

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SEATTLE CHILDREN'S HOSPITAL, a Washington nonprofit corporation; OVERLAKE HOSPITAL MEDICAL CENTER, a Washington nonprofit corporation; HOSPITAL CENTRAL SERVICES ASSOCIATION, a Washington nonprofit corporation; COSTCO WHOLESALE CORPORATION, a Washington corporation; NORTHWEST BAKING LIMITED PARTNERSHIP dba NORTHWEST BAKING COMPANY, a Washington limited partnership; FIRST CALL PLUS OF WASHINGTON, L.L.C., a Washington limited liability company; REPAUL TEXTILES LLC dba STERILE SURGICAL SYSTEMS, a Washington limited liability company; SHINING OCEAN, INC., a Washington corporation; TUCCI & SONS, INC., a Washington corporation; WESTROCK CP, LLC, a Delaware limited liability company; NUCOR STEEL SEATTLE INC., a Delaware corporation; ACE GALVANIZING, INC., a Washington corporation; GARDNER ASPHALT CORPORATION, a Delaware corporation; WESTERN WOOD PRESERVING CO., a Washington corporation; and TULALIP TRIBES OF WASHINGTON, a federally recognized Indian Tribe;

Complainants,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKET UG-190857

BRIEF SUPPORTING SETTLEMENT
STIPULATION AND AGREEMENT

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STIPULATION AND AGREEMENT- 1

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I. INTRODUCTION

1. Pursuant to WAC 480-07-740(3)(a), this brief is submitted in support of the Settlement Stipulation and Agreement (“Settlement Agreement”) entered into by and between Puget Sound Energy (“PSE”) and the Complainants in this case: Seattle Children’s Hospital, Overlake Medical Center, Hospital Central Services Association, Costco Wholesale Corporation, Northwest Baking Limited Partnership dba Northwest Baking Company, First Call Plus of Washington, L.L.C., Repaul Textiles dba Sterile Surgical Systems, Shining Ocean, Inc., Tucci & Sons, Inc., Westrock CP, LLC, Nucor Steel Seattle Inc., Ace Galvanizing, Inc., Gardner Asphalt Corporation, Western Wood Preserving Co., and Tulalip Tribes of Washington (“Customers”). The parties are hereinafter collectively referred to as “Settling Parties” and each individually as a “Settling Party.”
2. The Settlement Agreement presented to the Commission in this case is a “full settlement,” as that term is defined in WAC 480-07-730(1), because this Settlement Agreement is entered into by all parties and resolves all disputed issues in the case.
3. The Settling Parties request that the Commission review the Settlement Agreement and this brief supporting the Settlement Agreement and approve the terms of the Settlement Agreement in their entirety. Consistent with the requirements of WAC 480-07-740(2)(e) and (3)(b), the Settling Parties will present one or more witnesses to testify in support of the Settlement Agreement if the Commission believes a hearing will assist the Commission to decide whether to approve and adopt the Settlement Agreement.

II. DESCRIPTION OF THE DISPUTED ISSUES

4. The case arises out of a dispute over PSE’s imposition of penalties on natural gas transportation customers for unauthorized use of gas during an Overrun Entitlement

1 Constraint Period after the Enbridge Pipeline rupture (“Rupture”) in October 2018.
2 Following the Rupture, PSE declared a “Curtailment Period”, as defined in Section 2 of
3 Rule 23 of PSE’s tariffs, on October 10-11, 2018. The Curtailment Period was lifted on
4 October 11, 2018. A “Curtailment” is a condition specifically and expressly declared by
5 PSE during which interruptible customers must “partially or totally stop consumption” of
6 natural gas “in excess of the firm contracted amount.” PSE also declared three Overrun
7 Entitlement Constraint Periods from October 2018 through February 28, 2019.¹ A
8 declared “Overrun Entitlement Constraint Period,” is a condition specifically and
9 expressly declared by PSE during which customers must balance their pre-scheduled or
10 “nominated” natural gas usage with their actual natural gas usage within a certain
11 threshold percentage on a daily basis. PSE charged penalties for unauthorized use of gas
12 on customers who failed to comply with the terms of the Curtailment Period and the
13 Overrun Entitlement Constraint Period. Customers’ Complaint addresses only penalties
14 imposed during Overrun Entitlement Constraint Periods and does not address any
15 penalties imposed during a Curtailment Period. The money PSE received from Customers
16 paying the penalties flowed through PSE’s purchased gas adjustment (“PGA”)
17 mechanism beginning November 1, 2019, in Docket UG-190729.

18 5. Customers are fifteen industrial and commercial customers who elected optional
19 natural gas transportation schedules that require daily balancing for Overrun Entitlement
20 Constraint Periods, and that require limits on their consumption during Curtailment
21 Periods. In their Complaint, the Customers alleged that PSE unlawfully charged

¹ The three periods were from 10 a.m. on October 26, 2018 through 7 a.m. on December 11, 2018; from February 2, 2019 through February 18, 2019, and from February 23, 2019 through March 9, 2019.

1 Customers “Curtailment Penalties” of more than \$900,000 for a period of time in which
2 there was no declared Curtailment Period. Customers alleged that the Curtailment
3 Penalty may be applied by PSE only during a Curtailment Period and not during an
4 overrun entitlement or other constraint period. Some Customers paid the penalties and
5 some Customers paid the penalties under protest. Some Customers have not paid the
6 penalties.

7 6. The dispute in this case centers around the interpretation of PSE’s tariff rules with
8 respect to the amount of penalties to be charged for unauthorized use of gas when
9 customers fail to balance their actual gas use within the specified percent threshold over
10 their nomination during declared Overrun Entitlement Constraint Periods.²

11 7. Customers alleged that PSE unlawfully billed penalties for unauthorized use of gas
12 for the Overrun Entitlement Constraint Period at the rate set forth in the tariffs for a
13 declared Curtailment Period and that Section 5 of tariff Rule No. 23 titled “Penalty for
14 Unauthorized Use of Gas” applies only during a Curtailment Period because the penalties
15 are specific to the defined term “Curtailment Penalty”. *See* Complaint at ¶¶ 42-43, 45-49.

16 8. PSE asserts that the penalties billed for unauthorized use of gas were appropriate
17 because Customers failed to limit their delivered volumes within the declared threshold
18 percentage during an Overrun Entitlement Constraint Period. *See* Answer, p. 1. PSE
19 relies on Rule No. 29 Section 13(2)(b), which provides that “volumes delivered in excess
20 of 103% . . . of the Confirmed Nomination will be billed at the unauthorized use of gas
21 rate described in Section 7 of this rule.” *See* Answer ¶¶ 14, 16, 42. Section 7 of Rule No.

² There is no dispute over the imposition of Curtailment Penalties for the declared Curtailment Period that began on October 10, 2018 and was lifted on October 11, 2018.

1 29 points to Rule No. 23, and Section 5 of Rule No. 23 sets forth the “Penalty for
2 Unauthorized Use of Gas,” which is the amount of penalties PSE billed customers for the
3 Overrun Entitlement Constraint Period.

4 9. During the course of the Overrun Entitlement Constraint Period at issue in this case,
5 PSE worked with natural gas stakeholders to develop revised tariff rules addressing
6 penalties for unauthorized use of gas during an Overrun or Underrun Entitlement
7 Constraint Period. On January 25, 2019, after working with stakeholder groups, PSE
8 filed revisions to its natural gas tariff rules. Among other things, PSE revised the
9 penalties and penalty structure for gas volumes delivered outside of PSE’s declared
10 entitlement tolerance during an Overrun Entitlement Constraint Period. Complaint Exh.
11 F p. 2. These revisions were intended to clarify tariff rule language regarding Gas Service
12 Curtailment and Overrun Entitlement and to propose new Entitlement penalty charges in
13 Rule No. 23, which are different from the penalty charge for a Curtailment. These
14 revisions to Rule No. 23 and Rule No. 29 went into effect by operation of law on March
15 1, 2019.

16 10. On December 12, 2019, PSE and Customers participated in a Settlement Conference
17 and reached agreement on the terms of a settlement that would provide a compromise on
18 the amount of penalties owed for unauthorized use of gas for the declared Overrun
19 Entitlement Constraint Periods, in light of the different interpretations of the tariff rules.
20 For settlement purposes, the Settling Parties agreed to a penalty structure for the Overrun
21 Entitlement Constraint Period that is generally consistent with the penalty structure set
22 forth in the tariff revisions that went into effect on March 1, 2019, without the natural gas
23 market price component.

1 **III. PROPOSED RESOLUTION OF THE DISPUTE**

2 11. The dispute reflects two reasonable but conflicting interpretations of the language in
3 the natural gas rules and tariff schedules relating to the imposition and amount of
4 penalties for unauthorized use of gas during Overrun Entitlement Constraint Periods.

5 12. In the Settlement Agreement, the Settling Parties negotiated a compromise of the
6 amount of penalties owed, or paid, to PSE for the declared Overrun Entitlement
7 Constraint Periods. Rather than litigate the interpretation of the language in the tariff
8 rules, the Settling Parties reached a compromise on the overall amount of penalties for
9 the Overrun Entitlement Constraint Periods at issue in this case.

10 13. The Settling Parties have agreed to calculate the Overrun Entitlement penalties from
11 October 11, 2018 through February 28, 2019 as follows: The Overrun Entitlement
12 penalties will be comprised of both the Schedule 41 delivery charges and a \$1 per therm
13 penalty. For those Customers who paid Overrun Entitlement penalties for Overrun
14 Entitlement Constraint Periods during the time period October 11, 2018 through February
15 28, 2019, they will be refunded the difference between the amount of Overrun
16 Entitlement penalties paid and the amount agreed to in this Settlement Agreement.³ For
17 those Customers who were billed for penalties associated with the Overrun Entitlement
18 Constraint Period during the time period October 11, 2018 through February 28, 2019,
19 but who have not yet paid such penalties, PSE will issue revised statements reflecting the
20 amounts due under the terms of the Settlement Agreement. The negotiated terms of the

³ Any state or local taxes paid on billed penalties will be refunded or adjusted to reflect the proposed settlement penalties described in this Settlement Agreement.

1 Settlement Agreement do not provide for payment of interest to customers, and each
2 party is responsible for paying their own attorneys' fees.

3 14. The Settlement Agreement is a reasonable compromise between two differing but
4 reasonable interpretations of the tariff rules addressing penalties for Overrun Entitlement
5 Constraint Periods. The proposed settlement is also reasonable because it is generally
6 consistent with the newly revised penalty structure for unauthorized use of gas set forth in
7 the tariff rule revisions that went into effect on March 1, 2019, which provide for an
8 Overrun Entitlement penalty for unauthorized use of gas of \$1 per therm.

9 15. The Settlement Agreement provides that the difference in penalties paid or billed to
10 Customers for the declared Overrun Entitlement Constraint Period should flow through
11 the PGA deferral. As the initial Overrun Entitlement Constraint Period penalties had
12 been credited to the PGA mechanism based upon the billed amount in the 2019 PGA
13 annual filing, the difference between the billed penalties and the proposed Settlement
14 penalties will follow the same treatment by passing it through the PGA mechanism, in the
15 2020 PGA annual filing. This is a key term of the Settlement Agreement and requires
16 Commission approval of the refund through the PGA before any refunds are paid to
17 customers.

18 16. To avoid further litigation and to avoid claims of rate discrimination pursuant to
19 RCW 80.28.100, the Settling Parties agree that the proposed calculation of the Overrun
20 Entitlement penalties will apply not only to the Customers who are Complainants in this
21 case, but also to all natural gas transportation customers who were charged for Overrun
22 Entitlement penalties during the period of October 11, 2018 through February 28, 2019.
23 The total refund amount to be adjusted in the PGA deferral mechanism, i.e., the billing

1 difference between the billed penalties and the settlement rate, is estimated at \$2.3
2 million. A similar amount was credited to the PGA in 2019. PSE has calculated the
3 approximate amount of the billing difference to customers, as shown in Attachment A.

4 17. The Settling Parties agree that a key term of this Settlement Agreement is that the
5 Commission approve the terms of the Settlement Agreement including authorization of
6 the payment of the billing difference from the PGA deferral account before refunds are
7 paid to customers.

8 **IV. THE SETTLEMENT AGREEMENT IS IN THE PUBLIC**
9 **INTEREST AND SHOULD BE APPROVED**

10 18. Washington law and Commission precedent strongly support and encourage “the
11 resolution of contested issues through settlement when doing so is lawful and consistent
12 with the public interest.”⁴ The Commission has recognized that settlements are “by
13 nature compromises of more extreme positions.”⁵ The Commission should approve a
14 settlement when doing so is lawful, the settlement terms are supported by an appropriate
15 record, and the result is consistent with the public interest in light of all the information
16 available to the Commission.⁶

⁴ See RCW 34.05.060 (informal settlement of matters that may make unnecessary more elaborate proceedings under this chapter is strongly encouraged); WAC 480-07-700, -740-750; *WUTC v. Cascade Natural Gas Co.*, Docket UG-060256, Order 05 ¶ 24 (Jan. 12, 2007) (internal citations omitted); see also *WUTC v. Verizon Northwest, Inc.*, Docket UT-061777, Order 01 ¶ 11 (June 30, 2008).

⁵ *Cascade Natural Gas Co.*, Docket UG-060256, Order 05 ¶ 24 (internal citations omitted).

⁶ See WAC 480-07-750(2); *WUTC v. Puget Sound Energy*, Dockets UE-170033 and UG-170034 (consolidated), Order 08 ¶ 63 (December 5, 2017).

- 1 19. The Settlement Agreement in this case meets the criteria set forth above and should
2 be approved. The Settlement Agreement is lawful, it is supported by an appropriate
3 record and is consistent with the public interest. The Settlement Agreement represents a
4 reasonable compromise of two competing interpretations of PSE's tariff rules addressing
5 penalties for unauthorized use of gas during an Overrun Entitlement Constraint Period. It
6 allows the Commission, PSE, and Customers to avoid protracted litigation over the
7 interpretation of the terms of a tariff that has since been revised.
- 8 20. The Settlement Agreement broadly applies the negotiated penalty rate to all PSE
9 customers who were billed penalties for unauthorized use of gas for the three Overrun
10 Entitlement Constraint Periods, thus avoiding claims of rate discrimination or future
11 claims addressing the penalty calculation. The Settlement Agreement is also equitable
12 because it provides that adjustments to all customers flow through the same PGA deferral
13 mechanism through which the original penalty payments flowed.
- 14 21. For these reasons, the Settling Parties respectfully request the Commission approve
15 the Settlement Agreement filed in this docket and order that the Overrun Entitlement
16 Constraint Period penalty charge adjustments should flow through the PGA mechanism.

17 Dated this 18th day of February 2020

18 **PERKINS COIE**

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ATTACHMENT A

*Difference Between Billed Penalties and Settlement Penalties for
Overrun Entitlement Constraint Period*

ATTACHMENT A

Difference Between Billed Penalties and Settlement Penalties for Ovrerrun Entitlement Constraint Period

Sum of Amount	Accounting Order	Accounting Order 2	Corrected Accounting Order	Rule No. 23, Section 5.2: Penalty for Unauthorized Use of Gas - Following Initial 2 Hours	Rule No. 23, Section 5.2: Penalty for Unauthorized Use of Gas - First 2 Hours	Rule No. 23, Section 5.2: Penalty for Unauthorized Use of Gas - Following Initial 2 Hours	Rule No. 23, Section 5.2: Penalty for Unauthorized Use of Gas - First 2 Hours	Total	Difference
003/2019	49500013	Com-RI 23 Crtlmnt Cnstrnt Pnlt 1st 2 Hrs	\$637.15		\$637.15	\$0.00	\$127.43	\$127.43	\$509.72
003/2019	49500014	Cm-RI 23 Crtlmnt Cnstrnt Pnlt Bynd 2 Hrs		\$6,714.50	\$6,714.50	\$671.45	\$0.00	\$671.45	\$6,043.05
003/2019	49500015	Com-RI 23 Entlmnt Cnstrnt Pnlt 1st 2 Hrs	-\$81,335.75		-\$81,335.75	\$0.00	-\$16,267.15	-\$16,267.15	-\$65,068.60
003/2019	49500018	Cm-RI 29 Unath Gas Use Chg-Entlmnt Cnstr		-\$1,500,332.40	\$1,500,332.40	-\$150,033.24	\$0.00	-\$150,033.24	\$1,350,299.16
003/2019	49500021	Ind-RI 23 Entlmnt Cnstrnt Pnlt 1st 2 Hrs	-\$54.25		-\$54.25	\$0.00	-\$10.85	-\$10.85	-\$43.40
005/2019	49500015	Com-RI 23 Entlmnt Cnstrnt Pnlt 1st 2 Hrs	-\$56.30		-\$56.30	\$0.00	-\$11.26	-\$11.26	-\$45.04
007/2019	49500015	Com-RI 23 Entlmnt Cnstrnt Pnlt 1st 2 Hrs	-\$26,571.25		-\$26,571.25	\$0.00	-\$5,314.25	-\$5,314.25	-\$21,257.00

Sum of Amount			Corrected Accounting Order	Rule No. 23, Section 5.2: Penalty for Unauthorized Use of Gas - Following Initial 2 Hours	Grand Total	Rule No. 23, Section 5.2: Penalty for Unauthorized Use of Gas - First 2 Hours	Rule No. 23, Section 5.2: Penalty for Unauthorized Use of Gas - Following Initial 2 Hours	Total	Difference
	Accounting Order	Accounting Order 2	Rule No. 23, Section 5.2: Penalty for Unauthorized Use of Gas - First 2 Hours	Rule No. 23, Section 5.2: Penalty for Unauthorized Use of Gas - Following Initial 2 Hours	Grand Total	Rule No. 23, Section 5.2: Penalty for Unauthorized Use of Gas - First 2 Hours	Rule No. 23, Section 5.2: Penalty for Unauthorized Use of Gas - Following Initial 2 Hours	Total	Difference
007/2019	49500016	Cm-RI 23 Entlimnt Cnstrnt Pnlt Bynd 2 Hrs		-\$310,161.60	-\$310,161.60	\$0.00	-\$31,016.16	-\$31,016.16	-\$279,145.44
007/2019	49500021	Ind-RI 23 Entlimnt Cnstrnt Pnlt 1st 2 Hrs	-\$113,459.35		-\$113,459.35	-\$22,691.87	\$0.00	-\$22,691.87	-\$90,767.48
007/2019	49500022	Ind-RI 23 Entlimnt Cnstrnt Pnlt Bynd 2 Hrs		-\$600,687.70	-\$600,687.70	\$0.00	-\$60,068.77	-\$60,068.77	-\$540,618.93
008/2019	49500015	Com-RI 23 Entlimnt Cnstrnt Pnlt 1st 2 Hrs	-\$1,102.60		-\$1,102.60	-\$220.52	\$0.00	-\$220.52	-\$882.08
008/2019	49500021	Ind-RI 23 Entlimnt Cnstrnt Pnlt 1st 2 Hrs	-\$286.10		-\$286.10	-\$57.22	\$0.00	-\$57.22	-\$228.88
008/2019	49500022	Ind-RI 23 Entlimnt Cnstrnt Pnlt Bynd 2 Hrs		-\$1,037.50	-\$1,037.50	\$0.00	-\$103.75	-\$103.75	-\$933.75
Grand Total			-\$222,228.45	-\$2,405,504.70	\$2,627,733.15	-\$44,445.69	-\$240,550.47	-\$284,996.16	\$2,342,736.99