

**BEFORE THE**

**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of )  
)  
PUGET SOUND ENERGY, INC. )  
)  
For an Accounting Order Authorizing )  
Accounting Treatment Related to Payments )  
for Major Maintenance Activities )  
\_\_\_\_\_ )

Docket No. UE-130583

WASHINGTON UTILITIES AND )  
TRANSPORTATION COMMISSION, )  
)  
)  
)

Docket No. UE-130617

v. )

\_\_\_\_\_ )  
PUGET SOUND ENERGY, INC. )

PETITION FOR ACCOUNTING )  
ORDER OF THE INDUSTRIAL )  
CUSTOMERS OF NORTHWEST )  
UTILITIES )

In the Matter of the Application of )  
)  
PUGET SOUND ENERGY, INC. )  
)

Docket No. UE-131099

For an Accounting Order Authorizing )  
Accounting the Sale of the Water Rights and )  
Associated Assets of the Electron )  
Hydroelectric Project in Accordance with )  
WAC 480-143 and RCW 80.12. )  
\_\_\_\_\_ )

In the Matter of the Application of )  
)  
PUGET SOUND ENERGY, INC )  
)

Docket No. UE-131230

For an Order Authorizing the Sale of )  
Interests in the Development Assets )  
Required for the Construction and Operation )  
of Phase II of the Lower Snake River Wind )  
Facility )  
\_\_\_\_\_ )

## I. INTRODUCTION

1 Pursuant to WAC § 480-07-370(1)(b), the Industrial Customers of Northwest  
Utilities (“ICNU”) petitions the Washington Utilities and Transportation Commission  
 (“Commission”) for an accounting order requiring Puget Sound Energy, Inc. (“PSE” or the  
 “Company”) to: (1) refund to customers amounts the Company has collected in rates between the  
 effective date of its tariffs filed in accordance with the Final Order issued in the 2013 power cost  
 only rate case (“PCORC”) and other above-referenced dockets (“2013 PCORC Order”), and the  
 date of this Petition, that were in excess of fair, just, reasonable and sufficient rates; and (2)  
 defer, beginning from the date of this Petition, amounts the Company is currently collecting in  
 rates that are in excess of fair, just, reasonable and sufficient rates.

2 ICNU is an incorporated, non-profit association of large industrial customers in  
 the Pacific Northwest. Many members of ICNU purchase power distribution and transmission  
 services from PSE. The contact information for ICNU’s attorneys in this matter is included at  
 the end of this Petition. ICNU’s contact information is:

Industrial Customers of Northwest Utilities  
 818 S.W. Third Ave, #266  
 Portland, OR 97204

3 The rules and statutes relevant to this Petition are: WAC § 480-07-370, RCW §  
 80.28.010, and RCW § 80.01.040.

## II. FACTUAL BACKGROUND

### A. 2013 PCORC

4 The Commission issued the 2013 PCORC Order on October 23, 2013, approving  
 and adopting an all-party settlement agreement and finding that a \$10,481,843 reduction to

PSE’s revenue requirement would “result in rates that are fair, just, reasonable, and sufficient.”<sup>1/</sup>

Included within this overall finding, the Commission approved the: 1) lowering of the power cost baseline rate; 2) prudence of various resource acquisitions and upgrades; and 3) effectual offsets to fixed production rate base in the form of Treasury Grants.<sup>2/</sup> New rates reflecting the Commission’s findings in the 2013 PCORC Order became effective on November 1, 2013.<sup>3/</sup>

5           The Commission approved PCORC filings and a power cost adjustment mechanism (“PCA”) in 2002.<sup>4/</sup> In so doing, the Commission approved and adopted an unopposed settlement stipulation detailing PCORC parameters, and incorporated the settlement stipulation into the order as an appendix.<sup>5/</sup> The Commission affirmed that the “power cost baseline” established in the settlement stipulation would be “embedded in PSE’s rates.”<sup>6/</sup> The stipulation defined: 1) the “power cost baseline rate” as “the sum of the Fixed Rate Components and Variable Rate Components divided by the test year delivered load (MWh)”;<sup>7/</sup> and 2) “Baseline Power Costs” as “the Power Cost Baseline rate times actual delivered load in the PCA period.”<sup>8/</sup> Finally, the settlement provided that the power cost rate would be composed of two components: 1) a fixed rate component, including production plant and transmission return on ratebase; and 2) a variable rate component, including production regulatory assets amortization and return.<sup>9/</sup>

6           In sum, the power cost baseline is embedded within PSE rates subject to review in a PCORC proceeding, including the 2013 PCORC, and this baseline rate is a product of

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<sup>1/</sup> 2013 PCORC Order at ¶ 11 (Oct. 23, 2013).

<sup>2/</sup> *Id.* at ¶¶ 19, 28.

<sup>3/</sup> *Id.* at ¶ 19; 2013 PCORC, Commission Compliance Letter (Oct. 25, 2013).

<sup>4/</sup> *WUTC v. PSE*, Docket Nos. UE-011570/UG-011571, 12<sup>th</sup> Suppl. Order (June 20, 2002).

<sup>5/</sup> *Id.* at ¶¶ 6, 21.

<sup>6/</sup> *Id.* at ¶ 22.

<sup>7/</sup> *Id.* at Appendix A, Exh. A ¶ 12.

<sup>8/</sup> *Id.* at Appendix A, Exh. A ¶ 13.

<sup>9/</sup> *Id.* at Appendix A, Exh. A at 4, “Total Revenue Requirement Table.”

calculations factoring in the Company’s rate of return. The rate of return is itself derived from a company’s return on equity (“ROE”). As the Commission explains, a company’s “overall rate of return ... is determined by taking the sum of the products of each component cost (*i.e.*, equity, long-term debt and short-term debt).”<sup>10/</sup>

**B. PSE Rate Appeal**

7 On June 25, 2013, the Commission entered a Final Order in PSE’s consolidated expedited rate filing (“ERF”), rate plan, and decoupling cases (collectively, the “ERF cases”), in which it approved the ERF, rate plan, and a decoupling mechanism for PSE.<sup>11/</sup> The Commission set PSE’s rates using the Company’s previously authorized ROE of 9.8%,<sup>12/</sup> despite the fact that the record evidence demonstrated that a reasonable ROE for the Company at the time that ERF Order 07 was issued was 9.3%.<sup>13/</sup> ICNU and Public Counsel challenged this decision in Thurston County Superior Court (the “Court”).<sup>14/</sup>

8 On July 25, 2014, the Court entered an order affirming in part and reversing in part ERF Order 07 (“Court Order”).<sup>15/</sup> In a letter ruling expressly incorporated into the Court Order via attachment, the Court found that the Commission’s decision to set the Company’s ROE at 9.8% was not based on substantial evidence in the record, and improperly shifted the burden of proof away from PSE and onto other parties.<sup>16/</sup> The Court remanded ERF Order 07 to

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<sup>10/</sup> WUTC v. PSE, Docket Nos. UE-111048/UG-111049, Order 08 at ¶ 33 (May 7, 2012).

<sup>11/</sup> WUTC v. PSE, Docket Nos. UE-121697/UG-121705 and UE-130137/UG-130138, Order 07 at ¶¶ 244-245 (June 25, 2013) (“ERF Order 07”).

<sup>12/</sup> Id. at ¶ 220.

<sup>13/</sup> Id. at ¶ 51; ERF cases, ICNU Ex. No. \_\_ (MPG-3).

<sup>14/</sup> ERF cases, ICNU and Public Counsel Petitions for Judicial Review of Final Agency Action (July 24, 2013).

<sup>15/</sup> The Court Order is attached to this Petition for the Commission’s convenience.

<sup>16/</sup> Court Order, Appendix A at 4-5.

the Commission “to establish fair, just, reasonable and sufficient rates to be charged under the rate plan, and to order any other appropriate relief.”<sup>17/</sup>

9 ICNU filed a Petition for Accounting in the ERF cases on July 30, 2014, seeking both a refund and deferral of rate amounts determined to be illegal by the Court.<sup>18/</sup> On August 5, 2014, the Commission issued two Notices in the ERF cases: 1) suspending deadlines for responses to ICNU’s ERF cases Petition and providing parties with an opportunity to file proposals regarding the procedure the Commission should use on remand to comply with the Court Order; and 2) noticing a prehearing conference to address the appropriate procedure on remand and to establish a procedural schedule.<sup>19/</sup> In the body of these Notices, the Commission explicitly acknowledged the Court’s conclusions regarding the illegality of the Commission’s findings of fact with respect to ROE in the Company’s rate plan.<sup>20/</sup>

### III. GROUNDS FOR THE PETITION AND RELIEF REQUESTED

10 ICNU’s Petition seeks to effectuate the Court Order. Specifically, ICNU proposes to capture the difference between what PSE has collected, and continues to collect, in rates found to be unlawful, and the amount that is “just, fair, reasonable and sufficient” as required by RCW § 80.28.010(1) and the Court Order.

11 As noted, rate changes approved in the 2013 PCORC Order were calculated based on embedded power cost calculations which incorporated the Company’s rate of return, itself a derivation from the ROE. Because the ROE used in those calculations has been found illegal by the Court, the rates approved in the 2013 PCORC based on that ROE amount are also illegal. PSE should be required to refund the amount, plus interest, that it has over-collected from

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<sup>17/</sup> Court Order at 3.

<sup>18/</sup> ERF cases, ICNU Petition for Accounting Order (July 30, 2014).

<sup>19/</sup> ERF cases, Notice Suspending Response Deadlines and Providing Opportunity to File Proposals and Notice of Prehearing Conference (Aug. 5, 2014).

<sup>20/</sup> Id.

customers during the period between November 1, 2013, the effective date of PSE’s tariffs filed in compliance with the 2013 PCORC Order, and the date of this Petition. Additionally, the Company should be required to defer from the date of this Petition, for later reduction to rates, the amount it is currently over-collecting from customers.

**A. Refunds**

12           The Commission’s accounting order should refund to customers amounts, with interest, that PSE has already collected that are in excess of “just, fair, reasonable and sufficient” rates.<sup>21/</sup> “Just, fair, reasonable, and sufficient” rates are those that are “reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.”<sup>22/</sup>

13           PSE has operated with unlawfully high rates since July 1, 2013, the date the tariff approved by ERF Order 07 became effective,<sup>23/</sup> and since November 1, 2013, the date its tariffs approved by the 2013 PCORC Order, which incorporated the illegal ROE approved in ERF Order 07, became effective.<sup>24/</sup> The amount PSE has over-collected since both these dates and, relevant to the instant Petition and the latter date, is known. The record in the ERF cases establishes that a 9.3% ROE would have assured confidence in the Company’s financial soundness, and thus met the statutory requirements, at the time ERF Order 07 was issued. ICNU’s witness in the ERF cases, Michael Gorman, performed a full cost of capital study, including three versions of a discounted cash flow analysis, a risk premium analysis, and a capital asset pricing model analysis, which collectively supported this level of ROE as adequate

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<sup>21/</sup> RCW § 80.28.010(1).

<sup>22/</sup> Bluefield Water Works & Imp. Co. v. Pub. Serv. Comm’n, 262 U.S. 679, 693 (1923).

<sup>23/</sup> ERF cases, Commission Compliance Letter (June 28, 2013).

<sup>24/</sup> 2013 PCORC, Commission Compliance Letter (Oct. 25, 2013).

and sufficient for PSE.<sup>25/</sup> This is “sufficient evidence in the record ... to adjust the Company’s ROE.”<sup>26/</sup>

14                   The Commission’s accounting order, therefore, should order PSE to immediately refund to customers the amount PSE has unlawfully collected in rates between November 1, 2013, and the date of this Petition. This represents the difference between calculations based on the 9.8% ROE approved in ERF Order 07—which was incorporated in the power cost baseline in the 2013 PCORC—and the 9.3% ROE supported by the record in the ERF cases, including interest, at the Company’s legally appropriate, overall cost of capital.

15                   Moreover, as the 2013 PCORC was consolidated with other cases, and the 2013 PCORC Order approved rate changes implementing findings in those other cases, PSE’s refund should include any effect of illegal ROE calculations on these other approved rate changes. This includes, for instance, findings in the 2013 PCORC Order as to the prudence of various resource acquisitions and upgrades and effectual offsets to fixed production rate base in the form of Treasury Grants.<sup>27/</sup>

### **B.       Deferred Accounting**

16                   ICNU also requests that the Commission’s accounting order require PSE to establish a deferred account to track, for later inclusion in rates, the amount PSE continues to over-collect in excess of “just, fair, reasonable and sufficient” rates.<sup>28/</sup> Because the Commission established rates in the ERF cases to be in effect for the term of the rate plan, ICNU supports using an ROE of 9.3%, as supported by record evidence in the ERF cases, to calculate PSE’s 2013 PCORC deferrals, since the rate plan is scheduled to continue through the period in which

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<sup>25/</sup> ERF cases, ICNU Ex. No. \_\_ (MPG-3).

<sup>26/</sup> ERF Order 07, Separate Statement of Commissioner Jones at ¶ 4.

<sup>27/</sup> 2013 PCORC Order at ¶¶ 19, 28.

<sup>28/</sup> RCW § 80.28.010(1).

2013 PCORC rates are in effect. Under ICNU's proposal for an accounting order, PSE would defer, for later refund through rates, plus interest, the difference between the amount the Company is currently collecting from customers based on calculations using a 9.8% ROE and the amount the Company would be collecting based on calculations using a 9.3% ROE.

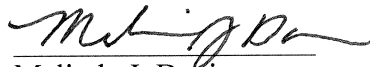
#### IV. CONCLUSION

17 For the foregoing reasons, ICNU respectfully requests that the Commission enter an accounting order granting the relief requested in this Petition.

Dated in Portland, Oregon, this 8th day of August, 2014.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.



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Of Attorneys for Industrial Customers  
of Northwest Utilities



FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

2014 JUL 25 AM 9:11

BETTY J. GOULD, CLERK

1  EXPEDITE  
2  No Hearing Set  
3  Hearing is Set:  
4     Date: Presented Ex Parte  
5     Time:  
6 THE HONORABLE CAROL MURPHY  
7  
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9

10 STATE OF WASHINGTON  
11 THURSTON COUNTY SUPERIOR COURT

12 INDUSTRIAL CUSTOMERS OF  
13 NORTHWEST UTILITIES,

14             Petitioner,

15 v.

16 WASHINGTON UTILITIES AND  
17 TRANSPORTATION COMMISSION,

18             Respondent.

19 \_\_\_\_\_  
20 WASHINGTON STATE ATTORNEY  
21 GENERAL'S OFFICE, PUBLIC  
22 COUNSEL DIVISION,

23             Petitioner,

24 v.

25 WASHINGTON UTILITIES AND  
26 TRANSPORTATION COMMISSION,

              Respondent.

CASE NOS. 13-2-01576-2 and  
13-2-01582-7 (*consolidated*)

~~[PROPOSED]~~ ORDER GRANTING  
IN PART AND DENYING IN PART  
PETITIONS FOR JUDICIAL  
REVIEW

1           THIS MATTER came before the Court pursuant to RCW 34.05.570 on the Petitions for  
2 Judicial Review of the Industrial Customers of Northwest Utilities and the Public Counsel  
3 Division of the Washington State Attorney General's Office. After considering the Petitions  
4 for Judicial Review, the administrative record, briefing and oral argument from the parties, and  
5 for the reasons set forth in the Court's written ruling, entered June 25, 2014, and attached to  
6 this Order as Appendix A ("Ruling") and incorporated herein by this reference, it is hereby  
7 ORDERED, ADJUDGED AND DECREED that:  
8

- 9           1. The Washington Utilities and Transportation Commission's ("Commission")  
10           decision not to hold a general rate case in the administrative proceeding below  
11           is AFFIRMED;
- 12           2. The Commission's use of an attrition adjustment in the administrative  
13           proceeding below is AFFIRMED; and
- 14           3. The Commission's determination that the Puget Sound Energy, Inc. rates to be  
15           charged during the rate plan approved in the administrative proceeding below  
16           are just, fair, reasonable and sufficient is REVERSED because the  
17           Commission's findings of fact with respect to the return on equity component of  
18           Puget Sound Energy, Inc.'s cost of capital in the context of a multi-year rate  
19           plan are unsupported by substantial evidence and the Commission improperly  
20           shifted the burden of proof on this issue from Puget Sound Energy, Inc. to the  
21           other parties in the proceeding below, contrary to RCW 34.05.461(4) and RCW  
22           80.04.130(4).  
23  
24  
25  
26

1 IT IS FURTHER ORDERED, this case is REMANDED to the Commission for further  
2 adjudication, consistent with this Court's Order and attached Ruling, to establish fair, just,  
3 reasonable and sufficient rates to be charged under the rate plan, and to order any other  
4 appropriate relief.

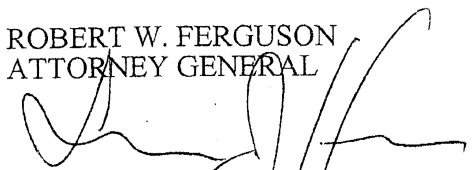
5 Dated this 25<sup>th</sup> day of July, 2014.  
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7  
8 Carol Murphy  
9 The Honorable Carol Murphy  
10 Thurston County Superior Court  
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1 DATED this 24<sup>th</sup> day of July, 2014.

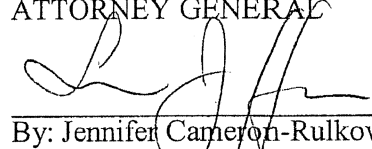
2 **PRESENTED BY:**

3 ROBERT W. FERGUSON  
4 ATTORNEY GENERAL

5   
6 By: Simon J. Fitch  
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8 Senior Assistant Attorney General  
9 800 5th Ave., Ste. 2000  
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11 Attorney for Petitioner, Public Counsel

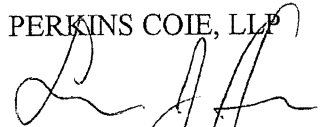
**APPROVED AS TO FORM/NOTICE OF PRESENTMENT WAIVED:**

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19 Utilities and Transportation Commission


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19 Inc.

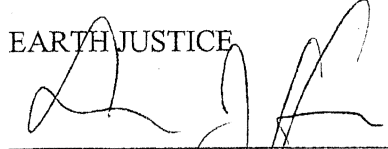
10 **APPROVED AS TO FORM/NOTICE OF PRESENTMENT WAIVED:**

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18 Attorney for Petitioner, Industrial Customers  
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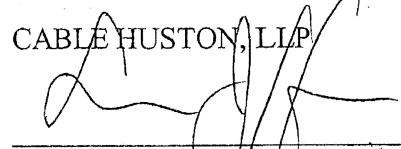
18 **APPROVED AS TO FORM/NOTICE OF PRESENTMENT WAIVED:**

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21 Amanda Goodin *per email authorization*  
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26 Industrial Gas Users

APPENDIX A

Superior Court of the State of Washington  
For Thurston County

Gary R. Tabor, *Judge*  
Department No. 1  
Chris Wickham, *Judge*  
Department No. 2  
Anne Hirsch, *Judge*  
Department No. 3  
Carol Murphy, *Judge*  
Department No. 4



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Lisa L. Sutton, *Judge*  
Department No. 5  
James J. Dixon, *Judge*  
Department No. 6  
Christine Schaller, *Judge*  
Department No. 7  
Erik D. Price, *Judge*  
Department No. 8

June 4, 2014

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Re: INDUSTRIAL CUSTOMERS OF NW UTILITIES V. WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION and  
WASHINGTON STATE ATTORNEY GENERAL'S OFFICE, PUBLIC  
COUNSEL DIVISION V. WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Thurston County Cause Nos.: 13-2-01576-2, 13-2-01582-7 (Consolidated)

Dear Counsel:

On May 9, 2014, this court heard oral argument for these two consolidated administrative appeals. The petitioners are Industrial Customers of Northwest Utilities (ICNU) and the Public Counsel Division of the State Attorney General's Office. The court also allowed intervention by Puget Sound Energy (PSE), Northwest Energy Coalition, and Northwest Industrial Gas Users.

There are three primary arguments for reversal in this case. First, Public Counsel argues that the Commission should have conducted this adjudication as a general rate case. Second, both Public Counsel and ICNU challenge the rate

plan. Third, Public Counsel appeals the attrition adjustment. The court affirms the procedural nature of this case, in which the Commission declined to conduct a general rate case. The court reverses the rate plan because it is not based on substantial evidence in the record and because the Commission shifted the burden of proof away from PSE. Finally, the court affirms the attrition adjustment.

### **1. Was a General Rate Proceeding Required?**

The Commission used this case to experiment with a new process, called an expedited rate filing, as well as a decoupling plan<sup>1</sup> and attrition analysis. This expedited rate filing process was not the product of rulemaking, but instead the result of discussions among Commission staff and stakeholders. While the Court finds it unusual that an administrative change of this magnitude was made outside of the rulemaking process, no party has appealed the expedited rate filing process itself. The issue of whether that is an appropriate process for setting utility rates, in a general sense, is not before the court.

Public Counsel does, however, argue that this particular action should have been adjudicated as a general rate proceeding. This Court disagrees, holding that the Commission acted within its discretion to dispense with a general rate proceeding.

Typically, general rate proceedings are required under certain circumstances. Such proceedings have heightened evidentiary requirements. See Chapter 480-07 WAC. Public Counsel asserts that such a proceeding was required because "gross revenue provided by any customer class would increase by three percent or more." WAC 480-07-505(1)(b). The Respondent asserts that the increase was not over three percent, and the Commission specifically capped annual rate increases at three percent. While Public Counsel asserts that the increase is actually over nine percent when considering the three-year period in which this order will be in effect, it is not readily clear whether the standard should be based on annual impact or multi-year impact. The Court need not resolve these issues because the Commission acted within its discretion to waive the general rate proceeding.

"The commission may grant an exemption from or modify the application of its rules in individual cases if consistent with the public interest, the purposes underlying regulation, and applicable statutes." WAC 480-07-110. Here, the Commission articulated why it followed this process:

[The] pattern of one general rate case filing following quickly after the resolution of another is overtaxing the resources of all participants and is

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<sup>1</sup> Briefly, decoupling is the separation of a utility company's profit from its total sales of energy. This is considered desirable in order to encourage energy efficiency. Decoupling is not at issue in this appeal.

wearying to the ratepayers who are confronted with increase after increase. This situation does not well serve the public interest and we encourage the development of thoughtful solutions.

The solutions we approve here include an update to PSE's rates established in the 2011/2012 GRC in an Expedited Rate Filing (ERF) that is limited in scope and results in a relatively modest increase (1.6 percent) in electric rates and a slight decrease (0.1 percent) in natural gas rates.

The third initiative the Commission approves in this Order is a rate plan that will allow modest annual increases in PSE's rates while requiring that the Company not file a general rate increase before March 2016 at the earliest. This holds the promise of customers paying rates that are lower than might be the case under traditional approaches to ratemaking. The rate plan is designed to give an incentive to PSE to become more efficient and to implement cost-cutting measures that will promote its ability to earn its authorized overall rate of return. The rate plan includes important protections for customers, including an earnings test that requires PSE to share with customers on an equal basis any earnings that exceed its authorized return during the term of the plan. Annual rate increases also are capped at 3.0 percent.

AR 960-61.

This Court holds that the Commission acted within its discretion when it dispensed with a general rate filing case. The Commission considered the public interest when it articulated that participants' resources were being overtaxed, constant increases have been "wearying to the ratepayers," and the public interest has not been served well by the status quo of serial general rate cases. The Commission also soundly articulated that this approach is best for customers because the rates will ultimately be lower than for general rate filing cases, and that PSE will be given an incentive to become more efficient, another benefit to the public.

These reasons are consistent with the purposes of the underlying regulations and with applicable statutes, which articulate a general policy of making natural gas and electric services affordable to customers, advance efficiency, ensure that prices are reasonable, and permit flexible pricing. RCW 80.28.074. The Commission holds special expertise in advancing these goals, and this Court finds no basis to reverse the decision to dispense with a general rate filing in this case.



## 2. Did the Commission Err When it Set the Rate Plan?

Public Counsel and ICNU urge this court to reverse the rate plan, arguing that it was not based on substantial evidence and that the burden was improperly shifted. This Court agrees.

A core principal of public utilities law is that:

All charges made, demanded or received by any gas company, electrical company, wastewater company, or water company for gas, electricity or water, or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient.

RCWA 80.28.010(1). The analysis of whether a rate is "just, fair, reasonable, and sufficient" is complex, and generally is determined through sophisticated models. The Commission has particular expertise in understanding the relevant evidence, determining which evidence and models are credible, and determining what "fair, reasonable, and sufficient" means in the context of an individual rate case. See *ARCO Products Co. v. Utilities & Transp. Com'n*, 125 Wn.2d 805 (1995); *People's Organization for Wash. Energy Resources v. Utilities & Transp. Com'n*, 104 Wn.2d 798 (1985). This court does not attempt to override the Commission's expertise on such matters, but focuses on the procedural requirements.

The Legislature requires that:

At any hearing involving any change in any schedule, classification, rule, or regulation the effect of which is to increase any rate, charge, rental, or toll theretofore charged, the burden of proof to show that such increase is just and reasonable shall be upon the public service company.

RCWA 80.04.130(4). Further, as the Commission stated, rates must be "based solely on the record developed in [the utility rate] proceeding."<sup>2</sup> All findings and orders in an adjudication must be limited to the record developed for that adjudication.<sup>3</sup>

In this case, the Commission increased electricity rates beyond the rate that was approved in the previous order. Moreover, it extended annual electric and gas

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<sup>2</sup> AR 975 (Order 07, at ¶ 28) (citing *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923)).

<sup>3</sup> RCW 34.05.476(3) ("Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings."); RCW 34.05.461(4) ("Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding."); WAC 480-07-820(1)(b) (contested issues are resolved "on the basis of the official record in a proceeding.").

rate increases for a three-year period. It did not base these rates on a sophisticated model or complex presentation of evidence by PSE regarding its current situation. Instead, it based this rate on (1) rejection of the expert testimony that PSE's opponents offered, (2) reliance on a settlement agreement by another company, Avista, (3) generic evidence about other energy companies, not PSE, and, most strongly, (4) the Commission's determination of the proper rate in a separate, 2011 PSE general rate case.

The Commission expressed frustration about the lack of evidence in the record regarding rates, and specifically the return on equity component in rate-setting analysis. The Commission stated that "[t]he record on this issue in this case lacks the depth and breadth of data analysis, and the diversity of expert evaluation and opinion on which the Commission customarily relies in setting return on equity." AR 989. Commissioner Jones issued a dissenting opinion on this issue, asserting that the evidence was insufficient to warrant an adjustment to the return on equity and that PSE had not met its burden of proof. AR 1060-63.

Instead of requiring more evidence, however, the majority of the Commission purported to keep the status quo of 2011 rates. In fact, however, the 2011 rate was not adjudicated to continue for multiple years until the Commission issued this order. The Commission set rates in this Order, and by its own admission, it did so without the evidence it deemed necessary and customarily relied on. Instead, the evidence that it relied on was from a previous PSE adjudication, a settlement agreement by Avista, and generic information that was not specific to PSE. This does not satisfy the requirement of substantial evidence in the record. See RCW 34.05.570(3)(e); *U.S. West Communications v. Wash. Utilities & Transp. Com'n*, 134 Wn.2d 48 (1997).

Additionally, the Commission did not hold PSE to its burden of proof. Rather than putting on its own evidence, PSE merely attempted to rebut the respondents' evidence. AR 987. The Commission held that "on balance . . . the evidence in this case is simply too sparse to support a reduction in PSE's current authorized [return on equity] to reflect current financial market conditions." AR 989. This demonstrates that the majority of the Commission did not hold PSE to the burden of proving that the rate increases are justified. Commissioner Jones dissented on this issue of burden of proof, and this Court holds that the majority followed improper procedure. For these reasons, the Court reverses the rate plan and remands for further adjudication consistent with this opinion.

### **3. Did the Commission Err When it Established the Attrition Adjustment?**

Finally, Public Counsel takes issue with the attrition adjustment, escalating elements collectively referred to as the K-Factor. Public Counsel argues that the Commission departed from prior precedent by granting an attrition adjustment

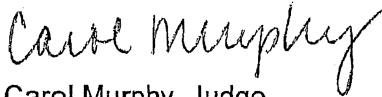
without a finding of extraordinary circumstances and without an attrition study, and it failed in its duty to explain its departure from prior precedent.

This Court is sympathetic to Public Counsel's plea for consistency in adjudications. Litigants want to forecast what evidence will be persuasive to the adjudicators and want to be able to predict how a future case will likely be resolved. Public Counsel presents a historical analysis of attrition adjustments, and shows that they were greatly disfavored in the past. It appears that the Commission may be changing course and granting attrition adjustments more liberally now. The Commission disagrees that there has been a change.

This is certainly an appropriate topic for policy discussions and perhaps rulemaking. However, Public Counsel presents no mandatory authority to show that any change constitutes arbitrary and capricious agency action.<sup>4</sup> This Court is required to grant great deference to the Commission and may not reverse merely based on a dispute in the evidence or a departure from the expected course of action. See *ARCO Products Co.*, 125 Wn.2d 805; *People's Organization for Wash. Energy Resources*, 104 Wn.2d 798. The Court therefore affirms the attrition adjustment.

The Court will enter an order consistent with this ruling ex parte with all parties' counsel's signatures, or upon presentment with notice to all parties properly noted on a Friday civil motion calendar.

Sincerely,



Carol Murphy, Judge  
Thurston County Superior Court

CM: emv

cc: Court File

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<sup>4</sup> The cases that Public Counsel cite are not clearly applicable to Washington administrative cases, and even if applicable, they merely state that the agency must provide a reasonable explanation from its departure from the previous course. See *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970).