BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Air Liquide America Corporation, Air Products and Chemicals, Inc., The Boeing Company, CNC Containers, Equilon Enterprises, LLC, Georgia-Pacific West, Inc., Tesoro Northwest Company, and the City of Anacortes, Complainants, v. Puget Sound Energy, Inc., Respondent.	)	DOCKET NO. UE-001952 (consolidated)
In re: Petition of Puget Sound Energy, Inc. for an Order Reallocating Lost Revenues Related to any Reduction in the Schedule 48 or G-P Special Contract Rates	)	DOCKET NO. UE-001959 (consolidated) PRE-HEARING BRIEF OF COMMISSION STAFF RE: PHASE ONE

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I. INTRODUCTION

This proceeding began on December 12, 2000, when the Complainants filed a Complaint against Puget Sound Energy (PSE) requesting that the Commission: (1) initiate an emergency adjudication pursuant to RCW 34.05.479; and (2) require PSE to serve the Complainants under Schedule 49 or, in the alternative, an emergency price cap on the index component of Schedule 48 and the special contract between PSE and Georgia-Pacific West, Inc. Either emergency remedy proposed by the Complainants would be subject to refund or surcharge, with interest, pending a later determination of a cost-based rate. Complainants characterize these requests as "Phase One" of the proceeding.[1]

A prehearing conference was convened before the Commission on December 14, 2000 and a Prehearing Conference Order issued on December 18, 2000. The Order set forth a list of legal issues, and mixed questions of fact and law, all related to Commission authority that the Commission must resolve in Phase One. (Order at 3-4.) The discussion set forth below includes Staff's position on each of the issues referenced by the

[1] Similar requests have come before the Commission recently. On July 21, 2000, Georgia-Pacific and Bellingham Cold Storage Company requested emergency relief under their special contracts with PSE through summary determination in Docket No. UE-001014. The reasons stated by these two customers for their request are identical to those now identified by the Complainants' in the current proceeding as justification for emergency rate relief. The Commission denied the request for summary determination. Order Directing Parties to Negotiate; Denying Motion, *Bellingham Cold Storage Company and Georgia-Pacific West, Inc. v Puget Sound Energy, Inc.*, Docket No. UE-001014 (July 31, 2000). Air Liquide, The Boeing Company, Equilon Enterprises, Tesoro Northwest Company and Air Products all intervened in the case, but never presented a position on the merits.

Thereafter, both Georgia-Pacific and Bellingham Cold Storage moved to dismiss voluntarily their pricing claims against PSE. Their motions were granted by the Commission. *Id*. at 5th Supplemental Order Granting Voluntary Dismissal (August 15, 2000). Thereafter still, Georgia-Pacific withdrew entirely from Docket No. UE-001014. *Id*. at Order Granting Leave to Withdraw (November 8, 2000) and Bellingham Cold Storage requested numerous continuances of the transmission issues raised in its complaint to allow it and PSE to attempt to resolve their differences by negotiation. *Id*. at 8th Supp. Order (December 7, 2000).

Commission, as well as a summary of the Staff testimony it now intends to offer at hearing on January 8, 2001.

II. STAFF SUMMARY OF ITS TESTIMONY

Before turning to the issues listed in the Commission's Prehearing Conference Order, Staff takes this opportunity to summarize the case in chief it expects to present at hearing next week. We caution strongly, however, that this summary is preliminary, given the very accelerated schedule of the case, the pendency of on-going discovery, and the lack of prefiled, written testimony from all parties.

First, Staff has concluded that payment by the Complainants to PSE of market-based rates under Schedule 48 and the Georgia-Pacific special contract does not constitute an immediate danger to the public health, safety or welfare. Factors considered by Staff in reaching this conclusion include: (1) its understanding that the products manufactured by the Complainants are available from other businesses not involved in this Complaint; and (2) that any plant closures and related employment layoffs are limited to relatively few businesses that elected to tie their rates for electricity to market prices. Therefore, immediate agency action under RCW 34.05.479 is not warranted. Nor is the Commission legally authorized to grant the emergency remedy sought by the Complainants, as discussed below in Section III.B.

Nevertheless, Staff is concerned that the severe spikes in prices that occurred in December 2000 under Schedule 48 and the Georgia-Pacific special contract may be unjust and unreasonable, exorbitant or excessive, because the Mid-Columbia Index may not reflect accurately the price of wholesale electricity. Staff also recognizes the urgency, if not the emergency, of the Complainants' present situation. Therefore, under

the accelerated case schedule already established in this case and already in compliance with RCW 80.04.110, and .120, the Commission may consider an amended rate for service to the Complainants.[2] Staff and Public Counsel jointly propose a Rate Cap mechanism for that purpose.[3] (Attachment A.) Staff's and Public Counsel's assumptions and its justification for the Rate Cap are also summarized. (Attachment B.) Those assumptions include the preliminary conclusion that the Rate Cap meets the statutory test of being just, fair, reasonable and sufficient.[4]

III. STAFF POSITION ON ISSUES IDENTIFIED IN PREHEARING CONFERENCE ORDER

The issues listed by the Commission in its Prehearing Conference Order fall generally into two categories: (1) issues related to Commission authority to grant Complainants' request for an emergency adjudication; and (2) issues related to

[2] We say "already in compliance" because a hearing on 10 days notice has been given in accordance with RCW 80.04.110(3) and .120. The emergency procedures under RCW 34.05.479, which Staff recommends not be invoked, differ as to notice only by shortening it to such notice as is practicable. Complainants have, however, filed on December 29, 2000 a Second Amended Complaint adding the Intel Corporation as a party. This amendment may require the Commission to start the 10-day clock again under RCW 80.04.110(3).

[3] The Staff-Public Counsel Rate Cap rejects the Complainants' proposal that they should be served under Schedule 49. Schedule 49 is a cost-based tariff which, therefore, is inconsistent with the Complainants' voluntary movement to market-based rates under Schedule 48. Moreover, while Schedule 49 is presumed to include a just and reasonable rate because it is a tariff filed and in effect with the Commission, it has not been analyzed in detail since PSE's last general rate case in 1992 in Docket No. UE-921262. Therefore, it cannot be known with certainty whether Schedule 49 is set at levels that represent truly the cost of service. Finally, serving the Complainants under Schedule 49 would cause unreasonable administrative burdens because it would require PSE to determine and plan for a level of resources necessary to serve each individual customer. It may also require a different surcharge for each individual customer based on the long-run resource costs and incremental capacity costs incurred by PSE to provide such alternative service. *See*, Schedule 48 Service Agreement at ¶6, Attachment to Schedule 48 .

[4] If the Commission finds that rates under Schedule 48 and the Georgia-Pacific special contract are excessive or exorbitant, and it provides relief under the Staff-Public Counsel Rate Cap or otherwise, the Commission must also determine whether to make that relief retroactive, under RCW 80.04.220, to the date of the Complaint (December 12, 2000) or before. We believe that RCW 80.04.220 provides the Commission discretion on that issue since the statute allows the Commission to determine that a rate is excesive or exhorbitant and, then, whether "any party complainant is entitled to an award of damages. ". The Commission may, therefore, weigh any relative equities of the parties in this case in determining the effective date of the Rate Cap, if adopted. We do not know, however, whether retroactive application of the Rate Cap is administratively burdensome to PSE or even possible to do. The Staff proposes only a prospective application of the Rate Cap.

Commission authority to grant Complainants' proposed emergency remedy. These categories are discussed separately below.

A. Emergency Adjudication Issues

1. General Considerations

The Complainants seek immediate agency action under the emergency adjudication provisions of RCW 34.05.479. That statute provides as follows:

> **Emergency adjudicative proceedings.** (1) Unless otherwise provided by law, an agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.
> (2) The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.
> (3) The agency shall enter an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.
> (4) The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when entered.
> (5) After entering an order under this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.
> (6) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.
> (7) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.
> (8) This section shall not apply to agency action taken pursuant to a provision of law that expressly authorizes the agency to issue a cease and desist order. The agency may proceed, alternatively, under that independent authority.

Before turning to the specific questions noted by the Commission, a few preliminary points warrant consideration in determining whether to find that an immediate danger to the public health, safety or welfare exists, as alleged by the Complainants. First, Complainants ask the Commission to invoke RCW 34.05.479 in a

context--utility retail ratemaking--where no specific judicial or regulatory guidance is available.[5] We have been unable to find *any* court cases in this state which interpret RCW 34.05.479. Moreover, cases found from other states under a similar statute involved the emergency suspension of a professional license where public health and safety were immediately threatened. *E.g., Lindenman v. Umscheid*, 875 P.2d 964 (Kan. 1994) (daycare license suspension); *Everett v. Georgia Bd. of Dentistry*, 441 S.E.2d 66 (Ga. 1994) (dentist license suspension).

Likewise, the Commission's rule implementing RCW 34.05.479 contemplates situations not presented in this proceeding. They, instead, concern an immediate danger to the public safety where inadequate, unsafe or unlawful service is involved and must be remedied quickly. The rule is WAC 480-09-510 and states as follows:

> **Emergency adjudicative proceedings.** (1) The commission may use emergency adjudicative proceedings pursuant to RCW 34.05.479 to suspend or cancel authority, to require that a dangerous condition be terminated or corrected, or to require immediate action in any situation involving an immediate danger to the public health, safety, or welfare requiring immediate action by the commission. Such situations include, but are not limited to:
> (a) Failure to possess insurance;
> (b) Inadequate service by a gas, water, or electric company when the inadequacy involves an immediate danger to the public health, safety, or welfare; and
> (c) Violations of law, rule, or order related to public safety, when the violation involves an immediate danger to the public health, safety, or welfare.

[5] The Commission did initiate an emergency adjudication in *Washington Utilities and Transp. Comm'n v. U S West Communications, Inc*., Notice of Emergency Adjudicative Proceeding Regarding The 360 Numbering Plan Area Code, Docket No. UT-950446 (April 25, 1995). This is the only Commission case we found under RCW 34.05.479 and it concerned whether the then-mandatory conversion to the 360 area code in Western Washington should be delayed beyond May 21, 1995 and, if so, for what period. The Commission found that it was required to act immediately in order to effect a short 90-day extension, given the imminent administrative deadline, the evidence of substantial and devastating hardship arising under the mandatory deadline, including the critical and possibly fatal blow to business customers' operations, and the relatively light adverse consequences upon existing and potentially new customers. Therefore, the *U S West* case may be instructive in determining whether to invoke RCW 34.05.479 in the current case, but it also may be factually distinguishable from the current case.

> (2) The commission shall hear the matter and enter an order. If a majority of the commissioners is not available, a commissioner shall hear the matter. If no commissioner is available, a commission administrative law judge shall hear the matter.
> (3) The commission's decision shall be based upon the written submissions of the parties and upon oral comments by the parties if the presiding officer has allowed oral comments. The order must include a brief statement of findings of fact, conclusions of law, and justification for the determination of an immediate danger to the public health, safety, or welfare. The order is effective when entered. The commission must serve the order pursuant to WAC 480-09-120. (Emphasis added.)

Second, unlike regulated utilities, Complainants have neither a constitutional nor a statutory right to emergency rate relief, as the Commission has recently held. Order Directing Parties to Negotiate; Denying Motion at ¶33, *Bellingham Cold Storage Company and Georgia-Pacific West, Inc. v. Puget Sound Energy, Inc.*, Docket No. UE-001014 (July 31, 2000). In fact, our research found no commission cases in this or any other state in which emergency rate relief was granted to retail customers of a regulated utility, rather than to the utility itself. Complainants are, therefore, required to utilize traditional complaint and rate setting procedures under applicable statutes in title 80 RCW (primarily RCW 80.04.110 and 80.28.020), although those procedures can certainly be tailored to account for any exigent circumstances the Commission may find in this particular proceeding. As noted above in Section II, these are the procedures (and substantive standards) under the Staff-Public Counsel Rate Cap proposal is advanced.

Third, while the Commission may decide to invoke the emergency *procedures* under RCW 34.05.479, it is quite clear that the former statute does not provide any additional or different *substantive* rights, remedies or obligations for either the

Complainants, PSE or the Commission.[6] The Commission is empowered only to regulate in the public interest the rates, services and practices of electric companies "as provided by the public service laws . . .". RCW 80.01.040(3). Moreover, the specific substantive provisions of those public service laws must govern over the general provisions of the Administrative Procedures Act. *General Telephone Co. of the Northwest, Inc. v. Washington Utilities & Transp. Comm'n,* 104 Wn.2d 460, 464, 706 P.2d 625 (1985). Ultimately, therefore, the Commission must apply the appropriate substantive standards contained in the public service laws, including those in chapter 80.28 RCW, irrespective of the procedures it may decide to employ.

Finally, as the moving party, Complainants alone have the burden to prove that there exists an immediate danger to the public health, safety or welfare if they are required to pay market-based rates for electricity as required by Schedule 48 and the Georgia-Pacific special contract. The focus of that specific issue is narrower than the issue of whether an emergency exists generally in this State because of conditions in the wholesale market for electricity in the West.

We turn now to the specific questions listed by the Commission concerning its authority to grant Complainants' request for an emergency adjudication under RCW 34.05.479.

2. Specific Issues

As stated previously, there is no specific judicial or regulatory precedent to guide the Commission as to what factors it is authorized to consider when determining whether to find an immediate danger to the public health, safety or welfare under RCW 34.05.479.

[6] In enacting the Administrative Procedures Act (APA), the Legislature intended that the APA be interpreted consistent with model acts. RCW 34.05.001. The Model State Administrative Procedures Act

It is reasonable, however, to compare Complainants' request for emergency action to a request for injunctive relief since Complainants, in essence, ask the Commission to enjoin PSE from charging market-based rates otherwise required by Schedule 48 and the Georgia-Pacific special contract, until the Commission can later determine what should be an appropriate cost-based rate with which to replace Schedule 48 and the Georgia-Pacific special contract. Judicial precedent on injunctive relief does help to answer the questions posed by the Commission. These cases are discussed immediately below.

> **a. Is the financial ability of individual ratepayers to pay increased costs for electricity a consideration relevant to determine whether there exists an immediate danger to the public health, safety, or welfare?**
>
> **Must the circumstances that Complainants assert constitute an immediate danger to the public health, safety or welfare be circumstances beyond the ability of Complainants to cure?**

It is well-settled that in order to obtain injunctive relief—whether the relief sought is temporary, preliminary or permanent --- the plaintiff must satisfy a three-part test. First, the plaintiff must demonstrate a clear legal or equitable right to an injunction, and that the acts complained of are resulting in, or will result in, injury to the plaintiff. *Port of Seattle v. International Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958). If there is doubt at the outset as to the plaintiff's right to an injunction, one will be denied. *Funk v. Inland Power & Light Co.*, 164 Wash. 110, 117, 1 P.2d 872 (1931).

Second, actual and substantial injury, or the prospect of such injury to the plaintiff, must be shown. *Protect the Peninsula's Future v. Clallam County*, 66 Wn.2d 671, 677, 833 P.2d 406 (1992). Moreover, the injury must be irreparable. *Hollis v. Garwall, Inc.*, 88 Wn. App. 10, 16, 945 P.2d 717 (1997), and may not result in injury to

(1981) states that it creates only procedural rights and imposes only procedural remedies. Section 1-103(b).

the party enjoined in an amount greater than any damage which the plaintiff would suffer. *Holmes Harbor Water Company v. Page*, 8 Wn. App. 600, 603, 508 P.2d 628 (1973).

Finally, whether or not an injunction will issue must be determined by balancing the equities of the parties. *Steele v. Queen City Broadcasting Co.*, 54 Wn. 2d 402, 411, 341 P.2d 499 (1959). It is within the sound discretion of the decision-maker, here, the Commission, to balance these equities when determining whether to grant or deny injunctive relief. *Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn. App. 70, 74, 587 P.2d 1087 (1978).

Applying these general principles for injunctions to this proceeding, we believe it is relevant for the Commission, in its determination of whether there exists an immediate danger to the public health, safety or welfare, to consider whether Complainants have the financial ability, either locally or as corporate entities, to pay increased costs for electric service, even if Complainants can demonstrate that it is "uneconomic" (i.e., they experience lower profits) for them to continue their own operations.[7] We also believe that it is relevant for the Commission to consider any actions, or inactions, by Complainants to cure the circumstances they now assert constitute an immediate danger to the public health, safety or welfare, including: (1) whether Complainants attempted or can use financial or physical risk management tools (e.g., hedges) to insulate themselves from increased costs for electricity; (2) whether Complainants attempted or can self-provide (e.g., temporary diesel generators) or self-generate electricity; or (3) whether Complainants attempted or can pass increased electric costs on to their own customers. Finally, in order to reasonably "balance the equities", we believe it is relevant for the

Commission to consider that the Complainants undertook voluntarily the risks and rewards of going to non-core status at market-based rates, and that the injury asserted by Complainants is the result not of action by PSE, but of circumstances in the wholesale market for electricity, especially if they cannot demonstrate that the harm they may suffer is not outweighed by financial harm to PSE or risk to PSE's other ratepayers. The Commission may also wish to consider whether the issues raised by the Complainants are better left to possible resolution before the Federal Energy Regulatory Commission.

b. What indices of proof are required to show an individual ratepayer is financially incapable of paying increased costs for electricity so that there exists an immediate danger to the public health, safety or welfare?

Complainants ask the Commission to provide an extraordinary and equitable remedy through an emergency adjudication even though, as stated above, they have no constitutional or statutory right to the remedy they seek. We, therefore, see no legal reason why the Commission should not require the Complainants to satisfy similar and significant indices of proof of financial hardship that the Commission has applied historically to utilities seeking interim rate relief.[8] Those standards were adopted by the Commission in, *Washington Utilities and Transp. Comm'n v. Pacific Northwest Bell Telephone Co.*, 2nd Supp. Order at 13, Cause No. U-72-30tr (October 1972). In essence, the standards do not examine if continued utility operations fail to achieve reasonable returns under existing rates, but, rather, whether the applicant for interim rates is impacted so detrimentally as to significantly imperil its ability to obtain necessary

[7] Our discussion is limited solely to the issue of whether there exists an immediate danger to the public health, safety or welfare. The financial ability of an individual ratepayer is irrelevant absent an emergency when analyzing whether a rate is just, fair, reasonable and sufficient.

[8] This conclusion, however, ignores the very difficult task of determining whether the PNB test for interim rates is satisfied by individual, but different customers. Neither the Commission nor its Staff has the necessary resources to examine individual customer records regarding financial viability.

financing on reasonable terms. Typical indices of proof examined by the Commission include rate of return, interest coverage, earnings coverage and growth, stability or deterioration of each, and the immediate and short term demands for new financing.

c. What legal authority does the Commission possess to take the minimum action necessary to prevent or avoid the asserted immediate danger to the public health, safety or welfare?

Staff's response to this issue is discussed in detail in Section III.B.1-3, *infra*.

d. What does each party assert is the minimum action necessary to prevent the immediate danger to the public health, safety or welfare?

Is that minimum action prohibited under the Merger Rate Plan?

As stated at the outset, Staff does not believe that Complainants have justified immediate Commission action under the emergency adjudication provisions of RCW 34.05.479. Staff and Public Counsel will, however, propose a Rate Cap which they believe may resolve this dispute in compliance with applicable legal standards and procedures in RCW 80.04.110 and chapter 80.28 RCW.

It is expected that PSE will argue that any adjustment to the rates produced under Schedule 48 and the Georgia-Pacific special contract is prohibited by the Rate Plan approved in the Fourteenth Supplemental Order Accepting Stipulation; Approving Merger, Docket No. UE-951270 (February 5, 2000) ("Merger Order"). PSE may rest this argument on the following language from the Merger Order which described the Stipulation that formulated the Rate Plan:

> The Stipulation recognizes costs pressures facing Puget during the five-year Rate Plan due to increases in purchased power, production, and transmission expenses, and is based upon recovery of various power cost components for 1997-2001. Considering these costs pressures and the potential for savings associated with the merger, the Rate Plan reflects the implicit balance struck by the stipulating parties between five years of "rate certainty" for customers, and five years of opportunity for the

> company to manage its resource cost pressures. Within the five-year window, PSE's financial results will be a function of management's ability to achieve savings in order to provide shareholders with the opportunity to earn a reasonable rate of return on investment.

Merger Order at 21.

The Rate Plan should not prevent the Commission from acting here, for three essential reasons. First, the Merger Order language quoted above is clearly focused on the ability of PSE's management during the Rate Plan to: (1) manage its resource costs pressures; and (2) achieve savings associated with the Merger. In contrast, any relief granted in this case, including the Rate Cap proposal of Staff and Public Counsel, serves to reduce revenues that PSE would otherwise be able to obtain as a result of circumstances that have been completely fortuitous to PSE's management. This is not meant in any derogatory way. Nor does it imply that whatever revenues PSE has obtained recently from Schedule 48 customers and Georgia-Pacific are "windfall profits". It is simply to say that the Rate Plan was never intended to cover the circumstances now presented to the Commission in this Complaint proceeding. Therefore, the Rate Plan itself does not bar the Staff proposed Rate Cap.

Second, in another context, the Commission has held that the Rate Plan does not require the benefits of power cost savings to be kept for shareholders. In 1999, the Commission considered PSE's proposed sale of its interest in the Colstrip generation facilities. PSE argued that precluding it from capturing the gain from the sale would violate the Rate Plan, which reflected an implicit balance struck by the parties in the Merger and approved by the Commission. The Commission, nevertheless, ordered all of the gain from the proposed Colstrip sale to go to ratepayers despite the Rate Plan. *In the Matter of the Application of Puget Sound Energy, Inc.*, 3rd Supp. Order Approving Sale at

18-19, Docket No. UE-990267 (September 30, 1999).[9] Surely, if the gain on the sale of a generation asset was not required by the Rate Plan to be kept by management for shareholders, then any excessive revenues that may result only from application of a flawed market index at the Mid-Columbia must also not be required by the Rate Plan to flow only to shareholders.[10]

Third, there is no assumption in the Rate Plan either that PSE is entitled to all revenues produced by Schedule 48 and the Georgia-Pacific special contract, or that any reduction in those revenues should, but cannot under the Rate Plan, be offset by increases to other classes of customers in order to make PSE whole. Such assumptions are clearly inconsistent with the letter and spirit of the Commission Order Approving Schedule 48 With Conditions, *Washington Utilities and Transp. Comm'n v. Puget Sound Power & Light Co.*, Docket No. UE-960696 (October 30, 1996). There, in first approving Schedule 48, the Commission stated unequivocally that cost-shifting to other classes of customers was prohibited:

> The revenue difference between Schedule 48 rates and the effective tariff rates that would otherwise be applicable to current Schedules 31, 46, 49, or special contract customers (i.e., lost revenues), shall not be shifted to other customer classes and shall be borne by shareholders until future Commission determination regarding allocation of costs and cost savings, and then only on a prospective basis.

[9] The Commission ordered all of the gain from PSE's proposed sale of Colstrip to be deferred and later flowed through to ratepayers in PSE's next general rate case after the Rate Plan expired. This was done to allow PSE's entire operations to be examined in a general rate case setting in order to determine how best to use the gain for the full benefit of ratepayers. The deferral was not ordered out of agreement with PSE's argument that the Rate Plan required the gain from the sale to be captured for shareholders. *Id*. at 18 ("The Commission in its order approving the merger did not grant PSE permission to sell used and useful generation assets as a power cost savings.")

[10] When PSE filed for approval of its sale of the Centralia generation facilities, it did not raise the same argument concerning the effect of the Rate Plan. In fact, it proposed a five-year amortization of the gain on sale beginning during the Rate Plan. It later abandoned that proposal in favor of a one-time bill credit that flowed all of the gain from the sale to ratepayers during the Rate Plan. *In the Matter of the Application of Puget Sound Energy, Inc.*, Docket No. UE-991409, 5th Supp. Order Granting PSE's Petition for Centralia Transaction Credit (August 22, 2000).

Id. at 5. The Commission also accepted PSE's firm commitment that "we guarantee that other classes will not pay as a result of Schedule 48" during or after the Rate Plan. *Id*. at 7. The argument that nothing can be done to Schedule 48 rates without making the company whole for lost revenues is belied by this guarantee.

Finally, when the Commission approved Schedule 48, it conditioned that approval on a formal review and possible revision of that tariff during the Rate Plan:

> Within 60 days after receipt of notice from the Commission, but not later than January 1, 2001, Puget Power shall refile Schedule 48 with the Commission along with updated supporting data, including such information set forth in any such Commission notice. The Commission may approve the terms of or revisions to Schedule 48 or may, after hearing, issue an order terminating or revising Schedule 48. In any such proceeding, Puget Power has committed to bearing the burden of proof.

Id. at 6. The Company, in fact, made this required filing on December 29, 2000 in Docket No. UE-960696. The Staff Rate Cap proposal is consistent entirely with the review and revision of Schedule 48, as originally contemplated by the Commission and PSE to occur during and despite the Rate Plan.

> **e. Does the Commission possess any legal authority to require customers of regulated utilities to take specific actions to protect themselves from circumstances such as those Complainants contend now constitute an immediate danger to the public health, safety or welfare? For example, does the Commission have the authority to order Complainants to seek financial or physical hedges against increased prices when they have elected to purchase power under a rate schedule that includes market-based rates?**

"Administrative agencies have those power expressly granted to them and those necessarily implied from their statutory delegation of authority." *Tuerk v. Department of Licensing*, 123 Wn.2d 120, 123-25, 864 P.2d 1382 (1994). This doctrine is discussed in great detail, *infra*, in Section III.B.3. Its application here also requires the Commission to examine statutes contained in chapters 80.01, 80.04 and 80.28 RCW. That examination

demonstrates that the Commission's authority extends only to the electric companies it regulates. Any impact of Commission action on the customers of regulated companies occurs indirectly only.

For example, the Commission's jurisdiction is limited to regulating in the public interest the rates, services, facilities and practices of electric companies. RCW 80.01.040(3). The complaint statute, RCW 80.04.110, concerns either acts performed or omitted by any public service company in violation of law, rule or order of the Commission, or the reasonableness of a company's schedule of rates and charges. RCW 80.04.220 (reparations) and RCW 80.04.230 (overcharges) are also directed toward remedies to be ordered by the Commission against a regulated company in favor of a customer or class of customers. Statutes contained in chapter 80.28 RCW concerning duties as to tariffs, services and facilities all establish obligations of the electric company, not the customer, to be enforced against the company, as determined by the Commission. While those same statutes provide companies the legal authority to require customers to comply with the rates, terms and conditions of approved tariffs and special contracts, the remedy for a customer's failure to fulfill those requirements is refusal, disconnection, or interruption of service, and civil collection procedures for unpaid bills. The Commission cannot order directly the customer to comply.

In short, the Commission does not have express or implied legal authority to require customers of regulated utilities to take certain actions to protect themselves from circumstances they assert constitute an immediate danger to the public health, safety or welfare. The Commission may deny their requested remedy, which may have the effect

of the customer taking preventative action. But a direct order to take such action is beyond the Commission's jurisdiction.

B. Emergency Relief Issues

There are three issue areas here:

- Whether the Rate Plan precludes the relief sought, or other relief, and if not:
- Whether the fact that the rates at issue are implemented in contracts prohibits the relief sought, or other relief, and if not:
- Whether any lack of express or implied power prohibits the Commission from granting the relief sought, or other relief.

We address these issues at the outset, before proceeding to answer the individual questions of the Commission.

1. Commission Authority Under the Rate Plan to Provide the Relief Sought, or Other Relief

This issue was discussed above in Section III.A.2.d. We concluded the Rate Plan does not prohibit the Commission from addressing Schedule 48 issues.

2. Commission Authority to Affect the Rates in Schedule 48 Contracts and the Georgia-Pacific Contract

This issue relates to the power of the Commission to affect rates established or implemented through contracts. The Staff concludes the Commission has express power to do so.

The Commission Staff anticipates that PSE and perhaps others will argue the Commission is powerless to affect the contracts for electricity entered into between

Complainants and PSE, whether these are contracts under Schedule 48, or not.[11] Schedule 48 is implemented through contracts, and it provides that such contracts terminate no later than the fifth anniversary of the effective date of Schedule 48, *i.e.* November 1, 2001. *See* Schedule 48, Attachment to Schedule 48, ¶3.

As a matter of sound regulatory policy, the Commission may well be loathe to assert its power to affect rates embodied in and enforced through contracts freely entered into between sophisticated customers and a sophisticated utility. Particularly since the underlying tariff and the underlying contracts themselves expressly place the risk of increased electricity prices squarely upon the customers, and state that customers had the opportunity to seek their own legal and other expert advice.

However, the law in this state does not favor the argument that the Commission is powerless to affect rate contracts. First, RCW 80.28.020 expressly authorizes the Commission to find that "rates" or "contracts" are unjust, unreasonable, unduly discriminatory or unduly preferential, and to fix just and reasonable rates by order. Even

[11] At the federal level, such a policy is often called the "*Mobile-Sierra* doctrine," after the Supreme Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.,* 350 U.S. 332, 100 L. Ed. 373, 76 S. Ct. 373 (1956) and *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 100 L. Ed. 388, 78 S. Ct. 368 (1956). The *Mobile-Sierra* doctrine is inapplicable to contracts subject to Commission jurisdiction, for at least two reasons.

First, that doctrine is based "solely" on an interpretation of the language in the federal Natural Gas Act, not the Constitution (*See United Gas Pipeline Co v. Mobile Gas Service Corp., supra*, 350 U.S. at 337-38), and certainly not Title 80 RCW.

Second, that doctrine applies to unilateral changes in rates proposed by the utility, not to cases in which the issue was the reasonableness of the contract rate itself: "the contracts remain fully subject to the paramount power of the [FPC] to modify them when necessary in the public interest." *Id.* 350 U.S. at 344.

In that context, the Court has not permitted the FPC to modify a utility/customer contract when the rate simply produced utility returns lower than authorized. But the agency could step in when the rate might "adversely affect the public interest," such as if the rate was unduly discriminatory or "cast upon other consumers an excessive burden…" *Federal Power Comm'n v Sierra Pacific Power Co., supra,* 350 U.S. at 355. As the Court put it: "But, while it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than an authorized return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain." *Id.* (emphasis in original).

assuming the Commission could waive this express statutory power with respect to the contracts at issue in this case, there is no evidence it has ever done so.

Second, rates established in contracts which were entered into between a utility and its customers before the onset of regulation have been held to be subject to different (and prospective) rates set by a later-established regulatory agency. *Raymond Lumber Co. v. Raymond Light & Water Co.,* 92 Wash. 330, 159 P. 133 (1916). The rationale is that private contracts are entered into with a view to possible subsequent public interest regulation. If the Commission can lawfully (and prospectively) affect the rates set between private parties to a contract entered into before the existence of public service regulation, certainly it is empowered to similarly affect the rates set in a contract entered into in the context of public service regulation itself.

Should the Commission have lingering concerns about its legal ability to affect rates established in rate contracts, it is at least conceivable that some principles of contract law could apply to support such Commission action. But such principles may fall well short of protecting the customers here. That is primarily because the contracts and Schedule 48 plainly place the risk of price increases on the customers, and/or it may be difficult for the customers to prove there were no opportunities for them to hedge against such risk.[12]

[12] Two contract theories may apply. The first is commercial impossibility or frustration of purpose. This basis for relief is rarely granted. This is an equitable doctrine requiring the promissor to prove the events rendering its performance impossible were "fortuitous and unavoidable" on the part of the promissor. *Metropolitan Park Dist. Of Tacoma v. Griffith,* 106 Wn.2d 425, 440, 723 P.2d 1093 (1986). If the contract allocates the risk at issue to one party, that party may not assert commercial frustration of purpose. *Id.* 106 Wn.2d at 440, and *Scott v. Petett,* 63 Wn. App. 50, 60, 816 P.2d 1229 (1991).

The tariff Schedule 48 and the contracts at issue in the instant case expressly allocate the risk of high electricity prices on the customers. And possibilities for hedging gave the customers an avenue for avoiding large price swings.

The second contract theory that may apply is mutual mistake of fact, which, if proven, makes a contract voidable. This doctrine is also equitable in nature. It does not apply if the party seeking

3. Commission Express and Implied Authority As to the Relief Sought, or Other Relief

This issue area relates to the legal authority of the Commission to order the relief sought. The legal issue regarding the Commission's authority to grant the relief requested underlies the Staff's responses to all issues. Therefore, we will proceed to analyze that issue first, then respond directly to each specific question posed by the Commission. For the reasons stated below, we conclude the Commission has no express or implied power to grant "interim" relief of the sort requested, even assuming an emergency could be proven. This conclusion is consistent with the Commission's decision in *Bellingham Cold Storage Co. and Georgia-Pacific West, Inc. v. Puget Sound Energy, Inc.*, Docket No. UE-001014, Order Directing Parties to Negotiate; Denying Motion (April 5, 1999), *supra*, at 9-10:

> As Commission Staff points out, the Commission's authority to grant interim relief stems from the constitutional and statutory rights enjoyed by regulated utilities in exchange for their loss of pricing ability and their obligation to provide service. While customers enjoy no such rights, they do have the ability to participate in rate setting and do have the power to institute complaints against utilities, as the movants have done in this docket.

The Commission does have authority to fix a different rate, but only upon a finding that the existing rate is unjust, unreasonable, unduly discriminatory, unduly preferential, or excessive or exorbitant. Should the Commission make such a finding on an appropriate record, the rate fixed would be the rate to be charged. There would be no need to make that rate subject to refund or surcharge.

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avoidance of the contract bears the risk of the mistake. *Scott v. Petett, supra*, 63 Wn. App. at 57, and *Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, 426, 922 P.2d 115 (1996).

Again, the risk of increasing electricity prices was expressly placed on the customers here. It might be argued that the "mistake" was not rising prices, but the inefficacy of the Mid-C Index. On the

For purposes of the analysis we assume the relief the Complainants immediately request is to be served under Schedule 49 until new Schedule 48 rates, if any, are determined in this proceeding. If those new Schedule 48 rates are determined to be less than Schedule 49 rates, a refund would result. If those new Schedule 48 rates are determined to be greater than Schedule 49 rates, a surcharge would result.

It is further assumed that this relief is to be granted before any findings were made that the rates heretofore charged were excessive or exorbitant, or unjust, unreasonable, unjustly discriminatory, or unduly preferential. *See* Second Amended Complaint at 10, ¶1 (although the Complaint contains allegations about rates being unjust and unreasonable, the claim for relief at 10, ¶1 is not predicated on such a finding). This assumption in particular may be moot, given the evidentiary hearings scheduled in this matter.[13]

Express powers. "Administrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority." *Tuerk v. Department of Licensing, supra,* 123 Wn.2d at 124-25.

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one hand, the parties did agree to that index. On the other hand, the Index as implemented may not represent what it was intended to represent.

[13] The Second Amended Complaint also seeks damages for alleged breach of contract, based on allegations that PSE has not and/or will not permit open access. Complainants seek damages in the amount of the "transition charges" they paid to PSE. *See* Second Amended Complaint, Second Cause of Action, ¶32-45. We assume this claim is not an aspect of Phase One of this case. In any event, even assuming the Commission has authority to determine whether a breach of contract has occurred, and assuming the contracts alleged to have been breached were the contracts of the Complainants under Schedule 48 or a special contract, it is unlikely that the Commission has jurisdiction to award damages for breach of contract: "… where implied authority to grant or impose a particular remedy is not clearly set forth in the statutory language or its broad implication, the courts of this state have been reluctant to find such authority on the part of an agency." *Skagit Surveyors & Engineers v. Friends of Skagit County*, 135 Wn.2d 542, 565, 958 P.2d 962 (1998). *See also Schriner v. Pennsylvania Power & Light Co.*, 501 A.2d 1128, 1131 (Pa. Super. 1985); *Glidden v. Central Vermont PSC*, 116 PUR 4th 142, 150 (1990); and *Cohn v. Department of Corrections*, 78 Wn. App. 63, 895 P.2d 857 (1995)(no express or implied agency power to award dam ages in the form of attorney's fees). RCW 80.040220 does refer to "damages," but it requires a finding of entitlement thereto, and the award is limited to the amounts found to be excessive or exorbitant, plus interest

The Commission's express powers are set forth in its statutes. Relevant here is the complaint statute, RCW 80.04.110(1) which permits certain customer complainants to file complaints challenging the reasonableness of any rate schedule. The amended Complaint in this docket appears to satisfy the statutory requirements for such a complaint.

The Commission is to serve the complaint upon the entity complained of, and set the matter for hearing. RCW 80.04.100(3). Under RCW 80.04.220,[14] in the context of such a complaint against the reasonableness of a rate, the Commission may determine, after investigation, that a rate is "excessive or exorbitant," and order that the excessive amount be refunded, with interest:

> When complaint has been made to the commission concerning the reasonableness of any rate, toll, rental, or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount for such service, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged, whether such amount has been charged and collected before or after the filing of said complaint, with interest from the date of collection of said excess amount.

Under RCW 80.28.020, in the context of a complaint, the Commission may establish the "just, reasonable or sufficient rates thereafter to be observed." This authority is predicated upon a finding that the existing rates are "unjust, unreasonable

[14] The Complainants do not cite RCW 80.04.220 in their Second Amended Complaint. The standards in RCW 80.04.220 may nonetheless be invoked, based on the standards in RCW 80.04.020. The latter statute was referred to in the Second Amended Complaint at 4, ¶12.

unjustly discriminatory, or unduly preferential, or in any wise in violation of the provisions of the law..."[15]

Nothing in the foregoing statutes expressly provides the Commission the power, upon customer complaint, to order a rate to go into effect that is lower than the pre-existing rate, without the requisite statutory findings and/or determinations in RCW 80.28.020 and, by reference, RCW 80.04.220.

We discovered no Commission cases directly addressing this issue in the context of a customer-initiated complaint. We located one court case (albeit a venerable one) from another state that held that a ratemaking authority (under a similar statutory scheme) upon customer complaint, was powerless to impose a rate different than what was prescribed in the published tariff, prior to making the requisite findings regarding existing rates. *Public Utilities Comm'n ex rel. Mitchell v. Chicago & West T. R. Co.*, 114 N.E. 325 (Ill. 1916).

In sum, there is no express power to grant the relief sought. If the Commission is able to make the requisite findings in relation to the standards in RCW 80.04.220 and RCW 80.28.020, it has the express power to fix an appropriate rate.

Implied Powers. As noted above, agencies have express powers and "those *necessarily implied* from their statutory delegation of authority." *Tuerk v. Department of Licensing*, *supra,* 123 Wn.2d at 124-25(emphasis supplied).[16]

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[15] Note the difference in language between the language in RCW 80.04.220 (reparations allowed when rates are "excessive or exorbitant") and RCW 80.28.020 (rates may be changed after complaint, and a finding that existing rates are "unjust, unreasonable, unjustly discriminatory, or unduly preferential, or in any wise in violation of the law"). We assume the "otherwise in violation of the law" in RCW 80.28.020 includes the "excessive or exorbitant" standard in RCW 80.04.220.

[16] The court in the *Tuerk* case found implied powers in the context where an agency is charged with a specific duty, but the statute is silent as to the means for accomplishing that duty. In that case, the agency's power to issue and enforce regulations relating to real estate brokers included implied power to interpret those regulations, and to determine standards for when an application for renewal of a real estate broker's

"Necessarily implied" powers are not easily inferred. For example, in the case of *In re Electric Lightwave, Inc.,* 123 Wn.2d 530, 869 P.2d (1994), the issue was whether there was an implied power to make local exchange boundaries exclusive in nature. (The Commission had the express power to "prescribe" such boundaries under RCW 80.36.230). The court held there was no such implied power:

> Since the Commission is fully capable of exercising its authority under RCW 80.36.230 without the power to grant monopolies or other exclusive rights, the text [of that section] does not necessarily or impliedly grant such power.

123 Wn.2d at 537.[17]

Under this analysis, the issue is whether the Commission is "fully capable" of exercising its authority to determine whether rates are "excessive or exorbitant" (RCW 80.04.220) or unjust, unreasonable unjustly discriminatory, or unduly preferential (RCW 80.28.020) without imposing a rate lower than the existing rate prior to that determination?

On its face, an implied power to impose a lower rate without making the requisite findings as to the existing rate would not appear to satisfy the "necessary" standard in the context of this case. The Commission could proceed to determine the merits of the Complaint, and order reparations, with interest, if that result is warranted. And it can establish a different rate to be charged, if the existing rate is found to be unjust,

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license was sufficient. By contrast, in the instant case there is specific statutory language regarding the "means" by which a customer complainant is entitled to relief. RCW 80.04.220 and RCW 80.28.020.

[17] Another example of the application of the implied powers doctrine to the Commission is *Washington Independent Tel. Ass'n v. Telecommunications Ratepayers Association for Cost-based and Equitable Rates*, 75 Wn.2d 356, 880 P.2d 50 (1994). In that case, the Commission authorized the creation of a "Community Calling Fund," funded by a charge against local exchange carriers. The Fund was to be used to enable the implementation of a policy encouraging broad conversion to toll-free local calling areas around the state. The court found no authority, express or implied, to justify the creation of the Fund. In particular, it found that the broad grant of authority in RCW 80.36.080 was an insufficient basis for the action taken.

unreasonable, *etc*. But granting lower rates before deciding whether existing rates fail those statutory standards, does not appear to be "necessary" to accomplish those ends.

This conclusion is buttressed by an evaluation of Commission practices that have obtained court approval either in this state, and/or are commonly accepted practices in other jurisdictions. The practice that comes first to mind is the Commission's approval of "interim" rates.[18] "Interim" rates are usually placed into effect prior to a final decision in a rate proceeding initiated by the utility. Interim rates are typically "permanent" in nature, though of short duration. The utility keeps the revenues from such rates regardless of whether the rates ultimately approved in the case are lower or higher than the interim rates.[19]

Since the utility keeps the revenues from interim rates, and the need for interim rate relief is decided based on less than a full rate case record, the Commission has, as a matter of policy, required a strict showing of significant financial harm to the utility, well beyond a mere failure to earn an authorized return. The Commission also requires an evidentiary hearing in which the alleged harm is subjected to proof. *See, e.g. Washington Utilities and Transp. Comm'n v. Pacific Northwest Bell Telephone Co.,* U-75-40 (2d Supp. Order)(Sept. 26, 1975), 11 PUR 4th 166, 168-89.

There is no separate statutory authority specifically empowering the Commission to implement interim rates. It could be argued that the express general ratemaking

[18] Please note that the term "interim rate" can and has been used to describe a number of different rate actions by regulatory agencies. For purposes of this memorandum, the term "interim" rate has the narrow meaning given in this memorandum.

[19] One case was located where interim rates were placed into effect subject to refund in the unlikely event the utility earned in excess of its authorized return. *WUTC v. Washington Natural Gas Co.*, Cause No. U-80-111 (2d Supp. Order)(March 3, 1981) at 7. To the extent the refund condition was other than illusory given the exigencies involved, this case may be more properly categorized as involving a temporary rate subject to refund.

authority in RCW 80.04.110 and RCW 80.28.020 is broad enough to justify exercise of this power, since relief is granted after hearing, and a determination of specific revenue needs. It could also be argued that such power arises from the constitutional prohibition against confiscation of the utility's property, a prospect advanced by perpetuating a rate that is too low to enable the utility to finance on reasonable terms, even in the short term.

The Commission itself has stated that its exercise of the power to consider and grant interim rate relief is based on *State ex rel. Puget Sound Navigation v. Department of Transp.,* 33 Wn.2d 448, 206 P.2d 456 (1949).[20] In that case, the court held the Commission's authority to allow rates to go into effect before a full hearing was linked to its power to prevent a filed rate from becoming effective:

> The power vested in the department to refuse to allow the new rate filed by appellant to become effective implies the power to allow the tariff to become immediately effective, subject to reasonable conditions or limitations.

33 Wn.2d at 482.

In implementing interim rates, the Commission has examined the actual conditions facing the utility (*e.g.* a drought), as opposed to conditions that might be expected in a traditional, normal weather, *pro-forma* ratemaking environment. In other words, if prospective "fair, just and reasonable" was the standard for interim rates, interim relief might not be granted, since such rates could effectively ignore the short term conditions leading to the severe financial problem that imperils the utility. The underlying policy justification for interim rate relief appears to be that at some level, regardless of how rates would otherwise be set in a full rate case, the utility's financial

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[20] *See Washington Utilities and Transp. Comm'n v. Pacific Northwest Bell Tel. Co*., Cause No. U-72-30 tr (2d Supp. Order, October 10, 1972) at 5.

emergency requires an infusion of revenues immediately, before a full examination of appropriate overall rate levels can be accomplished. The standards adopted by the Commission therefore appear to be related somewhat to a confiscation-based standard. Many state commissions use an interim rate analysis similar to that used by this Commission.[21]

Allowing a "temporary rate" is the second mechanism under which the Commission has afforded relief short of a final order at the end of a full rate case. Temporary rates are similar to interim rates in the sense they are usually placed into effect pending further proceedings. But unlike interim rates, temporary rates are subject to refund. And unlike interim rates, temporary rates are not required to meet the more strict interim relief standards enunciated by the Commission, since temporary rates are subject to refund. That is, the "subject to refund" feature provides sufficient protection against rates that may ultimately be found to be too high.

The power to permit temporary rates subject to refund was recognized in the *Puget Sound Navigation* case, *supra,* which involved the regulated company actually filing a temporary rate. The Commission's power to permit that rate to become effective immediately, but subject to refund, was upheld.[22] It is our general understanding that this particular rate implementation mechanism is used by the Commission in various industries, such as solid waste.

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[21] The Commission supported its decision in *Washington Utilities and Transp. Comm'n v. Pacific Northwest Bell Tel. Co*., Cause No. U-72-30 tr, *supra*, with an analysis of decisions from several other states that had considered interim rate relief.

[22] The rationale, again, was that since the Commission had the power to suspend the filing, it had the authority to do less than that, by permitting the rates to go into effect subject to refund. The same sort of analysis was adopted by the Supreme Court in *Mobile Alaska Pipeline Company v. United States*, 436 U.S. 631, 655, 56 L. Ed. 2d 591, 98 S. Ct. 2053 (1978). The Court found the power to place temporary rates into effect was "a legitimate, reasonable, and direct adjunct to the Commission's explicit power to suspend

It therefore appears to be well-settled that the Commission has the power to allow a utility-filed rate to go into effect on a temporary basis, subject to refund, whether the utility-filed rate reflects a rate increase or rate decrease. In the latter context, the Commission recently implemented a temporary rate decrease in a case involving PSE itself, in the Commission's Fourth Supplemental Order in Docket UE-981238 (April 5, 1999). The Commission did not impose the standards applicable to interim relief requests in that case, which also involved Schedule 48.

The instant case, of course, does not arise in the context of a tariff filing by a utility. It arises in the context of a customer-initiated complaint alleging that an existing rate of PSE is unfair, unjust and unreasonable. The Complainants seek a temporary rate, subject to refund or surcharge, depending on the rate ultimately to be determined.

But a customer has no right directly analogous to the utility's statutory right to file a tariff which, absent commission action generally within 30 days, would otherwise become effective by operation of law. *See* RCW 80.04.130 (suspension statute) and RCW 80.28.060 (general 30 day notice requirement for tariff changes).

That is, after 30 days from filing a complaint, with no Commission action, a customer complaint does not change an existing rate. On the other hand, a customer complainant with standing can file a complaint against an existing rate, and if successful, can be provided relief back to the date of the complaint, and even before. RCW 80.04.220.

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rates pending investigation." (quoting *United States v. Chesapeake & Ohio R.. Co.,* 426 U.S. 500, 514, 49 L. Ed. 2d 14, 96 S. Ct. 2318 (1976).

The policy basis underlying the reparations statute appears to have been enunciated in *Pacific Coast Elevator Co. v. Department of Public Works*, 130 Wash. 620, 641, 228 P. 1022 (1924), a case which predated the enactment of RCW 80.04.220:

> The wrong sought to be corrected was then existent [at the date of the complaint]. The powers of the department in such matters are legislative rather than judicial, and its powers were as potent from the time it acquired jurisdiction as they were at any subsequent time. We hold, therefore, that the order [granting the complainant relief as of the date of the complaint] was not in this respect in excess of power.

Thus, the argument in Complainant's favor would be to extend the *Pacific Coast Elevator* rationale, to the effect that whatever power the Commission has to grant relief at the end of the complaint proceeding can be exercised at the outset, effective at least as of the date of the complaint. This could mean, for example, that if the Commission could grant the Complainants the rates they request by the end of the case, it can do so now, at the beginning of the case. And likewise, should the Commission grant the temporary rates Complainants have requested, and then later find that Schedule 48 rates should be higher than the temporary rates, then such temporary rates could be placed into effect subject to surcharge.

The counterargument would be that RCW 80.04.220 and RCW 80.28.020 already circumscribe the scope of a customer complainant's rights to relief, and additional relief of the type requested by the Complainants cannot be necessarily implied for that reason. Moreover, under the *Puget Sound Navigation* case, *supra*, the power to grant temporary rates subject to refund or surcharge arises from the Commission's power to grant relief at the outset. The Commission only has that power when tariff changes are filed by a utility. No such power exists *vis a vis* a customer-initiated complaint. This is the

preferred analysis, since, among other things, it is consistent with the implied power analysis of the more recent cases.

Complainants' case is further hampered by the fact that based on our research to date, the relief requested by the Complainants (temporary rates subject to refund or surcharge), is without precedent in this state in a customer-initiated complaint context. And even the Commission's power to grant a *utility's* request for temporary rates subject to *surcharge* is unprecedented in this state, based on our research to date.[23]

Accordingly, in the legal context discussed above, we cannot advocate that the relief sought by Complainants on an emergency basis is within the Commission's express or implied powers. Should the Commission disagree, we advise caution. If a court should later determine the Commission has no such power, it is Puget and potentially its other customers that would suffer the shortfall. That is unacceptable. The customers here have sought the surcharge remedy; they should be required to live with the remedy they seek, should the Commission see fit to grant it.

Therefore, if the Commission decides, on balance, that it has the implied power to grant the relief sought on an emergency basis, and wishes to exercise that power, we strongly recommend a condition precedent that all customers taking service under Schedule 48 sign an agreement that they waive the right to challenge the legal right of the

[23] There are few decisions from other state commissions in which interim rate decreases were ordered. One case was found in which a state commission imposed interim rate reductions in a commission-initiated complaint proceeding, upon a showing that the utility had persistently overearned despite prior rate reductions. It did so based on a *"prima facie"* showing that the amount of reduction imposed was reasonable based on a staff analysis of utility earnings. *In re US West Communications*, 114 PUR 4th 174, 180 (Utah PSC 1990). The Utah commission did not enunciate the legal basis for the assertion of this power, although it did recognize that there were differences between the status of the utility and the other parties to the proceeding that justified a different analysis than when the utility requested interim increases. The commission also noted that there was specific statutory authority to grant interim decreases. Given the existence of this statute, the value of this precedent is even further diminished.

Commission or PSE to impose any Commission-approved surcharge that would be implemented as a result of the complaint proceeding. This would not affect the customer's right as a party to challenge the result overall, just their right to challenge the Commission's power to impose a surcharge.[24]

4. Specific Issues

Having resolved the core legal issue, we proceed to answer the specific questions asked by the Commission.

a. Is a finding that the rates charged by PSE are unjust, unreasonable unjustly discriminatory, or unduly preferential a necessary predicate to ordering the relief the Complainants request?

If the relief requested is a temporary rate subject to refund or surcharge, for the reasons stated above Staff has concluded that the Commission has no power to grant such relief, as Staff has construed the terms "temporary" and "interim" rates herein.

If the Commission makes the findings that the existing rates are excessive, exorbitant, unjust, unreasonable, unduly discriminatory, or unduly preferential, and that a different rate should apply, then that different rate is neither a "temporary" rate nor an "interim" rate, again, as Staff has construed those terms. The Commission has express authority to fix such a different rate upon such findings. RCW 80.28.020.

b. What indices of proof are required to show the Schedule 48 or special contract rates are unjust, unreasonable, unjustly discriminatory or unduly preferential?

In answering this question, we would again add the criteria of rates that are "excessive or exorbitant" per RCW 80.04.220. As indicated previously, these criteria appear to be encompassed by the "catch-all" phrase "in any wise in violation of the

[24] In other words, the right to appeal the specific rate level would be retained, but they would not challenge the Commission's authority to adopt such a rate and implement it on a surcharge basis.

provisions of the law" in RCW 80.28.020. We assume RCW 80.28.020 is the source of the language in the Commission's question.

Proof that a rate is "excessive or exorbitant" under RCW 80.04.220, or fails the other standards in RCW 82.38.020 depends on the context, both factual and legal. A broad range of factors could and probably should be brought to bear on the issue.

Part of the unique context of this case is that the Commission clearly authorized the energy portion of Schedule 48 as a market-based service: "Schedule 48 customers will pay rates for electricity priced at market cost…" and "The pricing of service under Schedule 48 is based upon market cost of electricity…" "*Schedule 48 Order"* at 9 and Finding of Fact No. 9, respectively (*Washington Utilities and Transp. Comm'n v. Puget Sound Power & Light Co.*, Docket No. UE-960696 (Order dated October 31, 1996)). The "Mid-C Index" was the market index that was agreed to apply, and it was implemented.

Another part of the unique factual context here is the tariff itself, which explicitly states that the customers, not PSE or other ratepayers, bear the risk of rising prices:

> Customers taking service under this Schedule assume risks of variability in energy prices and availability of energy for delivery to Customer…
>
> Schedule 48 at ¶I.4.[25]
>
> The Company will no longer make commitments to have firm power supply resources available to Customer, unless contracted for by Customer as optional firming service under Schedule 48. …
>
> Attachment to Schedule 48, at ¶6.

[25] This point was emphasized by the Commission last summer in *Bellingham Cold Storage Co. and Georgia-Pacific West, Inc. v. Puget Sound Energy, Inc.*, Docket No. UE-001014, Order Directing Parties to Negotiate; Denying Motion (April 5, 1999), *supra*, at 10: "It is also essential for the parties to accept responsibility for their decisions" …"While [the customers at issue there] are free to decline available means of moderating market fluctuations, a consequence of that decision is that when the market goes up, they must pay more."

> Customer understands and agrees that it is assuming certain risks by voluntarily choosing to take service under Schedule 48 and electing not to take service under otherwise applicable Company tariffs. Customer understands that depending on a number of uncertain factors, including but not limited to the market for power (including supply and price) [*etc.*]…Customer may (i) experience a shortage of electricity or (ii) pay more than it would have otherwise. Customer has had opportunity to consult its own legal counsel and power market experts in its evaluation of the risks associated with taking service under Schedule 48.
>
> Attachment to Schedule 48, at ¶8.

Furthermore, Schedule 48 contains explicit provisions referring to "optional price stability services." Schedule 48, Item III.3. And certainly any customer could have pursued independent hedging or analogous opportunities prior to the recent large price fluctuations.

Yet another aspect of the factual and legal context of this case is the commitment that "other classes will not pay more as a result of Schedule 48." This "guarantee" was explicitly accepted by the Commission as a condition of approving Schedule 48. *Schedule 48 Order* at 7.

The legal context of this case also features the problem of dealing with the reasonableness of a market-based rate, under legal standards developed in a more traditional regulatory environment, and which are at the same time broad and general. In a somewhat similar context, FERC has recognized the problem of determining the "difficult question of what makes a market-based rate unjust and unreasonable." *San Diego Gas & Elec. Co. v. Sellers of Ancillary Services, Etc.*, 93 FERC ¶61,294, Order Directing Remedies for California Wholesale Electric Markets, 2000 WL 1840337 at 24. FERC recognized the lack of a "precise legal formulation for setting a just and reasonable rate and no precise bright line for when a rate becomes unjust and unreasonable." *Id.*

FERC took action to impose a form of price cap on the California wholesale market based, among other things, on its staff's report regarding the California market. FERC acted in part because it had "no assurances that rates will not be excessive relative to the benchmarks of producer costs or competitive market prices…" *Id.*

Balanced against these factors would be consideration that there is something untoward about the index selected, *e.g.* that the Mid-C Index is "broken," and the results it produces are inconsistent with what the Index was selected to measure. "Benchmarks" such as cost and competitive rates in the market overall, however those would be measured, could be relevant to this inquiry. By the same token, the fact the Commission has not used a cost standard to justify Schedule 48 rates should also be considered.

And, the context of this case arises in the overall ratemaking context of what is a "just and reasonable" rate. This is an amorphous legal concept. The court has recognized that the concept of just, reasonable and sufficient is a broad one, in the context of a general rate order:

> Following this broad standard, then, the WUTC must in each rate case endeavor to not only assure fair prices and service to customers, but also to assure that regulated utilities earn enough to remain in business-each of which functions is as important in the eyes of the law as the other.

POWER v. Utilities and Transp. Comm'n, 104 Wn.2d 798, 808, 711 P.2d 319 (1985).

c. Is a determination of what rate is a "sufficient" rate a predicate to ordering the relief the Complainant's request?

Complainants' proposal does not expressly address rate sufficiency considerations. The standard of "sufficiency" goes to the concept of the "zone of reasonableness." The lower bound of the zone is a rate structure that is confiscatory in its

overall effect. *See, e.g. POWER v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 811-13, 711 P.2d 319 (1985).

As noted, this standard usually goes to the overall earnings of the utility, and is not examined on a tariff by tariff basis. For example, a rate does not does not violate the "sufficiency" standard if it is below the cost indicated in a cost of service study, so long as overall, the utility is afforded a reasonable opportunity to earn a fair return, balancing investor and consumer interests.

The Commission Staff is satisfied, based on the information available, that under its Rate Cap concept, Puget would have a reasonable opportunity to earn a fair return. It is not clear whether that would be the case under Complainants' request for relief.

d. What rate does each party contend is a sufficient rate to be charged? What indices of proof are required to show the sufficiency of the proposed rate?

The Commission Staff will contend that the extreme spikes in the Mid-C Index under Schedule 48 produces prices that may not be just and reasonable under certain market conditions, and that an appropriate cap could be implemented in the short term. A cap mechanism would provide for appropriate and sufficient revenue recovery by PSE while affording some protection for customers against an index that is said to be broken. Staff believes this result will not unduly harm PSE's reasonable opportunity to earn a fair return.

e. By what legal authority can the Commission order an interim, or temporary, rate subject to refund when the regulated company has not filed for a rate change?

As discussed in detail previously, the Commission Staff takes the position that the Commission has no authority to grant either an "interim" rate or "temporary" rate subject

to refund, in the context of a customer-initiated complaint, as we have construed the terms "interim" and "temporary" rate.

If the Commission makes the requisite finding that a rate is excessive or exorbitant, or unjust, unreasonable, unduly discriminatory or unduly preferential, and is able to determine a rate that is appropriate, then that is the lawful rate prospectively. That is neither an "interim" rate nor a "temporary" rate, as we have construed those terms.

In sum, the customer complainants here are limited to the remedies in RCW 80.04.220 and RCW 80.28.020. The latter includes the Commission's power to "fix" an appropriate rate. Since the Commission has the power to fix such a rate permanently, it is likely the Commission has the power to place that rate into effect for a short term basis, if it wishes, or impose other conditions it deems appropriate. The authority for the latter conclusion would be the holding in the *Puget Sound Navigation* case.

f. On what bases may the Commission determine what should be the interim, or temporary rate?

As discussed in detail previously, the Commission Staff takes the position that the Commission has no authority to grant either an "interim" rate or a "temporary" rate subject to refund, in the context of a customer-initiated complaint, as we have construed the terms "interim" and "temporary" rate.

Should the Commission fix a rate pursuant to its express authority under RCW 80.28.020, after making the requisite findings, the broad standards established in RCW 80.28.020 would be the legal bases, decided in the context of Schedule 48, the Rate Plan and whatever relevant facts may be brought to bear on that question.

g. By what legal authority can the Commission order an interim, or temporary rate subject to surcharge?

Commission Staff is aware of no statute expressly authorizing a temporary or interim rate subject to surcharge. There appears to be no implied power to authorize same in the context of a customer-initiated complaint.

The Commission has from time to time adopted deferred cost tariff mechanisms in the context of setting rates, such as PRAM or ECAC for PSE itself. These mechanisms had "true-up" features that would be similar in concept to a surcharge.

Mechanisms of this type tread on issues of retroactive ratemaking. Commission Staff is proposing a temporary price cap mechanism that has no refund or surcharge feature. Due to the lack of precedent here in the context of a customer complaint, coupled with the large dollars and few customers involved in Schedule 48, Staff suggests that a surcharge is a highly risky proposition to all parties. This argues strongly against the use of such mechanisms.

h. Must an interim, or temporary rate decrease be determined to be a just fair, reasonable and sufficient rate before it is placed into effect?

Yes, for the reasons stated in the general considerations portions of this brief relating to Commission authority issues. At that point, such a rate would not be an

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"interim" rate or "temporary" rate, as Staff has construed those terms. It would simply be the rate, subject to whatever appropriate conditions, if any, the Commission saw fit to impose.

Respectfully submitted this 4th day of January, 2001.

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