

April 30, 2003

Ms. Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

RE: Docket A-010648, Rulemaking (Procedural Rules)

Dear Ms. Washburn,

Puget Sound Energy ("PSE" or "the Company") is providing these comments on the rulemaking in the above noted Docket pursuant to the Commission's Notice dated April 4, 2003. PSE appreciates the work that has gone into drafting the proposed rules, and hopes that these comments will be helpful in further refining the proposals.

Part II: Rulemaking Proceedings

PSE recommends that a requirement be added that all changes or additions to an existing rule be flagged by use of legislative format and/or through a comment describing the change. Otherwise, it can be very difficult to understand what is proposed to be changed. In addition, while Staff may not believe that a particular change is significant or material, a company regulated by the Commission may disagree, and should have the opportunity to comment on all proposed changes without the danger that some changes will be overlooked.

In addition, it would be helpful if the Commission required that a brief description of the *reason* for any proposed changes to existing rules or for any new rules be provided. That would permit those providing comments to better understand Commission Staff's concerns, would serve to focus comments, and might encourage imaginative suggestions for alternate ways of addressing a problem or issue.

Business Days versus Calendar Days

Proposed **WAC 480-07-120** now defines "Business day," which is helpful. However, proposed **WAC 480-07-130**, which states that it is based on WAC 480-09-130, has added to the current rule the definition: "'Day' means *calendar* day whenever used in this chapter, unless otherwise specified." This would effectively shorten the current deadlines set forth in the rules for a number of obligations such as responding to data requests. See **WAC 480-07-405(7)(b)**. The current rule explicitly excludes weekends and holidays from the ten-day count, but that sentence in the current rule has been eliminated in the proposed new rules.

PSE would not support any shortening of time of deadlines in the current rules by mandating that *calendar* days be counted rather than *business* days. Deadlines should be shortened only in specific proceedings that require expedited treatment. In addition, PSE would generally prefer that all deadlines in the procedural rules be counted in terms of *business* days rather than *calendar* days, as such a count automatically adjusts a deadline when proceedings are underway during holidays when personnel are generally out of the office and not available to work on a matter.

Moreover, the proposed addition of several *five day* requirements in the proposed rules is alarming when read in conjunction with the default definition that "days" are "*calendar* days." Even in recent proceedings that have expedited data request deadlines from ten days to five days, the Company had five *business* days to respond to data requests. PSE believes that it will be very difficult if not impossible to comply with any five *business* day deadlines imposed in the new rules. Any such requirement would impose an undue and unnecessary burden on the Company's personnel, and prejudice the Company's ability to advocate its position or defend itself.

PSE therefore recommends that the Commission revise proposed **WAC 480-07-130** to provide: "'Day' means ~~calendar~~ business day whenever used in this chapter, unless otherwise specified." PSE prefers use of business days for counting deadlines rather than calendar days even if the Commission concludes that some time periods (i.e. of twenty days or more) should be shortened by several days if business rather than calendar days are counted.

Intervention

WAC 480-07-355(1) states that persons desiring to intervene *should* file a written petition for leave to intervene at least three business days before the initial hearing date or prehearing conference date, but also permits oral petitions for leave to intervene at the time of the initial hearing or conference. PSE suggests that the rule be changed to *require* filing and service of written petitions for leave to intervene at least three business days before the initial hearing date or prehearing conference so that the other parties have the opportunity to consider how to respond to the petition and provide direction to their representatives on the subject before the initial hearing or conference. Late-filed petitions could still be considered under the rule, but with the required good cause showing.

Time/Procedure for Filing Answers and Motions to Dismiss

WAC 480-07-370(1)(c)(iv) provides that an answer to a formal complaint must be filed within twenty days after the Commission serves the formal complaint on the respondent. It further provides that "The *Commission* may alter the time allowed for any answer to be filed."

WAC 480-07-380(1)(b) provides that a motion to dismiss must be filed "no later than twenty days after the pleading is served, whichever time is less, unless the party shows good cause for delay." It further provides that "Filing a motion to dismiss a pleading, or seeking a similar remedy, does not extend the time for answering the pleading."

PSE is concerned that in some instances, twenty days is too short a time for investigating allegations made in a petition or complaint and for preparing the answer or a motion to dismiss. Plaintiffs in civil litigation often recognize this, and are willing to allow a defendant additional time to investigate a matter and file an answer or responsive pleading (which often also provides time for the parties to consider and discuss potential early settlement of the dispute.) The parties often implement such an extension by agreement that the plaintiff will not move for default until after the agreed, extended deadline.

If a petitioner or complainant is willing to provide such an extension in a case before the Commission, presumably the Commission should be indifferent to the extension. If the Commission needs notice of such an extension for planning purposes (such as setting the prehearing conference), PSE suggests that the rule be revised to permit parties to document an agreed extension through a letter providing notice of the extension rather than through the motions process.

In addition, PSE does not understand why filing a motion to dismiss should not toll the time for answering the complaint or petition until after the motion to dismiss is resolved. By its nature, a motion to dismiss typically assumes that the allegations made in a complaint or petition are true, but argues that the claim nevertheless has no merit. It is unnecessary and inefficient to require that an answer be filed while a motion to dismiss is pending, and places a further burden on the respondent at the time when the respondent should be focusing on preparing and filing the motion to dismiss rather than an answer.

Data Requests

WAC 480-07-405(6): The proposed rule adds an entirely new requirement that objections in lieu of providing a full response must be made "no later than five days before the response is due," or the objection is waived. If "a full response" is provided, but an objection "memorialized," then the objection can be provided at the time the response is provided.

As described above, PSE is concerned regarding any requirement that it provide a response or objection within five *calendar* days.

PSE is also concerned that this proposal will be counterproductive and inefficient. When PSE is served with data requests, its personnel with knowledge of the requested material are often called upon to provide vast quantities of information and data on a tight schedule. Although personnel are directed to quickly gather and prepare responsive information, it is not unusual for questions to be raised about the scope of the request, PSE's ability to respond, whether any objection should be made and/or whether any response or partial response can or should be provided. These questions must be addressed and often escalated to supervisory personnel or management, legal counsel, or others within the Company who have additional information about the subject matter of the request. The process is dynamic and typically cannot be easily separated into requests for which no response other than an objection will be provided and those for which a partial or full response will be provided. Also, the issue whether a "full" response is being provided may depend on resolution of an objection to a data request.

Because of this, it is most efficient to drive the data request process forward on a single calendar for each set of requests, and to look at all information and potential objections and responses as a whole, both with respect to each question and as a group. Forcing respondents to advance objections within five days or waive them would reduce the time and ability of responsible personnel to work on putting together responses rather than objections. It would also likely result in objections being made as to requests that would have been answered if a full ten days were permitted to investigate and develop the response without waiving any objection.

For these reasons, PSE is also concerned about the requirement in **WAC 480-07-405(7)(b)** that if data cannot be provided within ten days, the responding party must give written notice to the requesting party no later than five days before the response is due stating why the ten-day limit cannot be met and providing a schedule by which it will produce the data. Although this requirement is in the current rules, strict observation has rarely been required in practice. It is often difficult or impossible to tell four or five days into the process whether the Company will be able to meet the deadline or not. Efforts should be spent working toward the deadline rather than trying to determine whether the deadline will be met and, if not, on what schedule.

In addition, it will likely be difficult for the parties' representatives to have a productive discussion regarding objections until the objections and partial or full responses have been provided and reviewed together.

Hearing Guidelines/Order of Presentation

Proposed **WAC 480-07-470(6)** has deleted subsections (h) and (i) from existing WAC 480-07-735(1), which provide for the following additional steps after rebuttal testimony by the party having the burden of proof:

- (h) Response by other parties to any new material received on rebuttal;
- (i) Response by the party having the burden of proof to any new material received from others.

The proposed rule apparently intends to replace these provisions with the sentence: "The presiding officer may permit surrebuttal testimony." However, the proposed rule thereby fails to state clearly the fundamental principle that the party having the burden of proof is always entitled to the last word in a hearing. PSE recommends that the last sentence of the proposed rule be modified to state: "The presiding officer may permit surrebuttal testimony; provided that the party having the burden of proof will be given the opportunity to reply to any additional testimony by any other party."

General Rate Case Filings

WAC 480-07-510(3)(f) proposes to require a company to file information about transactions with an affiliated interest or subsidiary as part of the company's filing of "work papers and accounting adjustments." The Company does not believe that this information belongs in a company's filing of what is essentially its affirmative case in a rate proceeding. The Commission currently has (and is revising) rules regarding reporting transactions with affiliated interests, and affirmative reporting of such transactions should be dealt with through those rules.

Informal Complaints (WAC 480-07-910)

In PSE's experience, customers or potential customers occasionally request *information* about the Company or its rates or services through the Commission. In the past, Consumer Affairs Staff has identified such requests for information as "informal complaints," even if there is no indication in the request for information that the customer has any grievance against the Company. Such treatment is problematic because it does not accurately reflect the consumer's inquiry, and because of the Service Quality Indices to which the Company has agreed.

PSE recommends that WAC 480-07-910 be revised to add the words "inquiries or" in front of "complaints" so that the rule describes the availability of and procedures for "informal inquiries or complaints." WAC 480-07-910(2) and (4) could be retained as-is, since these subsections are specific to *complaints*. The Commission may wish to add a special subsection describing the required contents of *inquiries*. PSE also requests that the Commission add language to WAC 480-07-910(3) indicating that an informal inquiry will not be designated as an informal complaint unless it identifies an alleged violation of a statute, rule or tariff, or a similar grievance against a regulated company.

Access to Confidential Information

Proposed **WAC 480-04-095(6)** explains the procedures that will be followed when someone requests a public record from the Commission that contains information that has been designated confidential under RCW 80.04.095 and WAC 480-07-160.

In PSE's experience, those making public records requests often do not understand the deadlines and potential court procedures that are triggered when they request confidential material from the Commission. Many have no interest in pursuing the request through court proceedings, and/or

are satisfied by receipt of alternate information from the Company, receipt of information pursuant to a confidentiality agreement, or some other means of addressing their interest in receiving information while respecting the Company's concerns regarding confidentiality.

PSE therefore recommends that WAC 480-04-095(6) be amended to direct the public records officer to inform the requester of the provisions of WAC 480-07-160 and RCW 80.04.095, so that the requester is in a position to learn about the process that will be triggered if the requester confirms that it seeks release of confidential information through the public records request process. PSE also recommends that the public records officer be directed to suggest, as an alternative means of pursuing the requested information, that the requester directly contact the company or party that has designated the information as "confidential" to see whether that company or party can accommodate the requester.

Similarly, PSE recommends that proposed **WAC 480-07-160(7)** be amended to provide that confidential information will be released if the provider "does not restrain disclosure by way of court order within ten business days following notice...." (Adding the term "business" would not be required if the Commission accepts PSE's suggested revision to WAC 480-07-130 described above). This change will provide additional time for the requester and provider to negotiate and resolve a request for information in a manner that avoids the burden and expense of commencing legal proceedings. PSE recognizes that RCW 80.04.095 requires a restraining order to be obtained "within ten days of the notice," but the statute is ambiguous with respect to whether that deadline is ten *business* days or ten *calendar* days (unlike several other sections of the RCW that specify whether the count is of business or calendar days). Thus, the Commission has authority to address that detail in its regulations.

Typographical Errors

In the course of its review of these proposed rules, PSE identified several typographical errors that may well have been corrected by now. However, the Company is flagging these errors in the event that is helpful to the Commission:

WAC 480-07-350(2): "in the party's primary language ~~of the party~~ or will"

WAC 480-07-385(3)(a): "by means that ensure its receipt"

WAC 480-07-860: "may petition to stay ~~of~~ the effectiveness"

WAC 480-07-950(3): Last three sentences are duplicative and/or out of place.

Conclusion

Thank you for the opportunity to file these comments. The Company hopes they are helpful to the Commission and other interested parties as we work together to advance the public interest. If you have any questions regarding these comments or if we can be of any other assistance, please contact Phillip Popoff at 425-462-3229.

Sincerely,

George Pohndorf
Director, Regulatory Initiatives