PSE responded to four Bench Requests on June 18, 1999. The Complainants, PSE, and Staff filed initial briefs on June 8, 1999, and reply briefs on June 22, 1999.

The parties waived an initial decision and agreed this matter should be submitted directly to the Commission for decision. Our discussion and decision follows.

II. Discussion and Decision.

A. Background.

PSE, then known as Puget Sound Power & Light Company, filed with the Commission on May 24, 1996, a proposal to implement a "market transition plan" intended to provide its customers access to competitively priced electricity. PSE's industrial customers were dissatisfied during this time frame with their existing options for service from PSE. Some, at least, were actively considering other options, including potentially bypassing PSE and obtaining power from other sources. PSE was concerned that it might lose these customers. PSE also was then seeking to merge with Washington Natural Gas Company. Both to keep the industrial customers on Puget's system and to gain their support for (or, at least, their agreement to not oppose) the merger, PSE entered into negotiations with the customers. The result, developed over a relatively short period of time, was Schedule 48, a so-called optional large-power-sales rate schedule the essential terms of which were based on special contracts PSE recently had negotiated with other large industrial customers. It has certain "market-like" aspects in that prices for power are pegged to market indexes.

PSE filed Schedule 48 with the Commission within days after the conclusion of its negotiations with the customers. PSE proposed expedited approval of the rate schedule as the first step toward bringing market access to all customers. During the next six months, PSE, Commission Staff, and various interested persons, including PSE customers, participated in an ongoing dialogue and in several open meetings before the Commission to achieve early approval of the rate schedule without lengthy and detailed hearings. On October 31, 1996, the Commission approved Schedule 48, subject to seven conditions. The Commission authorized a November 1, 1996, effective date.

This dispute concerns the pricing of non-firm energy under Schedule 48, one component of the overall retail rate, which also includes a 2.5 mill charge for ancillary services and margin, taxes and regulatory fee costs, delivery-loss markup, and transition charges. Generally speaking, non-firm energy is energy that is not guaranteed to be delivered because its delivery can be interrupted under shortage conditions. Non-firm energy pricing is described at First Revised Sheet Nos. 48c and 48d which state in relevant part:

> 1. Non-Firm Energy. An hourly non-firm energy price equal to the index energy price in each on-peak hour or off-peak hour, adjusted for losses associated with power delivery to the customer, plus 2.5 mills/kWh for ancillary services and margin. Risk for price movements in the index energy price is borne by

> Customer; Customer will receive non-firm energy service in absence of the election of related optional services. . . .
>
> "Index" in 1996 means COB less ½ mill/kWh. "COB" means the California-Oregon Border Revised Non-Firm Electricity Index prices last reported by Dow Jones to Dow Jones Telerate subscribers for on-peak hours and off-peak hours for each day of the relevant billing month. After 1996, "Index" means the Mid-Columbia Revised Non-Firm Electricity Index prices, last reported by Dow Jones to Dow Jones Telerate subscribers for on-peak hours and off-peak hours for each day of the relevant billing month or such other, similar, published or verifiable index which reflects commodity electric energy prices in the Pacific Northwest, as determined by the Company. . . .
>
> If the Company and all of the Customers to which this Schedule is available pursuant to its terms agree that the Mid-Columbia Revised Non-Firm Electricity Index prices are not representative of non-firm electricity transaction pricing in the region, the Company will seek to obtain written agreement with all such Customers upon an index that is representative of non-firm electricity transaction pricing in the region, and if such agreement is obtained, then from and after the date of such agreement "Index" will mean that agreed-upon index.

The parties transacted their business under these terms without dispute for about 19 months. Then, a disagreement surfaced about the meaning of these paragraphs. The parties disagree about the specific index designated for application after 1996 and about the means by which a substitute index may be determined for use in place of the designated index. The Commission acted in its legislative capacity less than three years ago to approve Schedule 48. Now, we are asked to determine judicially what Schedule 48's terms mean and how those terms apply to certain facts and circumstances that have transpired since November 1, 1996, the date on which Schedule 48 first became effective.

Factually, there are three distinct periods important to this case. The first period runs from November 1, 1996, the effective date of Schedule 48, through December 31, 1996. As to these two months, at least, there is no controversy regarding what did happen, or what should have happened under Schedule 48's terms. It is useful, however, to consider what transpired then as an aid to understanding what occurred during the second and third periods.

The second period runs for 17 months, from January 1, 1997, through May 31, 1998. During this period PSE determined the energy cost component under Schedule 48 using an index that included both firm and non-firm transactions, according to Dow Jones's definitions. We will refer to this index as the "Undifferentiated Mid-C Index." It was the only Dow Jones Mid-Columbia Electricity Index then in existence. Although the complaint in this case seeks relief only for the period beginning June 1, 1998 (the third period), Complainants and Staff assert that PSE never was entitled to use the Undifferentiated Mid-C Index. Under RCW 80.28.020, RCW 80.28.080, and the filed rate doctrine embodied in those statutes, we must be concerned with, and address, these assertions.

The complaint focuses on the third period, commencing June 1, 1998. On that date, Dow Jones ceased publishing the Undifferentiated Mid-C Index. Also on June 1, 1998, Dow Jones began publishing indices at Mid-Columbia that separated firm-energy transaction prices from non-firm-energy transaction prices. We will refer to these post-May 31, 1998, indices as the "Mid-C Firm Index" and the "Mid-C Non-Firm Index," respectively. Complainants contend the tariff required PSE to begin using the Mid-C Non-Firm Index to price the energy cost component under Schedule 48 as of June 1, 1998. PSE disputes this and claims the right to use an index it arranged for Dow Jones to publish privately since June 1, 1998, an index that blends the Mid-C Firm Index and the Mid-C Non-Firm Index prices. We will refer to this index that PSE has used since June 1, 1998, as the "Blended Mid-C Index."

There is considerable controversy about what did happen, and what should have happened, during the second and third periods. The case is neither as simple and straightforward as Complainants and Staff purport (Complainants Initial Brf. at 2, Reply Brf. at 1; Staff Brf. at 1), nor as complex and difficult as PSE's extensive briefing and wide-ranging arguments would make it. Essentially, what is at issue in this case is PSE's administration of Schedule 48 from the beginning. The fundamental issues are what the rate schedule requires and whether PSE has met those requirements. We must determine the meaning of Schedule 48 from its plain terms, or, where it is not plain and unambiguous, by applying rules of construction. We pause briefly below to outline the general legal principles that guide us, then turn to our analysis of the record and application of the law to the facts presented.

B. Legal Standards and Analytical Framework.

Filed and approved tariffs such as Schedule 48 have the force and effect of state law. *General Tel. Co. v. City of Bothell,* 105 Wn.2d 579, 585 (1986). When, as here, parties dispute what particular provisions require, we must look first to the plain

meaning of the tariff. *Nat'l Union Ins. Co. v. Puget Power,* 94 Wn. App. 163, 171, 972 P.2d 481 (1999). If the tariff language is plain and unambiguous, there is no need to resort to rules of construction. *Whatcom County v. Bellingham,* 128 Wn.2d 537, 546, 909 P.2d 1303 (1996); *Food Servs. Of Am. v. Royal Heights, Inc.,* 123 Wn.2d 779, 784-85, 871 P.2d 590 (1994); *Waste Management of Seattle v. Utilities & Transp. Comm'n*, 123 Wn. 2d 621, 629, 869 P.2d 1034 (1994); *Vita Food Prods., Inc. v. State,* 91 Wn.2d 132, 134, 587 P.2d 535 (1978). If the tariff language is not plain, or is ambiguous, we must, as the Court says in *Whatcom County*:

> avoid a literal reading if it would result in unlikely, absurd or strained consequences. The purpose of an enactment should prevail over express but inept wording. [Legislative enactments] must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.

128 Wn.2d at 546 (citations omitted); *see City of Seattle v. Dept of L&I*, 136 Wn.2d 693, 701, 965 P.2d 619 (1998).

We are concerned first, then, with the plain meaning of Schedule 48 to the extent it is ascertainable from the language we approved. We discuss in our analysis below, however, that we do find certain provisions in Schedule 48 ambiguous. Therefore, we have reviewed the record of the Commission's inquiry and deliberations that led to approval of Schedule 48, and the Order that allowed the rate schedule to go into effect. Ex. 91 (transcripts of Docket No. UE-960696 (Schedule 48) proceedings); Ex. 72 (Docket No. UE-960696, Order Approving Schedule 48).

Although the principles by which we read and construe this tariff are the same as those that apply to statutes, we are mindful that Schedule 48 is the product of negotiation just like the special contracts on which it is based. Indeed, there is no dispute that Schedule 48 generally, and the specific provisions at issue here in particular, were derived from certain special contracts between PSE and other large industrial customers. Ex. 400D at 9:24-11:1, 22:17-20 (Davis); TR. 285: -286: (Heidell); TR. 425:14-426:20 (Omohundro). As Mr. Davis recounts in his deposition testimony, "Schedule 48 was a label we put on a topic that started as a special contract." Ex. 400D at 15:9-10; *see also* Ex. 400D at 20:17-21:3.

Our analysis in this case, and our decision, do not depend on principles of contract law, yet those principles are implicit as we consider the evidence and the advocacy that informs our analysis and decision. We cannot be blind here, anymore than in a special contract case, to evidence that illuminates what the disputed words are intended to mean. *See Tanner Electric Cooperative v. Puget Sound Power & Light Company,* 128 Wn.2d 656, 911 P.2d 1301 (1996). Were we reviewing the exact

language at issue now in a dispute over the special contracts (and that task yet may fall to us, or to the courts, as suggested by Ex. 97) our focus would be on the question of what the parties intended. *Id.* at 674. Similarly, here, where the meaning of particular words and provisions in Schedule 48 is unclear we consider and discuss what the parties meant by using those words and drafting those provisions even though, ultimately, it is the Commission's intent in approving the language that controls. Thus, while we follow the principles of statutory construction and interpretation, and venture no further than necessary to resolve the several points disputed in this case, we favor a broad and inclusive review of the record using all the analytical tools available to us to understand the evidence.

C. Analysis.

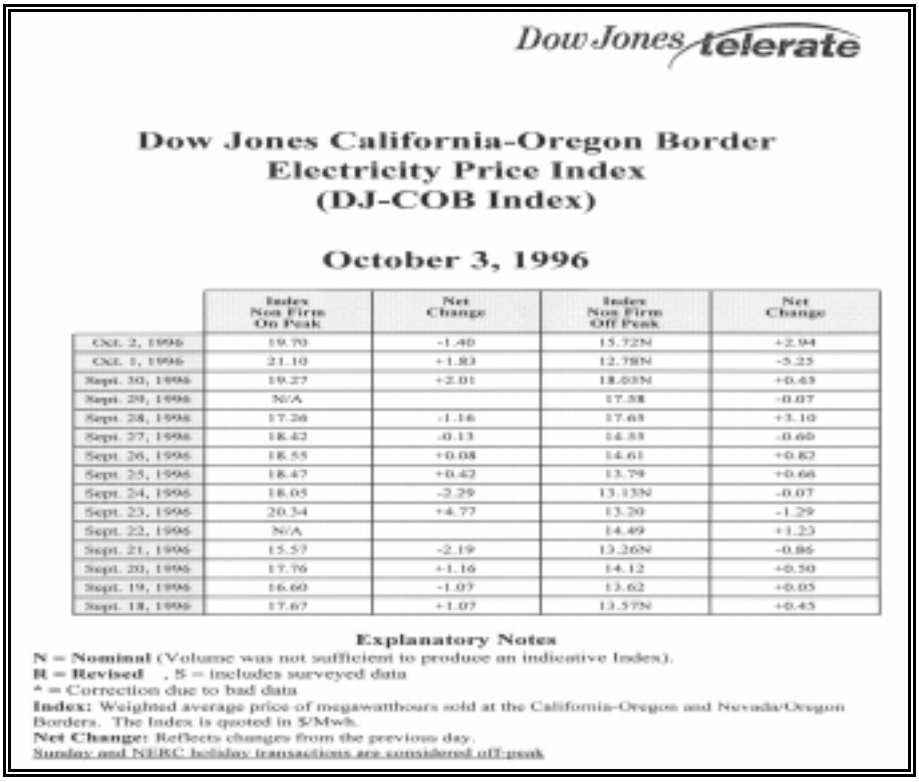
1. First Period: November 1, 1996 Through December 31, 1996.

The tariff language describing the index PSE was required to use beginning on the tariff's effective date, November 1, 1996, through the end of that year, says:

> "Index" in 1996 means COB less ½ mill/kWh. "COB" means the California-Oregon Border Revised Non-Firm Electricity Index prices last reported by Dow Jones to Dow Jones Telerate subscribers for on-peak hours and off-peak hours for each day of the relevant billing month.

PSE points out in its brief that "Dow Jones has never published an index labeled the 'COB Revised Non-Firm Electricity Index.'" PSE Initial Brf. at 14. PSE contends this makes the provision ambiguous. Staff describes PSE's contention as "innovative" considering that PSE is "the party responsible for drafting Schedule 48." Staff Reply Brf. at 1. Innovative or not, PSE's contention does not stand up under examination.

There was only one COB index in 1996. Ex. 330T at 3:1-12 (Wolverton);TR. 202:15-17 (Silliere); TR. 406:6-9 (Omohundro). Figure 1 is a representative copy of this index. The label or title on this index is the "Dow Jones



Dow Jones telerate

Dow Jones California-Oregon Border Electricity Price Index (DJ-COB Index)

October 3, 1996

	Index Non Firm On Peak	Net Change	Index Non Firm Off Peak	Net Change
Oct. 2, 1996	19.70	-1.40	15.72N	+2.94
Oct. 1, 1996	21.10	+1.83	12.78N	-5.25
Sept. 30, 1996	19.27	+2.01	18.03N	+0.63
Sept. 29, 1996	N/A		17.38	-0.07
Sept. 28, 1996	17.26	-1.16	17.63	+3.10
Sept. 27, 1996	18.43	-0.13	14.53	-0.60
Sept. 26, 1996	18.55	+0.08	14.61	+0.82
Sept. 25, 1996	18.47	+0.42	13.79	+0.66
Sept. 24, 1996	18.05	-2.29	13.13N	-0.07
Sept. 23, 1996	20.34	+4.77	13.20	-1.29
Sept. 22, 1996	N/A		14.49	+1.23
Sept. 21, 1996	15.57	-2.19	13.26N	-0.86
Sept. 20, 1996	17.76	+1.16	14.12	+0.50
Sept. 19, 1996	16.60	-1.07	13.62	+0.05
Sept. 18, 1996	17.67	+1.07	13.57N	+0.45

Explanatory Notes

N = Nominal (Volume was not sufficient to produce an indicative Index).
R = Revised , S = includes surveyed data
* = Correction due to bad data
Index: Weighted average price of megawatthours sold at the California-Oregon and Nevada/Oregon Borders. The Index is quoted in $/Mwh.
Net Change: Reflects changes from the previous day.
Sunday and NERC holiday transactions are considered off-peak

Figure 1

California-Oregon Border Electricity Price Index (DJ-COB Index)." Yet, the sheet bears other, prominent labels that identify the data portrayed as "Non-Firm" and "On Peak" or "Off Peak." Some of the data are identified further as being "revised" to correct for bad initial data. With reference to Figure 1, it is obvious that Schedule 48 does not simply identify the DJ-COB Index by its primary title or label, but refers to the nature of the data reflected: that is, daily, revised, non-firm electricity prices for peak and off-peak periods at the California-Oregon border, as reported by Dow Jones to its subscribers. When we look at Figure 1, we have no trouble understanding that this is exactly the index referred to in Schedule 48. Since Dow Jones published in 1996 only this one index for transactions at the California-Oregon Border delivery point, it is impossible that Schedule 48 refers by its relevant terms to any other index. Most significantly, despite PSE's assertion that the language is ambiguous, neither PSE nor any other party disputes that this was the index PSE was required to apply during 1996.

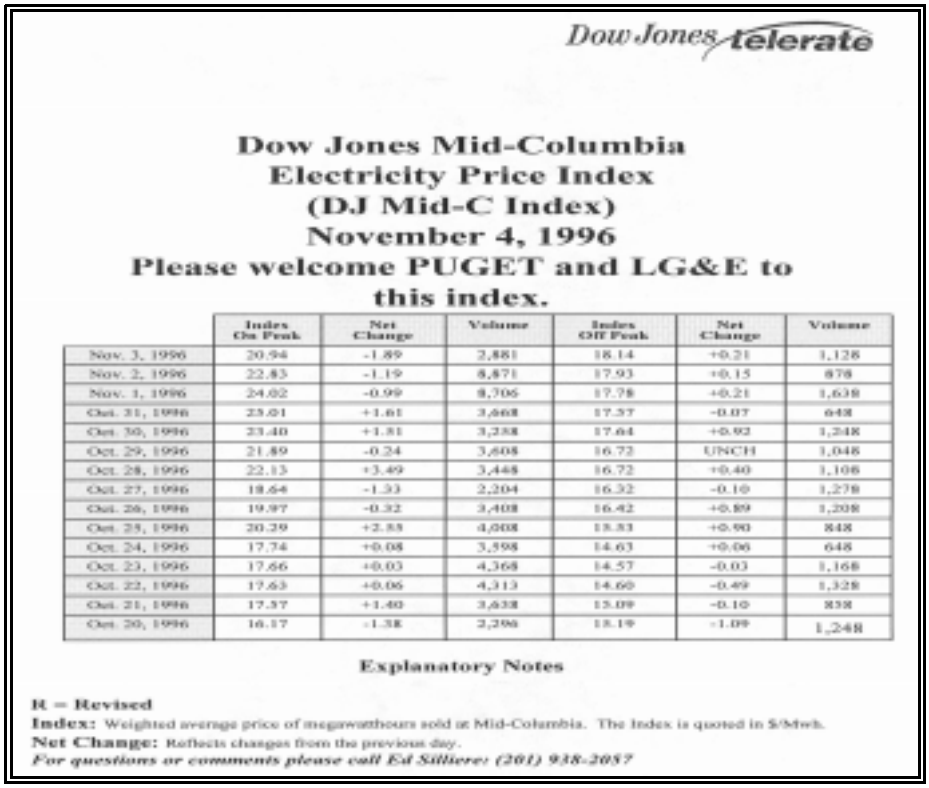
This brief discourse relative to an uncontested period of relations under Schedule 48 is important because it underscores the principle that requires us to look at all of the words in these provisions and not focus unduly on one word or some select set of words. *State ex rel. Royal v. Board of Yakima County Comm'rs,* 123 Wn.2d 451, 459, 869 P.2d 56 (1994); *King County v. Central Puget Sound Growth*

Management Hearings Board, 91 Wn.App. 1, 16 (Div. 1 1998). Considered together, all of the words used to define "COB" describe in considerable detail and leave no doubt about the index that applied under Schedule 48's terms during 1996. This might have proved important had Dow Jones gone forward, as planned, with a firm index at COB. TR. 202:6-17 (Silliere). Then, it would have been particularly important that the tariff not simply refer to the "Dow Jones COB Electricity Price Index." By including descriptive language in addition to the principal label Dow Jones placed on the index, the tariff is more precise, not less precise, and we are more certain of the tariff's meaning, not less certain.

We find that Schedule 48 does not mislabel the 1996 (COB) index and thereby create an ambiguity, as PSE asserts. Likewise, as further explained in the next section, we find that the post-1996 index (the Mid-Columbia index), in unambiguous. The tariff describes the index in plain and clear terms. It would be clear to anyone looking at Dow Jones' publications precisely which index among several that might become available was meant to apply during particular periods. The language in the sentence describing the 1996 index is identical to the language in the very next sentence which describes the post-1996 index, except in terms of the transaction point identified. Yet, PSE asserts that the meaning of "non-firm" varies materially from the one sentence to the next. We reject this assertion. What the tariff unambiguously provides is that the designated post-1996 index would reflect Mid-Columbia non-firm transactions (according to Dow Jones's criteria) just as the 1996 index reflected non-firm transactions (according to the same criteria) at the California-Oregon border. Unfortunately, as we discuss below, Dow Jones did not begin publishing such an index on January 1, 1997.

2. Second Period: January 1, 1997 Through May 31, 1998.

Schedule 48 required a change from the Dow Jones COB index on January 1, 1997, and PSE, in fact, made a change from the COB index on that date. Specifically, PSE began using the only Dow Jones index available for the Mid-Columbia at that time, the index we have labeled for purposes of this Order the Undifferentiated Mid-C Index. Dow Jones first published this index in May 1996, so it was in existence when the parties negotiated Schedule 48's terms and all during the pendency of the Commission's review of the rate schedule during the summer and fall of 1996. Ex. 41T at 1:16-18 (Silliere). Yet, as discussed above, this was not the index described in



Dow Jones telerate

Dow Jones Mid-Columbia Electricity Price Index (DJ Mid-C Index) November 4, 1996

Please welcome PUGET and LG&E to this index.

	Index On Peak	Net Change	Volume	Index Off Peak	Net Change	Volume
Nov. 3, 1996	20.94	-1.89	2,881	18.14	+0.21	1,128
Nov. 2, 1996	22.83	-1.19	8,871	17.93	+0.15	878
Nov. 1, 1996	24.02	-0.99	8,706	17.78	+0.21	1,638
Oct. 31, 1996	23.01	+1.61	3,668	17.57	-0.07	648
Oct. 30, 1996	23.40	+1.81	3,238	17.64	+0.92	1,248
Oct. 29, 1996	21.89	-0.24	3,608	16.72	UNCH	1,048
Oct. 28, 1996	22.13	+3.49	3,448	16.72	+0.40	1,108
Oct. 27, 1996	18.64	-1.33	2,204	16.32	-0.10	1,278
Oct. 26, 1996	19.97	-0.32	3,408	16.42	+0.89	1,208
Oct. 25, 1996	20.29	+2.33	4,008	15.53	+0.90	848
Oct. 24, 1996	17.74	+0.08	3,598	14.63	+0.06	648
Oct. 23, 1996	17.66	+0.03	4,368	14.57	-0.03	1,168
Oct. 22, 1996	17.63	+0.06	4,313	14.60	-0.49	1,328
Oct. 21, 1996	17.57	+1.40	3,638	15.09	-0.10	838
Oct. 20, 1996	16.17	-1.38	2,396	15.19	-1.09	1,248

Explanatory Notes

R = Revised
Index: Weighted average price of megawatthours sold at Mid-Columbia. The Index is quoted in $/Mwh.
Net Change: Reflects changes from the previous day.
For questions or comments please call Ed Silliere: (201) 938-2057

Figure 2

Schedule 48; Figure 2 illustrates the Undifferentiated Mid-C Index which clearly does not break out non-firm transactions, in contrast to the COB Index illustrated in Figure 1. The Undifferentiated Mid-C Index simply is not a non-firm index as Dow Jones defined that term in 1996, or at any time since 1996. Ex. 40T at 3:7-4:3; Ex. 41T at 1:19-2:12 (Silliere).[1] Just as we have no difficulty looking at the Dow Jones COB non-firm index in Figure 1 and ascertaining readily that it is what is described by the language in Schedule 48 for initial application, we have no difficulty finding that the Dow Jones Mid-Columbia index in Figure 2 is *not* what is described by the language in Schedule 48 for application *after* January 1, 1997.

[1] PSE offers extensive argument to the effect that "firm" and "non-firm" are elusive terms with various meanings in the industry, none of which matches Dow Jones' definition. PSE Initial Brf. at 50-54. The argument is misplaced. It is clear beyond doubt that Schedule 48 requires the energy cost component to be priced by reference to an index prepared by an impartial third party; by preference, the highly regarded Dow Jones organization. Those who conduct business under the tariff necessarily give to the third party the freedom to define the index in all its particulars. We note, too, that Dow Jones developed its indices in consultation with industry participants, including PSE. Ex. 40T at 4:19-20, Ex. 41T at 1:8-15.

Complainants and Staff say PSE's adoption of the Undifferentiated Mid-C Index on January 1, 1997 was unlawful. They contend that Dow Jones simply did not publish an index that meets the Schedule 48 description:

> Mid-Columbia Revised Non-Firm Electricity Index prices, last reported by Dow Jones to Dow Jones Telerate subscribers for on-peak hours and off-peak hours for each day of the relevant billing month . . ..

In Complainants' and Staff's view, PSE either should have worked with the customers to achieve unanimous approval of a substitute index, or should have returned to the Commission for some revision to Schedule 48 in light of the anticipated index not being available when needed. Complainants' Initial Brf. at 8-9; Staff Initial Brf. at 22.

PSE disagrees. PSE argues that Schedule 48 calls for PSE to use an index labeled "Dow Jones Mid-Columbia Revised Non-Firm Electricity Index," and claims no such index ever has existed. PSE argues this means the tariff is ambiguous and that we should apply standard aids to statutory construction to interpret the language quoted above. From PSE's interpretation we should conclude that PSE's use of the Undifferentiated Mid-C Index "was appropriate and lawful." PSE Initial Brf. at 13. In other words, PSE contends it is reasonable for us to find that the Undifferentiated Mid-C Index is the index described in Schedule 48. Alternatively, PSE claims the tariff gives PSE the unilateral right to choose and apply a substitute index at any time after 1996. *Id.*

a. The Express Index Provisions

We already have concluded that the language in Schedule 48 which describes the specific index intended to apply beginning January 1, 1997, is unambiguous. What the tariff requires by its terms is that PSE use an index tied to the Mid-Columbia delivery point, but otherwise identical in all material respects to the Dow Jones COB non-firm index applied during 1996. That would be an index that includes only transactions interruptible at any time, for any reason. That is the definition Dow Jones consistently has used for non-firm energy both at COB and at Mid-Columbia. Ex. 40T at 1:8-15, 3:10-12 (Silliere); TR. 208:10-18, 227:5-23 (Silliere). There is no dispute that Dow Jones did not publish such an index on January 1, 1997. Indeed, Dow Jones produced no such index until June 1, 1998.

It is true, as PSE observes, that the tariff does not specify what must happen under these circumstances. The tariff may be less than comprehensive, in the sense that it does not expressly contemplate every conceivable circumstance, but lack of completeness does not in itself make the tariff ambiguous. Nor does it mean we should read into the tariff provisions that are not there, no matter how desirable it might be to have a solution at hand. Sitting judicially as we do now, we may not add

language to a tariff we approved in our legislative capacity any more than a court may add language to a statute, even if the court believes the legislature intended something particular but failed to express it adequately. *See Adams v. DSHS,* 38 Wn. App. 13, 16, 683 P.2d 1113 (1984). Thus, we cannot retrospectively read criteria into the index provision that applies "after 1996" so that it can be said to have encompassed on January 1, 1997, an index other than the one that was contemplated in 1996 when we approved Schedule 48. It would be particularly inappropriate for us to read into the tariff an idea that did exist at the time the tariff was approved but that was not incorporated into the tariff at the time of approval.

Although not necessary to our determination, it is significant that if we accept *arguendo* that the tariff's index provisions are ambiguous and look to other evidence to construe the terms, we find the record corroborates our earlier findings and conclusions. Indeed, we find the overwhelming weight of the evidence about what specific index the tariff designates for use after 1996 supports the same result we reach by limiting ourselves to reading the plain language in Schedule 48.

As Complainants relate in their Reply Brief, the lead negotiators for both PSE and its customers acknowledge that the non-firm index specified for use after 1996 did not exist when Schedule 48 was negotiated, but both PSE and Complainants operated in good faith under a belief that such an index would be published. Ex. 400D at 38:20-41:9, 42:9-20 (Davis Deposition); Ex. 340T at 4:1-10 (Canon). Mr. Davis, PSE's lead representative both during the negotiation of Schedule 48 and two precursor special contracts which became the basis for Schedule 48, testified on deposition, as follows:

> Q. Why did the index change in 1996 from – at the end of 1996 from COB to Mid-C? In other words, why did the tariff provide for a switch in the index?
>
> A. As I testified to earlier, what the customers had bargained for and received agreement from the company to receive non-firm energy at Mid-C. But that index did not exist at the time the agreements were reached. So we started with COB non-firm, with a transfer to Mid-C when it became available, or it was contemplated it would become available.
>
> Q. Was it contemplated that beginning in 1997 the Dow Jones would publish both a firm and non-firm price for Mid-C?
>
> [Objection by PSE counsel: Vague as to who was doing the contemplating]

> A. The parties discussed the likelihood of that occurring, but it obviously was not something that either side knew to be a fact or we wouldn't have started with COB non-firm. It was contemplated that a Mid-C non-firm index would eventually come about.

Ex. 400T at 38:20-39:14. Mr. Canon, Complainant's chief negotiator, testified:

> The Mid-Columbia Non-Firm Electricity Index was the specific index the parties to the negotiations agreed to use in determining the price of service under Schedule 48. When Schedule 48 was initially implemented, the California-Oregon Border ("COB") Non-Firm Electricity Index was used because the Mid-Columbia Non-Firm Electricity Index was not yet in existence. However, the parties to the negotiations believed that the Mid-Columbia Non-Firm Electricity Index would be created at some point after the adoption of Schedule 48, and the parties to the negotiations structured the agreement so that the Mid-Columbia Non-Firm Electricity Index would be applied on January 1, 1997.

Ex. 340T at 4:3-10.

When the Commission's staff inquired into the matter during the proceedings that led to Schedule 48's approval, Mr. Heidell responded for PSE that:

> The pricing of non firm energy is based upon an index price plus adjustments . . .. There are no workpapers related to the proposal for using the COB/Mid-Columbia Index as the proxy for incremental power costs. The Company selected these indices based upon 1) professional judgment that these indices reasonable (sic) reflect incremental power costs in the Puget Sound region and 2) that the index price should be non-controversial and easily verified by all parties. . . . We propose to switch to Mid-Columbia when the externally published index is available and actively used since we believe the Mid-Columbia delivery point is more reflective of Puget Sound energy market.

Ex. 203 (PSE's response to staff data request no. 13 in Docket No. UE-960696). In light of this evidence, we do not give credence to the argument PSE makes that "actual data the parties used to construct Schedule 48's pricing mechanism supports PSE's position" that the Undifferentiated Mid-C Index was the one the parties intended would apply." PSE Initial Brf. at 30-33. Nor do we find on point the testimony PSE cites to

support this argument. Even if broad-based market data were considered by PSE for some purposes during 1996 in connection with Schedule 48's development, it is clear from Exhibit 203 that these data were not used to select the price indices named in the tariff.

We find equally unpersuasive PSE's argument that Schedule 48 must have been meant to refer to the Undifferentiated Mid-C Index because industry definitions of non-firm energy and PSE's definition were consistent with the Undifferentiated Mid-C Index in 1996. The argument is misplaced. All that mattered then, and all that matters now is how Dow Jones defines and uses the terms. It is Dow Jones's indices to which the tariff refers and it is Dow Jones's definitions and practices that control.

b. The Index Substitution Provisions

The Undifferentiated Mid-C Index in existence during the Schedule 48 negotiations and throughout the approval process--the index PSE began using on January 1, 1997--is not the index identified in Schedule 48 for use after 1996. The index identified in Schedule 48 for use after 1996 did not exist on January 1, 1997. It follows from the tariff's structure that PSE was permitted to use the Undifferentiated Mid-C Index only if it properly substituted that index for the unavailable Mid-C Non-Firm Index. It is noteworthy, and further corroborates our analysis and findings above, that Ms. Omohundro testified consistently that PSE's use of the Undifferentiated Mid-C Index, in fact, was predicated on the index substitution provisions. TR. 414:3-14 (Omohundro). Ms. Omohundro's affidavit in support of PSE's Motion for Summary Determination states:

> On January 1, 1997, when PSE was required to switch to the Mid-Columbia Index under the terms of Schedule 48, there was no Dow Jones "Mid-Columbia Revised Non-Firm Electricity Index."
>
> The language in the Schedule 48 tariff allows PSE to use "such other, similar, published or verifiable index which reflects commodity electric energy prices in the Pacific Northwest, as determined by PSE . . . ." Applying these provisions of the tariff, PSE selected the only Mid-Columbia index reported by Dow Jones at the time, the "Dow Jones Mid-Columbia Electricity Price Index" (the "Mid-C Index").

Affidavit of Christy A. Omohundro at 2:4-12.

Ms. Omohundro's affidavit, however, focuses on only part of the index substitution language. We quote all of the relevant tariff language again below, emphasizing by italics the language on which we now focus:

> After 1996, "Index" means the Mid-Columbia Revised Non-Firm Electricity Index prices, last reported by Dow Jones to Dow Jones Telerate subscribers for on-peak hours and off-peak hours for each day of the relevant billing month *or such other, similar, published or verifiable index which reflects commodity electric energy prices in the Pacific Northwest, as determined by the Company. . . .*
>
> *If the Company and all of the Customers to which this Schedule is available pursuant to its terms agree that the Mid-Columbia Revised Non-Firm Electricity Index prices are not representative of non-firm electricity transaction pricing in the region, the Company will seek to obtain written agreement with all such Customers upon an index that is representative of non-firm electricity transaction pricing in the region, and if such agreement is obtained, then from and after the date of such agreement "Index" will mean that agreed-upon index.*

The parties dispute whether this language is plain and unambiguous. Complainants argue there is but one "reasonable interpretation" of the provisions and it is that "they create one mechanism to change the index, and that mechanism requires customer consent." Complainants' Initial Brf. at 12. Complainants contend that PSE's reading of the first clause as giving PSE a unilateral right to change the index anytime after 1996 renders the balance of the tariff substitution language meaningless, contrary to the principle that statutes must be read as a whole to harmonize and give effect to all their provisions. Despite this, Complainants say that "Schedule 48 is arguably ambiguous" in regard to index substitution. *Id.* at 13. Complainants then focus their argument on the extrinsic evidence they assert demonstrates that there should be but one (consensual) index-substitution mechanism.

PSE says this language unambiguously establishes two separate mechanisms by which a substitute index may be selected. PSE Initial Brf. at 16. PSE claims under the first clause a unilateral "right to select a substitute index any time after 1996," so long as the index PSE selects is--again in PSE's sole opinion--similar to the specified index, published or verifiable, and reflects commodity energy prices in the Pacific Northwest. *Id.* PSE adds that "[u]nder the terms of the Commission's order approving Schedule 48, the index also must result in compensatory rates." *Id.* PSE claims that the customer consent paragraph is a separate mechanism by which a new

index may be substituted without the limitations PSE claims are imposed under the first mechanism. *Id.* at 19. PSE argues that to accept the alternative reading urged by Complainants and Staff would be to nullify the clause under which PSE claims a unilateral right to change the index. *Id.* at 17

Staff argues in the same vein as Complainants and contends that to accept PSE's reading, the Commission would render meaningless the full paragraph following the clause on which PSE's claim rests. Staff argues the evidence supports but one harmonized reading of the full set of index-substitution language. Staff relies in this connection on Mr. Davis's explanation that the first clause allowed PSE to bill customers on an interim basis during the period it sought to achieve customer agreement to a new index under the customer consent paragraph. If agreement could not be achieved, Staff argues, the parties would have to resort to the Commission for resolution.

On its face, the tariff language we quote above certainly is not "crystal clear," as Staff asserts. Staff Reply Brf. at 4. PSE urges a very different reading of the same language, yet says "[i]t is difficult to imagine how the language could be more clear on this point." PSE Initial Brf. at 16. The only thing that is perfectly clear is that this language is not a model of clarity; it is, in a word, ambiguous.

We follow the principles that when construing tariff language we must effect the Commission's intent in approving it and avoid a literal reading if that would result in unlikely, absurd, or strained consequences. *Whatcom County v. Bellingham,* 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (citing *State v. Elgin,* 118 Wn.2d 551, 555, 825 P.2d 314 (1992); *Wright v. Engum*, 124 Wn.2d 343, 351, 878 P.2d 1198 (1994). As the Court observes in *Whatcom County v. Bellingham* "[t]he purpose of an enactment should prevail over express but inept wording." *Id.* In addition, we must read the tariff, just as we read a statute, to harmonize and give effect to all its provisions. *King County v. Central Puget Sound Growth Management Hearings Board,* 91 Wn.App. 1 (Div. 1 March 2, 1998); *State ex rel. Royal v. Board of Yakima County Comm'rs,* 123 Wn.2d 451, 459, 869 P.2d 56 (1994) (quoting *Service Employees Int'l Union, Local 6 v. Superintendent of Pub. Instruction,* 104 Wn.2d 344, 348-49, 705 P.2d 776 (1985) (quoting *Washington State Human Rights Comm'n v. Cheney Sch. Dist. No. 30,* 97 Wn.2d 118, 121, 641 P.2d 163 (1982))).

One primary difficulty we have with PSE's interpretation of this language is that if PSE had the right it claims to substitute a new index any time it pleases, PSE would have no reason ever to attempt to achieve agreement on any substitute index; PSE's apparent obligation to work with the customers would be illusory and hence, meaningless. That is an unacceptable result both under principles of statutory construction and as a matter of contract construction. *City of Seattle v. Dept.*

of Licensing and Insurance, 136 Wn.2d 693, 701, 965 P.2d 619 (1998); *Whatcom County v. City of Bellingham,* 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

PSE claims its reading of the language is reasonable because PSE's discretion is expressly limited by certain criteria specified in the first clause that any substitute index must meet (*i.e.,* index must be similar, published or verifiable index which reflects commodity electricity prices in the Pacific Northwest). We find to the contrary. The reading urged by PSE would give the company unreasonably broad discretion because the supposed "criteria" do not limit PSE's choices in any meaningful way. The criteria are more qualitative and subjective than quantitative and objective; there is no meaningful test of "similar" or "reflects." This renders the criteria meaningless as a check on a unilateral right. Under PSE's analysis of "verifiable," it need only be the case that parties be able to confirm the accuracy of whatever numbers are included in whatever index PSE selects. It is difficult to conceive of any index that would not meet that criterion. Again, it is meaningless as a check against the exercise of a unilateral right.

PSE argues that adopting Complainants' reading of the tariff's index-substitution provisions "leaves PSE . . . at the mercy of a non-regulated news organization," and leaves PSE's "customers with the right to force it to sell energy at below cost prices" because it is highly unlikely unanimity among the customers ever could be achieved. On the first point, as Staff points out, reference to a price index prepared by an independent, third party "is exactly what the parties intended." Staff Reply Brf. at 7. Complainants echo the point that "an independent pricing mechanism is exactly what Schedule 48 customers bargained for and received." Complainants' Reply Brf. at 4. We agree with Staff and Complainants.

PSE's second point is a *non sequitur.* PSE's customers have no right to force PSE to do anything. If the tariff is violated or becomes untenable, the customers' only recourse is to bring a complaint to enforce it, or to ask us for relief from the tariff, as PSE's own brief suggests. *See* PSE Initial Brf. at 18. Therein, too, is the obvious answer to both of PSE's alleged concerns: if the index in effect at any point in time ceases to be viable in light of market conditions or PSE's particular circumstances, and the parties cannot agree to an alternative, PSE always has the right to seek Commission intervention to remedy the situation.

The central question is how the Commission intended the index substitution provisions to work. We can say with certainty that the Commission would not approve PSE having a right to unilaterally change the index under this rate schedule. It was unusual that the Commission approved a mechanism whereby the index could be changed via unanimous consent among PSE and the customers to whom Schedule 48 applies. The Commission allowed this method because of the tariff's purpose to enable "market-like" relationships between Puget and its customers, and because of the customers' sophistication and desire for the tariff. It would have

been entirely inappropriate for the Commission to approve a mechanism that would give PSE the unilateral right it claims here.

We find substantial and persuasive evidence that the index substitution provisions mean that PSE can propose a new index to substitute for the Mid-Columbia Revised Non-Firm Index after January 1, 1997, but PSE must achieve agreement from the customers before using a substitute index. In the meantime, the Mid-Columbia Revised Non-Firm Index, or a previously substituted index to which the customers had consented, would continue to apply. We note also that PSE would be required under Chapter 80.28 RCW to file revised tariff sheets to reflect any change from an expressly identified index to a substitute index.

Testimony by the chief negotiators of Schedule 48--Mr. Canon for the customers and Mr. Davis for PSE--establishes that the parties agreed and submitted for Commission approval what they considered at the time to be a single mechanism for change, a mechanism that required customer consent. Ex. 340T (Canon) 7; Ex. 400D (Davis deposition) 44-47. As Complainants relate in their Initial Brief:

> The drafts of Schedule 48 show that the 'other such similar' index language was included in the initial tariff language proposed by PSE. Ex. 400D, Davis Deposition at Ex. 2, page 9. The customers were concerned that this language created a unilateral right to change the index, and they suggested language to require customer consent. Ex. 96; Ex. 340T, Canon Direct at 7, lines 15-19. The provision requiring customer agreement was added later to address the customers' concerns about the 'other such similar' index language. Ex. 400D, Davis Deposition at 45, lines 12-18. In other words, the customers were concerned that the 'other such similar' index language might be read as creating a unilateral right to change the index; therefore, the customers negotiated the mandatory customer agreement language. Ex. 340T, Canon Direct at 7, lines 16-19.

Complainants' Initial Brf. at 13. Reading the two passages together and putting them in the context of our overall statutory scheme, we find and hold that PSE may propose a new index under appropriate circumstances, but it is only through mutual consent and Commission approval of revised tariff sheets that identify the substitute index that such an index actually may be implemented.

c. Customer Consent

Although we find that a substitute index for the Dow Jones Mid-Columbia Revised Non-Firm Index may not be used unless there is unanimous agreement among PSE and the Rate Schedule 48 customers, that does not quite bring to a close our analysis of the January 1, 1997, through May 31, 1998, period. Undoubtedly, PSE did not consult with and achieve express affirmative agreement to use the Undifferentiated Mid-C Index on January 1, 1997. But PSE raises the question whether the customers' acquiescence to PSE's use of that index, at that time, is tantamount to consent under the tariff.

PSE argues that "even if PSE were required to obtain the consent of the Schedule 48 customers to apply the Mid-Columbia Electricity Price Index, it did." PSE Initial Brf. at 22. This argument is based on the facts that "PSE notified customers of the change, calculated customers' rates based on this index and sent customers' bills based on those rates, and customers paid their bills without quarrel for 17 months." PSE argues that even if Schedule 48 is construed to require customer consent for a substitute index to be used, "the Mid-Columbia Electricity Price Index became the lawful rate in January 1997." *Id.*

Staff disputes that the customers' silence constitutes agreement to use the Mid-Columbia Electricity Price Index under the collaborative index substitution mechanism. Staff argues PSE did not establish that it had notified the customers of its application of the Mid-Columbia Electricity Price Index, citing Ms. Omohundro's testimony at TR. 411 that she did not know whether anyone at PSE personally notified the customers in January 1997 that PSE would apply "the Mid-Columbia Blended Index [Undifferentiated Mid-C Index] as opposed to the Mid-Columbia Non-Firm Index, which is contained in the tariff." We do not find this colloquy persuasive of Staff's point. Indeed we are somewhat nonplused at any suggestion that the customers were not aware of what index PSE began using on January 1, 1997. The customers who take service under Schedule 48 are major corporations with highly sophisticated employees; they routinely are aided in the conduct of their business by very able consultants and counsel. *See e.g.,* Ex. 340T at 2: 1-11 (Canon); Exs. 346, 347 (memoranda from ICNU Executive Director to members, including Complainants). It is all but inconceivable that the customers were not fully aware at all times that PSE was using the Dow Jones Mid-Columbia Electricity Price Index in the absence of any Dow Jones Mid-Columbia Revised Non-Firm Index being available.

At least one Schedule 48 customer, Texaco, was in active communication with PSE regarding the index pricing used as of January 1, 1997; the evidence shows Texaco's intention as of early 1997 to actively monitor PSE's index pricing practice on a regular basis. PSE Initial Brf. at 35 (citing Exs. 360C, 361C). Exhibit 351C suggests Boeing, too, monitored and analyzed pricing under Schedule 48 and was aware of what index PSE was using during 1997. We emphasize that we do not accept the factual inference PSE wishes us to draw from this evidence--that the Undifferentiated Mid-C Index is, in fact, what the tariff means when it identifies the Dow

Jones Mid-Columbia Revised Non-Firm Index. We already have discussed and rejected that argument. The evidence we cite here merely supports the all but undisputed fact that the customers knew about and acquiesced to PSE's use of an index other than the Dow Jones Mid-Columbia Revised Non-Firm Index on January 1, 1997, and for the next seventeen months. The question then becomes whether, by their acquiescence, the customers effectively agreed to a substitute index under the tariff's terms.

Acquiescence can be construed to equal consent. *Board of Regents of the University of Washington v. Seattle,* 108 Wn.2d 545, 552-54, 741 P.2d 11 (1987); *Huff v. Northern Pac. Ry.,* 38 Wn.2d 103, 114-15, 228 P.2d 121 (1951). As the Court observes in *Huff,*:

> Where a party knows what is occurring and would be expected to speak, if he wished to protect his interest, his acquiescence manifests his tacit consent.

38 Wn.2d at 114-15.

We are persuaded to apply this principle here in light of the facts related above. In doing so, we are mindful that neither PSE nor the customers would have wanted to return to the Commission with a dispute about the rate schedule's novel index pricing just two months after obtaining approval of Schedule 48. Indeed, the transcripts of the Commission's deliberations over Schedule 48 (*see* Ex. 91) show the caution with which the Commission approved its innovative rate design. The Commission's Order approving Schedule 48 included conditions that put everyone on notice that the Commission might initiate proceedings at any time on sixty days' notice to consider whether to allow Schedule 48 to continue. PSE and the customers undoubtedly were aware of the fragile nature of the rights they had been afforded by the Commission's approval of Schedule 48. Even as late as the fall of 1998, when this dispute matured, the parties expressed concerns about bringing a controversy about index pricing to our attention. Ex. 103 (notes re 9/17 PSE/ICNU meeting); TR. 390:12-24 (Omohundro). It is all the more reasonable under these circumstances to find that the customers' failure to object to PSE's use of the Undifferentiated Mid-C Index was tantamount to affirmative consent under the tariff's index-substitution provisions.[2]

d. Related Statutory and Regulatory Requirements

[2] Although we find acquiescence tantamount to consent under the tariff's terms and do not need to consider the point in detail, we note that the elements of equitable estoppel all are present here: 1) (acquiescence) inconsistent with a claim afterwards asserted; 2) action by another in reasonable reliance on the act; and 3) injury to the relying party if the other party is allowed to contradict the prior act.

There is one final point in this connection. In the context of our general authority over rates, reflected in our governing statutes and rules, implementation of a substitute index under Schedule 48 requires notice to, and approval by, the Commission. *See* Complainants Initial Brf. at 14, note 2; *See also,* RCW 80.28.050, .080, and WAC 480-80-120. Thus, when PSE decided to use the Undifferentiated Mid-C Index beginning January 1, 1997, PSE *should have* obtained written agreement from its customers and *should have* filed that agreement with the Commission together with revised tariff sheets that specifically identify the index to be used prospectively, subject to Commission approval.

Although PSE did not follow the procedure we outline above, it is appropriate under the circumstances of this case to find and conclude that PSE's adoption of the Undifferentiated Mid-C Index on January 1, 1997, was permitted under the index-substitution provisions of Schedule 48 in the absence of any objection from the customers. In addition, we find and conclude on the basis of the current record that the rates PSE charged during the period January 1, 1997 through May 31, 1998, were lawful rates. Thus, there was no violation of the filed rate doctrine during that period and there are no consequences to be assessed against PSE for that period. Since we agree with PSE that it charged a lawful rate during the period January 1, 1997 through May 31, 1998, we do not reach PSE's alternative argument that if the Mid-Columbia Electricity Price Index was not lawfully applied, the tariff requires the use of COB less ½ mill. PSE Initial Brf. at 37-41; Complainants Initial Brf. at 17, Reply Brf. at 17-20; Staff Initial Brf. at 23-24, Reply Brf. at 7-9.

3. Third Period: June 1, 1998 Through Present.

Prior to June 1, 1998, Dow Jones published the Undifferentiated Mid-C Index including both firm and non-firm transactions, as Dow Jones defines those terms. Beginning June 1, 1998, Dow Jones began publishing separate firm and non-firm indexes at Mid-Columbia and ceased publishing the Undifferentiated Mid-C Index. Dow Jones informed PSE of this change in April 1998. Ex. 47 (4/27/98 letter Silliere to Gaines). Mr. Silliere, of Dow Jones, testified he regarded this as "probably the most dramatic change or drastic change we made in our indexes." TR. 201:10-21. We find that as of June 1, 1998, Dow Jones ceased to publish the index that PSE had lawfully applied from January 1, 1997, under Schedule 48's index substitution provision. It follows that PSE had three choices on June 1, 1998: 1) PSE could apply the Mid-C Non-Firm Index as designated in Schedule 48; 2) PSE could work with its customers to achieve agreement to a new index to be applied prospectively; or 3) PSE could seek relief from the Commission via a tariff filing, or by other appropriate means.

PSE elected none of those choices. Instead, PSE calculated its own blended index while discussing with Dow Jones whether the organization would be willing to continue publishing the Undifferentiated Mid-C Index. TR. 174:10 -175:15 (Black); Ex. 36 (various PSE interoffice communications); Ex. 49 (7/6/98 e-mail Gaines to Omohundro and others); Ex. 204 (various PSE interoffice communications). Dow Jones said it would not continue to publish the Undifferentiated Mid-C Index, but would perform the calculations necessary to blend the new Mid-C Firm Index and Mid-C Non-Firm Index and provide that information to PSE, and others who might request it. *Id.;* Ex. 41T at 2:19-3:17 (Silliere). After gaining Dow Jones's agreement to calculate and provide to PSE a blended index (what we call here the Blended Mid-C Index), PSE elected to go forward using that index rather than the Mid-C Non-Firm Index. PSE did not discuss its decision with its customers, or indeed approach them at all until urged to do so by the Commission staff at an informal meeting one month after it put the new index into effect. TR. 415:3-416:13, 420:7-421:3 (Omohundro); Ex. 71T at 2:13-3:17 (Omohundro); *see generally* TR. 488-501 (Elgin). PSE met with the customers, but rejected a suggestion that PSE and the customers approach the Commission together. TR. 386:6-387:14 (Omohundro); Ex. 103 (notes from 9/17/98 PSE/ICNU meeting). The customers, accordingly, filed this complaint to challenge PSE's claim that it had the right to use the Blended Mid-C Index beginning June 1, 1998.

PSE argues now that the course of action it followed beginning June 1, 1998, is permitted under Schedule 48 either because "PSE is applying the same index it has applied since January 1997" (PSE Initial Brf. at 45), or because it had the right to unilaterally substitute the Blended Mid-C Index on that date. In fact, as we mention above, Dow Jones ceased publishing the Undifferentiated Mid-C Index on May 31, 1998. Mr. Silliere's testimony removes any doubt over this issue:

> In June of 1998 we separated the DJ-Mid-C index into firm and non-firm indexes. In doing so we also narrowed the scope on products we were looking to include. The index prior to June 1998 blended not only firm and non-firm but also pre-scheduled and real-time transactions of varying time periods. Following the split into firm and non-firm only pre-scheduled 16 hour blocks of either financially firm or physically firm would be used in calculating the DJ-Mid-C Firm On-Peak Index and only 8 hour blocks of financially firm or physically firm would be included in the DJ-Mid-C Firm Off-Peak Index. For the DJ-Mid-C Non-Firm Indexes we applied the same definition as we had in place for the DJ-COB Non-Firm Indexes–interruptible at any time, for any reason.

Ex. 40T at 3:12-4:1 (Silliere). PSE made special arrangements with Dow Jones whereby Dow Jones performs a calculation, or set of calculations to blend its new Mid-

C Firm Index and Mid-C Non-Firm Index, and provides that information to PSE for PSE's use under Schedule 48. We find that this privately published index is not the same as the blended index Dow Jones published prior to June 1, 1998 (*i.e.,* the Undifferentiated Mid-C Index). Describing the index PSE began using on June 1, 1998, Mr. Silliere testified:

> In June 1998, at PSE's request, we began publishing for use by PSE and several of its customers two composite indexes (on-peak and off-peak) that blended the new Dow Jones Mid-C Firm and Non-Firm Indexes. These composite indexes do not exactly match the original Dow Jones Mid-C on-peak and off-peak indexes: the combination of the new Dow Jones Mid-C Firm On-Peak Index and the new Dow Jones Mid-C Non-Firm On-Peak Index does not match the original on-peak index in that the new Dow Jones Mid-C Firm On-Peak Index includes only 16 hour block transactions of either financially firm or physically firm power and the Dow Jones Mid-C Non-Firm On-Peak Index includes only prescheduled 16-hour blocks of power whose delivery may be interrupted at any time for any reason and real-time non-firm transactions of the same power quality. The composite on-peak index no longer includes prescheduled transactions of shorter duration or non-firm transactions with a higher expectation of delivery. The same analysis applies to the new off-peak composite index as opposed to the pre-June 1998 Dow Jones Mid-C Off-Peak Index.

Ex. 41T at 3:3-17. Moreover, on cross-examination Mr. Silliere testified that PSE asked Dow Jones to continue calculating an "index that would represent the Mid-Columbia Electricity Index that was being discontinued" without any changes. TR. 220: 12-14, 16-18 (questions by Harris). Dow Jones recognized PSE was "hoping to obtain" an identical index, but "that couldn't be." TR. 220:23-23 (Silliere response). Even though Dow Jones could, and did, produce a blended index for PSE using the same form of calculation, the math was performed on a different set of transactions than included in the previously published index. Sometimes this difference reflected "a small number of transactions, but at times, they were significant, and at times they were not significant." TR. 221:7-9 (Silliere). Mr. Silliere testified that he could not confirm whether the overall effect of using a narrower set of transactions to determine prices under the new index would be "small or minor" (TR. 223:23-24 (question by PSE's counsel)) because he did not "have specific data to recalculate the index the way it existed prior to make that comparison." TR. 224:1-2(Silliere). Finally, Mr. Silliere testified that Dow Jones does not publish the index it prepares for PSE because "we felt that it would mislead the marketplace into thinking that we were still publishing the index the way it had been defined previously." TR. 227:1-4 (Silliere).

Because the Blended Mid-C Index PSE began using for Schedule 48 on June 1, 1998, is not the same as the Undifferentiated Mid-C Index Dow Jones published prior to June 1, 1998, and because it is a blended index and not the non-firm index expressly identified in the tariff, it is a new substitute index. Schedule 48 requires customer consent to the use of this new substitute index but, in this instance, the customers not only did not consent, they protested from the beginning. Accordingly, we conclude PSE's continuous use of this index since June 1, 1998, is unlawful. This requires us to consider what lawful rate should apply for the period since June 1, 1998.

We have come full-circle in a sense. Schedule 48 requires PSE to use either the index expressly identified for periods after 1996, or an agreed substitute index. In other words, if the Mid-Columbia non-firm index that Dow Jones began publishing on June 1, 1998, is the index expressly identified in the tariff, that index should have been used as of that date in the absence of an agreed substitute. The basic answer appears to us quite straightforward. There was no agreed substitute index on June 1, 1998. Schedule 48 therefore requires PSE to use the index expressly identified in the tariff. Albeit significantly later than the time the parties anticipated, Dow Jones did, in fact, publish at Mid-Columbia the index described in Schedule 48 on June 1, 1998.

PSE argues that regardless of whether the Mid-C Non-Firm Index is determined to be the index specifically identified in the tariff, it would violate our order approving Schedule 48 for PSE to apply that index today because this would result in "below cost pricing" and less than compensatory rates. PSE Initial Brf. at 45. PSE argues in essence that there must be a perfect, or near-perfect, match between what it actually pays in the wholesale market for energy purchased to meet Schedule 48 customers' needs and what those customers pay via a single component (*i.e.,* the energy cost component) of the overall rate they pay for retail sales service under the tariff. As Complainants and Staff argue, PSE's analysis is both flawed in its theory and unsupported by the evidence. Complainants' Initial Brf. at 26-27, Reply Brf. at 14-15; Staff Initial Brf. at 25-31, Reply Brf. at 9-12.

Staff points out that the energy cost component is only one component of the rate customers pay under Schedule 48. Staff Initial Brf. at 29. Recognizing their new status as non-core customers, Complainants also pay energy costs in the form of transition charges based on the historical demands the customers placed on PSE during the time prior to Schedule 48. *Id.* (citing Ex. 202, Schedule 48, page 48b; Ex. 200T at 17 [(Elgin)]). These transition charges recognize that PSE planned and acquired resources for these customers and that it would take time before PSE could restructure its energy portfolio to align its supply obligations to the customers' rights in their new status as Schedule 48 customers. The transition charges are based exclusively on an analysis of wholesale non-firm energy. Ex. 200T at 18:1-2. Thus, the transition charges contribute revenue that helps ensure PSE's rates remain compensatory. In addition, the published index price is marked up for losses

associated with delivery, includes a charge of 2.5 mills for ancillary services and margin, and is adjusted to compensate PSE for taxes and regulatory fee costs. Staff Initial Brf. at 29 (citing Ex. 202 (Schedule 48, Sheet 48d)); Ex. 301T at 4:1-7.

Mr. Schoenbeck, an industry expert offered by Complainants, provided testimony and analysis to rebut PSE's assertion that use of the Mid-C Non-Firm Index would produce less than compensatory rates. Mr. Schoenbeck sets the stage by pointing to relevant passages from the Commission's order that approved Schedule 48:

> 3. Compensatory Rates
>
> The Company maintains the rates in Schedule 48 cover fully embedded cost of non-power services , such as delivery service, demand-side management, and customer charges, as well as the cost of incremental nonfirm market-priced energy. Ultimately, however, the costs to serve these non-core customers could diverge from costs to serve current or core customers.
>
> The Commission here has required the Company to bear the burden of proof for demonstrating cost support for the rate charged for non-core service under Schedule 48. The Commission finds the safeguards established by this Order will enable it to ensure that Schedule 48 remains compensatory while the tariff is in effect.

Ex. 301T at 3:13-19 (quoting from Commission Order Approving Schedule 48 With Conditions (October 30, 1996)). Mr. Schoenbeck quotes further,

> The Company has agreed to provide Commission Staff and Public Counsel with monthly reports tracking Schedule 48. Because Commission Staff is unable to verify the Company's claim that Schedule 48 rates will be compensatory beyond the first two years, this information is essential to the continued operation of the tariff. The monthly reports will track the revenue differential between Schedule 48 and otherwise applicable rates under Schedules 31, 46 and 49 for both existing and future customers who would have taken their service under one of these three schedules. When combined with condition "(5) Review of Schedule 48," the Commission is satisfied the question whether Schedule 48 will remain compensatory can be resolved.

Id. at 4:13-18 (quoting from Commission Order Approving Schedule 48 With Conditions (October 30, 1996)). With that background, Mr. Schoenbeck next analyzes PSE's monthly reports through January 1999 and testifies that "[a]s of that point in time, [PSE] had received approximately $3.8 million of additional revenue from the customers under Schedule 48 than the otherwise applicable tariff charges." *Id.* at 5:3-5. Focusing on the period from June 1, 1998, through January 1999, Mr. Schoenbeck found the "Schedule 48 customers will still have paid approximately $1.8 million more than the otherwise applicable tariff charges." We note Mr. Schoenbeck's analysis is based on data furnished by PSE in response to various data requests, and find significant that PSE did not offer any independent analysis of these data. PSE did not show that using the Mid-C Non-Firm Index would render Schedule 48 rates less than compensatory as that term is recognized in the Commission's Order approving Schedule 48, or otherwise. We note, too, that PSE declined the opportunity to cross-examine Mr. Schoenbeck; his testimony stands unrebutted.

In light of this evidence we have no need to discuss at length the flawed premises underlying PSE's extensive arguments on this point. *See* PSE Initial Brf. at 45-50. We, however, do believe it is important to eliminate any potential for misunderstanding here and on a going-forward basis on two points. PSE argues that the concept of compensatory rates requires a match between PSE's energy acquisition costs and the energy component charged under Schedule 48. This argument is not credible. Our review of the Commission's deliberations in the Schedule 48 approval process and the Commission's Order approving the rate schedule shows that no such cost tracking was contemplated. It is clear from the record of the Commission's earlier proceedings that the Commission understood that rates with market-based price components tied to indices for non-firm power might result in a revenue loss to PSE. *See e.g.,* Ex. 91 at 49-58, 90-94. The potential problem appeared particularly significant when projected market rates were juxtaposed against PSE's energy supply portfolio costs. *Id.* The Commission was concerned that PSE would be tempted to make up all, or part of, the lost revenue from other customer classes. The Commission demanded reassurances that such cost shifting would not occur.

PSE offered such assurances by stating on the record that the rate structure under Schedule 48 would be compensatory. Most importantly, PSE committed to the Commission that PSE's shareholders would bear the full risk of revenue losses and the risk that Schedule 48 rates might prove less than fully compensatory. Ex. 200T at 20:14-21:12. Ms. Omohundro, for example, stated:

> Regarding your issue, Commissioner Gillis, I want to address the issue of rates being compensatory. What we have in Schedule 48 is an equal margin tariff whereby the delivery-based charges are based on the company's most recent cost of service, and the energy prices are based on nonfirm prices at the COB index so in that sense they're fully

> compensatory. On the other hand, the difference between those costs and the costs of the company's embedded power supply are totally the risk borne by shareholders and we've made that commitment to hold other customers harmless for those risks. So we would argue that they are fully compensatory.

Ex. 91 (transcript from Commission proceedings 9/25/96 in Schedule 48 approval process at 58). Asked later to elaborate further regarding the "hold harmless commitment" and "any revenue losses," Ms. Omohundro said it was

> Simply a commitment that those costs will not be shifted to other customer classes. What we're doing in this period of time is realigning our resources to match the cost of serving a noncore class of customers. We had to make the decision that the company's shareholders would bear the cost of that transition in that period, so we are here stating that we will not shift the risks of that realignment of costs to the core class of customers. To the extent that we have savings and we find savings in that realignment of costs we expect that that might help to mitigate the cost of schedule 48, and that's our challenge to mitigate those power supply costs to help pay for these schedule 48 contracts.

It is clear from this discourse, and further colloquy in the Docket No. UE-960696 record, that what PSE had in mind and conveyed to the Commission was the prospect that it would reduce its overall energy supply portfolio costs to offset the revenue losses it expected to experience under Schedule 48. PSE suggested that although other customer classes might receive no direct benefit from any across-the-board reductions to energy costs PSE might experience, other customers would benefit from the large industrial customers being kept on the system and paying a fully allocated share of PSE's fixed costs. Ex. 91 at 91-92.

There was no direct connection made between the index prices and particular costs PSE might incur as it "realigned its costs." If PSE succeeded in reducing its across-the-board supply costs enough, it would achieve alignment, or a "match" with its cost of serving Schedule 48 customers. If PSE did not achieve that much cost reduction, its shareholders would bear the shortfall. If PSE reduced its costs by even more than the amount of the anticipated revenue loss under Schedule 48, all customers might benefit from reduced costs, assuming PSE filed, or was required to file a rate case to capture the savings for its customers.

In sum, the present record does not establish that PSE's rates are, or will become, noncompensatory if PSE is required to peg the Schedule 48 energy

cost component to the Mid-C Non-Firm Index. If PSE remains of the view after this case that the Mid-C Non-Firm Index is not a viable index on a prospective basis, it may seek agreement with its customers to put a suitable substitute index in place. PSE may make an appropriate filing with the Commission to amend its tariff. Pending that, our decision here governs the parties and they must conduct themselves accordingly.

D. Decision.

PSE is obligated to administer its tariffs properly to ensure that its customers are charged only rates that are on file and lawfully established by the Commission. RCW 80.28.020, .050, .060, .080. Our governing statutes also provide:

> When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of said complaint, with interest from the date of collection of such overcharge.

RCW 80.04.230.

Since June 1, 1998, PSE has violated the terms of its tariff schedule 48 by charging its customers unlawful rates that exceed the filed rate approved by the Commission. Although PSE advances various equitable arguments urging us to exercise our discretion either not to order refunds, or to order only partial refunds, that would result in PSE retaining revenues it was not entitled to collect. We require PSE to refund to Complainants all overpayments calculated by applying the Mid-C Non Firm Index in lieu of the Blended Mid-C Index (as we have used those terms in this Order) to the customers' monthly bills from June 1, 1998, to the most current billing period during which overcharges occurred. We also require PSE to pay interest on the overpayments at the annual rate of 8.94%, which equals PSE's current overall rate of return.[3]

[3] Staff recommends this interest rate "because the overcharges to the Customers impact directly the Company's working capital. Since the Company is provided rate-base treatment on its working capital, the Customers are entitled to accrue interest at the overall rate of return. (Ex. 200T at 26)." It is reasonable to order interest at the overall rate of return in this case, but other interest rates may be more appropriate in other cases.

Considering the full context of this case, we do not find reason to impose penalties, as Complainants request. Nor do we find a basis to require PSE to pay Complainants' costs or attorney fees. It affords sufficient relief to put the parties where they would have been with respect to rates paid if PSE had administered Schedule 48 in accordance with its terms since June 1, 1998.

FINDINGS OF FACT

Based on our analysis, including the various underlying and subsidiary findings related therein, we enumerate here the principal findings of fact underlying our decision:

1. During the period November 1, 1996, through December 31, 1996, PSE was required to, and did, include in rates under Schedule 48 an energy cost component based on the index described as follows:

> "Index" in 1996 means COB less ½ mill/kWh. "COB" means the California-Oregon Border Revised Non-Firm Electricity Index prices last reported by Dow Jones to Dow Jones Telerate subscribers for on-peak hours and off-peak hours for each day of the relevant billing month.

2. On January 1, 1997, PSE was required under the terms of Schedule 48 to include in rates under Schedule 48 an energy cost component based either on the index described as follows:

> After 1996, "Index" means the Mid-Columbia Revised Non-Firm Electricity Index prices, last reported by Dow Jones to Dow Jones Telerate subscribers for on-peak hours and off-peak hours for each day of the relevant billing month,

or on a properly implemented substitute index.

3. On January 1, 1997, the index described in Schedule 48 for use "[a]fter 1996" did not exist.

4. On January 1, 1997, Dow Jones published an index that reflected both firm and non-firm transactions at the Mid-Columbia transaction point, but which did not differentiate between the types of transactions included. This Undifferentiated Mid-C Index was not the Dow Jones Mid-Columbia Revised Non-Firm Electricity Index expressly identified in Schedule 48.

5. Schedule 48 provides for the use of a substitute index if the designated index is unavailable or unviable, if the tariff's index-substitution requirements are satisfied. Schedule 48 provides that a substitute index is:

> such other, similar, published or verifiable index which reflects commodity electric energy prices in the Pacific Northwest, as determined by the Company. . .

and provides that such an index may be made effective according to the following procedure:

> If the Company and all of the Customers to which this Schedule is available pursuant to its terms agree that the Mid-Columbia Revised Non-Firm Electricity Index prices are not representative of non-firm electricity transaction pricing in the region, the Company will seek to obtain written agreement with all such Customers upon an index that is representative of non-firm electricity transaction pricing in the region, and if such agreement is obtained, then from and after the date of such agreement "Index" will mean that agreed-upon index.

6. On January 1, 1997, in the absence of the index expressly identified in Schedule 48 for use "[a]fter 1996," PSE began using the Undifferentiated Mid-C Index under the substitute index provisions of Schedule 48; no customer that received service under Schedule 48 objected to PSE's use of a substitute index in the absence of the designated index on January 1, 1997, or at any time during the subsequent 17 months. Under the circumstances of this case, the customers' acquiescence to PSE's use of the Undifferentiated Mid-C Index amounts to consent under Schedule 48's terms.

7. On June 1, 1998, Dow Jones ceased publishing the Undifferentiated Mid-C Index.

8. On June 1, 1998, Dow Jones first published a Mid-C Non-Firm Index that is the index described in Schedule 48 for use "[a]fter 1996."

9. On June 1, 1998, PSE was required under the terms of Schedule 48 to include in rates under Schedule 48 an energy cost component based either on the index described as follows:

> After 1996, "Index" means the Mid-Columbia Revised Non-Firm Electricity Index prices, last reported by Dow Jones to Dow Jones Telerate subscribers for on-peak hours and off-peak hours for each day of the relevant billing month

(*i.e.,* the Mid-C Non-Firm Index), or on a properly implemented substitute index.

10. On June 1, 1998, PSE included in rates under Schedule 48 an energy cost component based on neither the index expressly identified in the tariff, nor on a properly implemented substitute index. Instead, PSE began using a Blended Mid-C Index it calculated, or had Dow Jones calculate and furnish to PSE. The Blended Mid-C Index combined information from Dow Jones's Mid-C Firm Index and Mid-C Non-Firm Index. The Blended Mid-C Index was not the same as the Undifferentiated Mid-C Index PSE had used prior to June 1, 1998.

11. PSE's customers did not agree to PSE's use of the Blended Mid-C Index as a substitute index under Schedule 48. On or about June 1, 1998, one or more of PSE's customers that received service under Schedule 48 objected to PSE's use of the Blended Mid-C Index.

12. PSE continuously has overcharged its Rate Schedule 48 customers since June 1, 1998. The amount of the overcharge is determined by calculating the difference between the amounts PSE has charged its Rate Schedule 48 customers since June 1, 1998, using the Blended Mid-C Index and the amounts it should have charged using the Mid-C Non-Firm Index.

13. PSE's current overall rate of return is 8.94 percent.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this complaint and the parties pursuant to RCW 80.01.040 and Chapter 80.28 RCW .

2. PSE must administer its tariffs properly to ensure that its customers are charged only rates that are on file and lawfully established by the Commission. RCW 80.28.020, .050, .060, .080.

3. From November 1, 1996, though December 31, 1996, PSE properly administered Schedule 48 in accordance with its terms by using the Dow Jones Mid-C Non-Firm Index specified in the tariff.

4. From January 1, 1997, through May 31, 1998, PSE charged lawful rates under Schedule 48 by using the Undifferentiated Mid-C Index, as a substitute index in the absence of the index specified in the tariff for use "[a]fter 1996." The Commission approves PSE's use of the Undifferentiated Mid-C Index from January 1, 1997, through May 31, 1998.

5. Continuously since June 1, 1998, PSE has violated its tariff and RCW 80.28.080 by charging rates other than those on file and approved by the Commission consistent with the requirements of Chapters 80.04 and 80.28 RCW.

6. Continuously since June 1, 1998, PSE has charged excessive rates relative to those on file and authorized by the Commission.

7. RCW 80.04.230 provides:

> When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in forces at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of said complaint, with interest from the date of collection of such overcharge.

The Commission has discretion to order refunds in this case.

8. PSE is liable for, and should be required to pay, refunds equal to the amount of its overcharges collected from Rate Schedule 48 customers since June 1, 1998. PSE should be required to pay interest on the refund amount calculated at an annual rate of 8.94 percent.

ORDER

THE COMMISSION ORDERS:

1. The Complaint by Air Liquide America Corporation, Air Products and Chemicals, Inc., The Boeing Company, Equilon Enterprises LLC, and Tesoro Northwest Company alleging Puget Sound Energy's violation of tariff Schedule 48 is granted;

2. PSE's use of the Undifferentiated Mid-C Index during the period January 1, 1997, through May 31, 1998, is approved;

3. The lawful rate under Schedule 48 after May 31, 1998, must be based on the Dow Jones Mid-C Non-Firm Index, as described in the body of this Order.

4. PSE shall cease and desist from charging rates under Schedule 48 that include an energy cost component based on the unauthorized Blended Mid-C Index, as described in the body of this Order;

5. PSE shall begin charging rates under Schedule 48 that include an energy cost component based on the Mid-C Non-Firm Index published by Dow Jones since June 1, 1998, as discussed in the body of this Order;

6. PSE shall pay refunds to its Schedule 48 customers based on the difference between what it has charged under Schedule 48 since June 1, 1998, using the Blended Mid-C Index and what it should have charged using the Mid-C Non-Firm Index; and

7. PSE shall pay interest on the refunds ordered above, applying an annual interest rate of 8.94 percent.

8. PSE and its customers must implement any future substitute index (*i.e.,* any index not named in the tariff) by filing at the Commission a copy of their written agreement(s) to use such an index, and a revised tariff sheet that identifies clearly the substitution index they propose to use.

THE COMMISSION ORDERS FURTHER That all refunds and interest be paid within thirty (30) days of the date of this Order.

DATED at Olympia, Washington and effective this 3rd day of August 1999.

MARILYN SHOWALTER, Chairwoman

WILLIAM R. GILLIS, Commissioner

RICHARD HEMSTAD, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).