Service Date: June 14, 2017

STATE OF WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

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June 14, 2017

NOTICE CONCERNING ALLEGED *EX PARTE* COMMUNICATION, THE APPROPRIATE USE OF RESPONSES TO DISCOVERY IN ADJUDICATIVE PROCEEDINGS, AND THE APPEARANCE OF FAIRNESS

RE: *Washington Utilities and Transportation Commission v. Puget Sound Energy* Consolidated Dockets UE-170033 and UG-170034

TO ALL PARTIES:

Puget Sound Energy (PSE) filed with the Commission on June 7, 2017, a letter directed to the attention of Administrative Law Judges Moss and Pearson, who are co-presiding officers in the above-captioned proceeding. PSE describes the purpose of its letter being "to advise the Commission of concerns regarding the inappropriate use of discovery materials in WUTC Dockets UE-170033 and UG-170034 ("2017 General Rate Case"), by Intervenor Sierra Club, in violation of Commission Rules."

PSE's specific concern relates to a letter the Sierra Club sent to more than 50 people, members of the PSE Integrated Resource Plan Advisory Group (IRPAG), including two Commission policy advisors. The letter discusses PSE's plans for Colstrip Units 3 and 4 based on data request responses Sierra Club, an intervenor in PSE's pending general rate case in Dockets UE-170033 and UG-170034, obtained in discovery in that proceeding.

PSE expresses three concerns. First, PSE observes that data request responses in a Commission proceeding are not evidence in that proceeding unless and until successfully moved for admission. Thus, it was premature and inappropriate for Sierra Club to share this information with Commission policy advisors who report to, and advise, the Commissioners in adjudicative proceedings, including PSE's pending general rate case dockets. This sharing gives rise to PSE's second concern that, by sharing PSE's responses to data requests in the manner it did, Sierra Club may have violated statutory and procedural rule prohibitions against *ex parte* contacts. PSE's concern in this regard is heightened because Sierra Club also expressed its position and interpretation of information in the responses. PSE considers this to be "highly prejudicial" to its interest. PSE observes in this connection that WAC 480-07-310(5) allows for sanctions when a party engages in *ex parte* contacts. Finally, PSE is concerned that Sierra Club's use of PSE's data

request responses "for an advocacy campaign to address issues that are outside the scope of the [pending general rate case] is likely to have a chilling effect on discovery." PSE emphasizes its interest in maintaining the integrity of, and avoiding even the appearance of impropriety in the context of pending proceedings. PSE concludes by sharing its view that "Sierra Club's inappropriate conduct should be considered by the Commission in future cases in which Sierra Club seeks to intervene."

Sierra Club responded to PSE's letter on June 8, 2017, filing its own letter directed to Judges Moss and Pearson. Sierra Club acknowledges it should not have included Commission policy advisors as recipients of its email, realized its error the morning after the email was sent, and immediately sent a follow-up email to the policy advisors requesting that they disregard and delete the original email. Sierra Club says its concern in recalling the email was not that its transmission to Commission policy advisors was an *ex parte* violation but, rather, a violation of WAC 480-07-405. The cited rule prohibits serving or copying data requests to any person who is advising the Commission in a pending adjudicative proceeding, such as PSE's general rate case. This rule reflects the Commission's interest in maintaining scrupulously the appearance of fairness in adjudicative proceedings. Sierra Club states that it "regrets this error", "took immediate action to correct [it]", and "will take extra effort to ensure that such an oversight does not occur again."

The balance of Sierra Club's letter, nearly three pages of its four-page missive, is devoted to its vigorous disagreement "with PSE's assertion that Sierra Club violated the Commission's *ex parte* rules or engaged in abusive discovery tactics." Sierra Club nevertheless states that "to the extent [its] behavior runs afoul of a practice or norm generally accepted at the Commission, Sierra Club welcomes the presiding officers' guidance on this issue and will commit to following such practice in the future." Sierra Club says, in addition, that it "understands the importance of open and transparent discovery in adjudicative proceedings." Sierra Club states that even though it does not agree its email rises to the level of being an *ex parte* communication, it "does not object to the presiding officers instituting the remedy addressed in WAC 480-01-310(4)."

PSE's general rate case is at a relatively early stage from the Commission's perspective and, even though they are actively engaged in studying and developing an understanding of PSE's prefiled testimony and exhibits, neither policy advisors nor the presiding administrative law judges are in a position to evaluate definitively the question whether the discovery Sierra Club disseminated might bear on the merits of any issue in the general rate case proceeding. Thus, it is unclear whether Sierra Club's email meets fully the definition of *ex parte* communication in WAC 480-07-310. Regardless, the Commission's concerns with the integrity of its adjudicative processes and the appearance of fairness in adjudicative proceedings are far broader than simply the question whether behavior such as that engaged in by Sierra Club in this instance technically violates the *ex parte* rule.

In terms of the "guidance" Sierra Club invites in terms of "a practice or norm generally accepted at the Commission," we provide it here. Using discovery responses for <u>any</u> purpose other than prosecution of issues in the proceeding in which the responses are produced is inappropriate

because this can have a chilling effect on the discovery process not only in the immediate case, but in future adjudicative proceedings involving the same, or even wholly different parties. This does not mean that production during discovery in one proceeding acts as a shield against the need to provide the same information in another proceeding when appropriate process is used in the second proceeding to inquire into the same subject matter. As a practical matter, a fact learned during discovery in an adjudicative proceeding may prompt independent inquiry concerning the same subject matter in another proceeding. However, discovery responses provided in the adjudicative proceeding should not be relied on as establishing facts for purposes of the independent proceeding.

THE COMMISSION GIVES NOTICE That, at this time, it does not consider Sierra Club's May 31, 2017, letter and email to be a violation of the statute and Commission rule concerning *ex parte* contacts despite its inadvertent transmission to members of the Commission's advisory staff who, in turn, brought the communication to the attention of ALJ's Moss and Pearson. The Commissioners have not been provided copies of the communication and its substance has not, and will not, be disclosed to them. It appears, in any event, that the communication has no more than a tangential relevance, if any, to any issue in PSE's pending general rate case in these dockets. Nevertheless, Sierra Club is required to provide a copy of the communication to any party that requests it. The Commission will consider on an appropriate motion, if any is filed, whether to receive the communication into the record and to allow responses to it.

THE COMMISSION GIVES FURTHER NOTICE That it is a violation of WAC 480-07-405(2) to copy the presiding officers or Commission policy and accounting advisors when transmitting data requests or responses to data requests unless provided as part of a motion to compel under WAC 480-07-405(3).

THE COMMISSION GIVES FURTHER NOTICE That in the interest of preserving both fairness in fact, and the appearance of fairness during all stages of adjudicative proceedings, a party's use of responses to discovery requests should be limited to the purposes of understanding and prosecuting issues in the pending proceeding in which the discovery response is elicited.

DENNIS J. MOSS
Presiding Administrative Law Judge

RAYNE PEARSON
Presiding Administrative Law Judge