

ORDINANCE NO. 2010-05-033

AN ORDINANCE RELATING TO THE 2010 BUDGET APPROPRIATING \$216,965.00 FROM ESTIMATED ENDING DESIGNATED RESERVES IN THE GENERAL FUND FOR THE PURPOSE OF SETTLING A LEGAL DISPUTE REGARDING THE BUSINESS ACTIVITIES OF ENCOGEN NORTHWEST, L.P.

WHEREAS, Encogen Northwest, L.P. operated a plant for the generation and sale of electricity and steam within the City of Bellingham; and

WHEREAS, Encogen was owned by GP Acquisition Corporation and LP Acquisition Corporation, which were both wholly-owned subsidiaries of Puget Sound Energy, Inc. and were merged on April 30, 2005; and

WHEREAS, the City audited and assessed Puget Sound Energy \$244,339.73 in tax, interest, and penalties with respect to the business activities of Encogen for the period January 1, 2004 through April 30, 2005; and

WHEREAS, Puget Sound Energy, Inc. paid the assessment and filed a Complaint for Refund of Taxes and Declaratory Judgment in Whatcom County Superior Court; and

WHEREAS, the City and Puget Sound Energy, Inc. acknowledge the expense and uncertainty of litigation and the complexity of the factual and legal issues underlying the Encogen Litigation; and

WHEREAS, the City and Puget Sound Energy, Inc. agree it is in their mutual interest to compromise and settle this dispute in a manner beneficial to the parties.

NOW, THEREFORE, THE CITY OF BELLINGHAM DOES ORDAIN:

The sum of \$216,965.00 is hereby appropriated in the General Fund. The source of funding will be credited from:

<u>001</u>	<u>GENERAL</u>	
5 000	GENERAL	
001-50000000820	EST END DESIGNATED RESERVE	\$ 216,965.00

To be debited as follows:


<u>001</u>	<u>GENERAL</u>		
5 213	FINANCE SERVICES		
311	SERVICES - FINANCIAL		
001-52133114199	OTHER PROFESSIONAL SERVICES	\$	57,340.00
001-52133114902	JUDGEMENTS AND DAMAGES	\$	159,625.00
		\$	<u>216,965.00</u>

PASSED by the Council this 24th day of May, 2010.



Council President

APPROVED by me this 2nd day of June, 2010.




Mayor

ATTEST 

Finance Director

APPROVED AS TO FORM:



Office of the City Attorney

Published:

May 28, 2010

CC COPY
Contract
#2010-0210

CLOSING AGREEMENT

THIS CLOSING AGREEMENT is entered into by and between the City of Bellingham (the "City") and Puget Sound Energy, Inc. ("Taxpayer") through their authorized representatives.

RECITALS

A. Encogen Northwest, L.P., ("Encogen") operated a plant for the generation and sale of electricity and steam within the City of Bellingham during the period January 1, 2004 through April 30, 2005.

B. Encogen was owned by GP Acquisition Corporation and LP Acquisition Corporation, which were both wholly-owned subsidiaries of Taxpayer. Encogen was merged into Taxpayer on April 30, 2005.

C. The City audited and assessed Taxpayer \$244,339.73 in tax, interest, and penalties with respect to the business activities of Encogen for the period January 1, 2004 through April 30, 2005 ("Audit Period").

D. Taxpayer paid the assessment and filed a Complaint for Refund of Taxes and Declaratory Judgment in Whatcom County Superior Court, Docket No. 09-2-00533-4, and an Administrative Refund Claim and Appeal with the City of Bellingham Hearing Examiner, Docket No. HE-09-MISC-006 (collectively, the "Encogen Litigation").

E. The City and Taxpayer acknowledge the expense and uncertainty of litigation and the complexity of the factual and legal issues underlying the Encogen Litigation. The City and Taxpayer agree it is in their mutual interest to compromise and settle this dispute in a manner beneficial to the parties.

TERMS AND CONDITIONS

In consideration of the mutual promises set forth herein, and other good and valuable consideration, the City and Taxpayer agree as follows:

1. Within 14 days of the full execution of this Closing Agreement, the City shall pay to Taxpayer, and Taxpayer shall accept, a lump sum of \$159,624 in full resolution of Taxpayer's claims in the Encogen Litigation, including any applicable refund interest.

2. Within 7 days of Taxpayer's receipt of the payment in paragraph 1, Taxpayer and the City shall file joint motions for dismissal with prejudice of Whatcom County Superior Court Cause No. 09-2-00533-4 and Hearing Examiner Cause No. HE-09-MISC-006. Each party shall bear its own costs and expenses in connection with the Encogen Litigation.

3. This Closing Agreement is intended to resolve all alleged and potential liabilities and refund claims for business and occupation tax, utility tax, penalties, and

interest for or related to the business activities of Encogen for periods prior to April 30, 2005. The City and Taxpayer agree not to commence or pursue any judicial, administrative or other claim or action in regard to business and occupation tax, utility tax, penalties, or interest for or related to the business activities of Encogen for periods prior to April 30, 2005. This Closing Agreement is not intended to resolve any liabilities or claims relating to the natural gas use tax administered by the Washington Department of Revenue.

4. This Closing Agreement does not bind either the City or Taxpayer to a particular treatment of any tax liability or immunity of Taxpayer for periods after the Audit Period. None of the issues resolved by this Closing Agreement shall be asserted by either party as the basis for a claim of res judicata, collateral estoppel, or issue or claim preclusion.

5. The signatories hereto each represent and warrant that all necessary signatures and consents to enter into this Closing Agreement and to assume and perform the obligations hereunder have been duly and properly obtained. The Bellingham City Council has approved this Agreement in open session on April 12, 2010.

6. Each term and provision of this Closing Agreement is deemed to have been explicitly negotiated at arms' length by the City and Taxpayer, and in all cases shall be construed and interpreted according to its fair meaning and not strictly for or against either party.

7. The City and Taxpayer mutually represent and warrant that each has obtained independent legal advice prior to executing this Closing Agreement.

8. This Closing Agreement is being entered into and shall be construed and interpreted in accordance with the laws of the State of Washington.

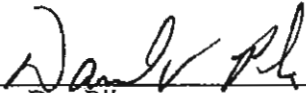
9. This Closing Agreement embraces and includes the entire agreement between the parties and may not be changed except in writing by both parties.

10. This Closing Agreement may be executed in two original counterparts. Each counterpart shall be deemed to be an original, all of which taken together shall be one and the same instrument.

11. This Closing Agreement shall become effective as of the date of the last signature fixed hereon.

Dated: April 16, 2010

CITY OF BELLINGHAM,

By: 
Name: Dan Pike
Title: Mayor

Attest:

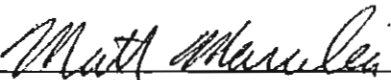
By: 
Finance Director

Approved as to Form:

By: 
Office of the City Attorney

Dated: April 26, 2010

PUGET SOUND ENERGY, INC.

By: 
Name: Matthew Marcellis
Title: Tax Director