

January 14, 2000

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

Re: Docket No. U-991928 (Review of WAC 480-80-335)

Dear Ms. Washburn:

Puget Sound Energy (“PSE”) appreciates the opportunity to comment regarding this review of the Commission’s special contract rule, WAC 480-80-335. PSE generally supports retention of this rule as consistent and compliant with Executive Order No. 97-02. As described below, the availability of special contracts is beneficial to utility customers, and their use should continue to be accommodated. The Commission’s review of this rule focuses mainly on disclosure issues. Accordingly, PSE’s comments will be limited primarily to this topic, although related issues will be addressed as well.

Background

Although the scope of the rulemaking is limited to determining “the essential terms and conditions of a special contract . . . to be made available to the public” (Notice, page 1), this rulemaking in fact involves fundamental issues about utility regulatory practices and the environment within which utilities currently operate. In PSE’s view, the following principles should be kept in mind as the issues in this rulemaking are considered:

In special contract filings under WAC 480-80-335, the Commission needs to be provided with the necessary information to permit it to determine whether a utility has demonstrated the necessary showing under WAC 480-80-335 to allow approval of a special contract. The Commission Staff and Public Counsel, in turn, need access to information sufficient to allow informed comment and participation in Commission hearings related to the approval of special contracts.

The Public Disclosure Act allows exceptions to be made to disclosure in certain circumstances, and disclosure of “essential terms,” while arguably justifiable

as a policy objective of the Commission, is not required by the Public Disclosure Act.

The use of special contracts is beneficial to utility customers, and the Commission's rules on disclosure should not hinder a utility's ability to use special contracts, where appropriate.

A utility or a special contracts customer of a utility should not be disadvantaged by compliance with Commission rules on disclosure.

These principles are discussed briefly below.

Access to Necessary Information. Under current practice for review of energy contracts, the following information is typically disclosed (regardless of whether confidential treatment is sought for the agreement itself): customer's name, general location, an explanation of why the special contract is necessary, and a description of what attributes make this specific customer different from others. In addition, other information must be provided to the Commission and Commission staff to show that the utility has satisfied the requirements of WAC 480-80-335, including:

A statement explaining why the special contract is not unduly discriminatory.

An explanation of what time period the direct incremental cost of providing the service will be recovered.

Explanation of how the special contract does not seriously prejudice competition in the customer's market.

Provide an estimate of the benefit the special contract creates for other customers, including at least an estimate of contribution the contract provides toward common costs and discussion of non-quantifiable factors, if applicable.

An explanation of how the Company bargained effectively and why the result should be found to be consistent with the public interest.

This appears to be the primary information Staff uses to make a recommendation to the Commission regarding whether the special contract is in the public interest, upon which the Commission renders a decision. It is not clear why any additional information needs to be disclosed. In PSE's experience, the filing of a special contract on a confidential basis has not hindered the analysis of the factors required to be considered under WAC 480-80-335. The Commission, Staff and Public Counsel have the necessary information available to them to determine whether the required showing has been made. As discussed below, application of the factors under WAC 480-80-335 typically involves analysis of the circumstances unique to a particular customer, and does not depend upon input from the public or other customers to determine whether a special contract is warranted.

Exceptions to Disclosure under the Public Disclosure Act. Washington law expressly recognizes the importance of protecting valuable commercial information that is submitted to the Commission. Washington's Public Disclosure Act, Chapter 42.17 RCW, generally provides that documents filed with public agencies must be made available to the public for inspection and copying. However, the Act recognizes the need to keep some records confidential and has specific exceptions to the general rule. RCW 80.04.095 is the provision which applies to the confidentiality of records submitted to the Commission. The statute states that records submitted to the Commission "shall not be subject to inspection or copying" if such documents "contain valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer specific usage and network configuration and design information . . ." If the "essential terms" of a contract fall within the scope of this exception, there is no requirement that they be disclosed. While the Commission may decide that as a matter of policy it would prefer that such "essential terms" be disclosed, such disclosure in many circumstances is not required, and may deny the utility and its special contract customers the protections which are afforded by the Act which recognize that disclosure of certain information may be disadvantageous.

Use of Special Contracts is Beneficial to Customers. In PSE's experience, special contracts have been used to respond to specific uneconomic bypass threats. A customer has an opportunity to leave PSE's system through construction of a bypass alternative, thereby posing the threat of a substantial loss of revenue, including the loss of that customer's contribution toward PSE's common costs shared among all customers. A special contract is used to price PSE's service to respond to the uneconomic bypass threat, and to attempt to retain the customer's load on the system. So long as the special contract recovers the incremental cost of that customer's utility service and makes some contribution to PSE's fixed costs, all of PSE's customers are better off from retention of the special contract customer's load. The benefit for other customers is in the contribution to common costs that the special contract customer is willing to pay, over and above the direct incremental cost. Every dollar (net of taxes) collected above direct incremental cost is a dollar of common costs that other customers do not have to pay. Given the benefits that accrue to the general body of customers from the use of special contracts, it is important that the Commission's rules do not hinder the ability of the utility to use this tool in responding to uneconomic bypass threats. Unnecessary disclosure of contract terms, however, presents such a risk. If disclosure of contract terms makes it less likely a utility will be able to retain a customer's load, the disclosure has harmed utility customers. In many situations, disclosure will reduce the likelihood of retaining the load, for disclosure puts the customer at a disadvantage to its competitors. If a customer can choose between signing a contract with a utility provider where the terms can be disclosed to a customer's competitors versus a non-utility provider where the terms need not be disclosed, the utility provider is much less likely the utility to be successful in retaining the load. Disclosure thus may have a "cost" to the utility's

remaining customers: the loss of the contribution to fixed costs when the potential special contract customer leaves the system to take service from the provider where disclosure of the terms of service is not required.

The Specific Issues in this Rulemaking

PSE suggests there are three separate issues that must be considered with regard to disclosure:

- Whether any information should be required to be disclosed and, if so,
- What information should be disclosed, and
- When that information should be disclosed.

Each issue is discussed below.

1. Whether Any Information Should be Disclosed

The first issue in the investigation the Commission should address is *whether* any special contract terms should be required to be disclosed.¹ On this point, however, it appears from the Commission's Notice itself that the Commission has already determined "the essential terms and conditions of a special contract under this section will be made available to the public." (Notice of Opportunity to File Written Comments issued December 28, 1999, p. 1) Notwithstanding, it is not clear that disclosing terms and conditions of special contracts will be in the best interests of the utility and its customers in many situations.

This decision requires careful weighing of the public benefit of disclosure balanced by the possible costs such disclosure could impose on remaining utility customers. As noted above, requirements to disclose special contract information to the public may impair a utility's ability to capture contribution to common costs for other customers. It does this by affecting the value a special contract customer places on the utility's service. The more information that must be made public, the less valuable the service. To the extent holding special contract information confidential increases the value to the special contract customer, the utility may be able to capture that value in the special contract price which creates more common cost recovery. This can be a particular issue for natural gas special contracts, as customers generally threaten to build their own facilities, which would not carry any public disclosure requirements, assuming the customer is a non-government entity.

The level of information that is currently required for special contracts may be

¹ It is assumed that in situations where special contracts are submitted without requesting confidential treatment, no issues arise with respect to the required disclosure of "essential terms," and that these issues arise only where a utility seeks confidential treatment of a special contract filing due to the particular circumstances involved with the special contract customer.

found to be sufficient to inform the public generally of the special contract filing. As noted above, special contract filings generally disclose the customer's name, general location, an explanation of why the special contract is necessary, and a description of what attributes make this specific customer different from others. The public interest benefits that might be created by additional disclosure requirements may be far less than the possible risks to utilities' ability to recover common costs. As discussed below, the benefits of disclosure are unclear, as it is not necessary to the analysis of a special contract that the essential terms be disclosed to the public.

2. What Information Should be Disclosed

If the Commission determines the public benefit created by disclosing "essential" terms and conditions is greater than the possible harm it could impose upon utility customers, then this rule making should define *what* information should be disclosed. "Essential terms" would probably include:

- Identity of the customer,
- Location of the customer,
- General description of services provided,
- Duration of the contract,
- General description of pricing terms

PSE recommends the Commission avoid disclosing enough information that would allow others to calculate what that customer is paying for energy service. The information should be general in nature and not disclose any quantities. Disclosing specific pricing information would complicate future special contract negotiations. The last special contract will naturally become the next special contract customer's perceived maximum rate. Of course, this will not be true, as each situation is unique. As noted above, the contribution to common costs benefits customers in the long run, and increasing the difficulty of negotiating special contracts risks is contrary to the interests of the utility's tariffed customers.

Identifying the prices of each unbundled element of a special contract may create additional unnecessary problems. PSE is concerned customers (special contract or otherwise) may seek to secure similar unbundled pricing of unbundled elements found in particular special contracts. The problem is that with a special contract, PSE is not providing a set of unbundled utility services. The entire package must be considered as a bundle. In isolation, it may appear that one element is a very good deal, but the Company may have obtained a concession in another part of the contract that increased the total value of the contract. Moreover, incremental costs can be very different for various customers.

3. When the Information Should be Disclosed

If the Commission determines the public benefit created by disclosing “essential terms” is greater than the potential harm it may cause to utility customers, then such information should be disclosed only after the Commission has approved the special contract. Timing of when any specific information is made public is an important consideration. Revealing pricing or other information regarding contract terms prior to final execution of the special contract may interfere with a utility’s ability to capture benefits for other customers. In some situations, when special contracts are filed at the Commission, the contracts have not been finalized.

It is not necessary to the Commission’s decisionmaking process that such essential terms be in the public domain at the time of the Commission’s deliberations. It has been suggested that disclosure of special contract terms and price information is necessary to identify undue price discrimination. It is important to recall, however, that undue price discrimination between similarly situated customers is what the commission must, by law, forbid. RCW 80.28.100. Providing different service at different rates to customers that are not similarly situated is not discriminatory, and thus not unduly discriminatory. A special contract customer is uniquely situated, that is, “a class of one,” by virtue of the bypass alternative which is available to that customer. The Commission recognized in a previous special contract filing that in a bypass situation, no other customers are “similarly situated”:

The Commission finds that [Cascade’s] special contract with BP meets Commission requirements, including cost recovery and rate discrimination considerations of WAC 480-80-335. Despite disagreement in the record, *the Commission concludes that the BP contract does not result in discrimination between customers. No other company is in the same position as BP. . . .* No other customer was shown to receive like and contemporaneous service under substantially similar circumstances to those of BP. The contract therefore does not result in discrimination within the meaning of the rule.

Docket No. UG-930511, *WUTC v. Cascade Natural Gas Corporation*, Fourth Supplemental Order Approving Special Contract, 1994 Wash. UTC LEXIS 33, 16 (emphasis added).

The analysis of whether a special contract is warranted depends solely on the circumstances unique to that customer. There are no “similarly situated customers” who must be considered in the analysis and who arguably needs access to essential contract information. Other customers simply need to know that the special contract customer has a unique bypass opportunity or is otherwise uniquely situated. After this fact is established, prices cannot be discriminatory. Therefore, to avoid any complications in the final approval process, PSE suggests that if any of the information discussed above must

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be disclosed, that it be disclosed only after the Commission has approved the contract. Procedurally, this could be done as a compliance filing.

Conclusion

PSE appreciates the opportunity to submit these comments. If the Commission or its staff has any questions regarding PSE's comments or if we can be of any assistance, please contact me at 425-462-3272.

Sincerely,

PUGET SOUND ENERGY, INC.

By _____
George R. Pohndorf
Director, Regulatory Planning

Enclosure (Electronic Disk)