BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Rulemaking to Consider Possible Corrections and Changes in Rules in Chapter 480-07 WAC, Relating to Procedural Rules	DOCKET NO. A-050802 SECOND SET OF COMMENTS OF PUGET SOUND ENERGY, INC.

I. INTRODUCTION

1. Puget Sound Energy, Inc. ("PSE") respectfully submits the following comments in response to the Commission's Notice of Opportunity to Submit Comments in this Docket dated December 9, 2005.

2. In Section II, below, PSE responds to the numbered questions set forth in the December 9, 2005 Notice, as to which PSE has any experience or comments. PSE then provides, in Section III, additional comments on the procedural rules, for the Commission's consideration.

II. COMMENTS IN RESPONSE TO COMMISSION QUESTIONS

1. Please comment whether the commission should consider adopting the amendments to WAC 480-07-730 and WAC 480-07-740 proposed by Public Counsel and others.

3. The Commission *should not* adopt the proposed amendments to the existing settlement rules. In reviewing this issue, it is important to keep in mind that the Commission historically has very liberally interpreted the intervention standard to allow

parties to intervene in cases without restrictions on the areas in which they may participate. Adjudicative proceedings before the Commission often involve a number of different parties with very different and often narrow interests in the proceedings. Sometimes the question whether the concerns of a particular party can be addressed is technically complicated and requires extensive discussion, brainstorming, and data gathering and modeling. One example is the inclusion in PSE's 2004 general rate case settlement regarding rate spread and rate design of a new Schedule 40. This new tariff schedule was designed to address the concerns of a small number of customers who believed their unique service characteristics and related costs warranted creation of a new type of tariff schedule.

4. While the proposed new WAC 480-07-730 would not restrict a regulated company from meeting one-on-one with a particular party to undertake such a project, including related negotiations, it would prevent the regulated company from working with Commission Staff on potential resolution of such issues without bringing all other parties into the discussions.

5. PSE submits that this is unnecessary and would lead to increased gamesmanship in the negotiation process. For example, a party with no real interest in a particular issue could seek to extract some concession from Commission Staff, the regulated company, or the other parties as the cost of not interfering with a negotiated resolution that has been worked out between the party that truly has an interest in an issue, the regulated Company, and Commission Staff.

6. Moreover, the dynamics of multiparty settlement negotiations are such that it is often much more productive for the regulated company to have individual negotiations with the various parties, including Commission Staff, than to gather all parties together in a room to negotiate the case. In all of PSE's recent rate cases, including the 2001 rate case

that has been held up as an example of the benefits of bringing all parties together around the negotiating table, one-on-one discussions between PSE and all of the other parties were essentially ongoing throughout the process. In PSE's experience, while there is a place and time for all parties to be in the same room together, it would greatly interfere with the settlement process and the likelihood of reaching settlements in Commission proceedings to limit negotiations between a regulated company and Commission Staff to that forum.

7. The proposed amendments to WAC 480-07-730 that would prevent the regulated company and Commission Staff from engaging in one-on-one negotiations would also prevent the orderly resolution of the many minor disputes that arise in the course of the Commission Staff's audit work in adjudicative proceedings. The carve out in the proposed new rule for information gathering is insufficient because after information is gathered about a topic, there may be a dispute between Commission Staff and a regulated company that needs to be resolved. For example, in a rate case, there may be a dispute as to the proper way to calculate or treat a particular adjustment. Depending on the magnitude of the dispute and whether there are any other disputes that would have an offsetting impact, the Commission Staff and regulated company should remain free to settle such disputes as the audit work on the case proceeds.

8. The Commission should also reject the proposed amendments to WAC 480-07-740. These changes would inappropriately tie the hands of the presiding officer and Commissioners with respect to determining the amount of additional process that should be provided with respect to a partial or multiparty settlement in any particular case. Factors that might impact the appropriateness of different types of process include the point at the proceeding in which the settlement was reached, in that extensive discovery may or may not already have taken place.

9. In addition, the presiding officer and Commissioners should be in a position to assess in each case whether there are concerns that an objecting party is seeking to leverage opposition to a settlement into concessions that would result in benefits to a narrow class of interests at the expense of others or the public interest. The proposed revisions would give such parties disproportionate power to hijack Commission proceedings.

10. Finally, PSE notes that efforts to revise the existing rules regarding protection of non-settling parties pre-date a number of recent settlements in which the Commission has clearly demonstrated that it can and will provide non-settling parties with ample opportunity to object to settlements under the rules as they currently exist.

4. Please state whether the amendment to WAC 480-07-730 proposed by Public Counsel and others, if adopted, should apply only to commission staff or to all parties.

11. If the Commission were to adopt the proposed amendment to WAC 480-07-730 requiring advance notice of settlement negotiations that are to take place between a regulated company and Commission Staff, the restriction *should* be extended as to negotiations between all parties to the case (not just the regulated company) and Commission Staff. It would be fundamentally unfair to restrict the regulated company from having one-on-one negotiations with Commission Staff while permitting other parties to do so.

12. However, if adopted, the Commission *should not* extend the advance notice requirement as to negotiations between any of the parties to an adjudicative proceeding other than Commission Staff. Such extension would only *increase* the harm to the settlement process that would be caused by adopting the proposed restriction as to negotiations with Commission Staff, for the reasons described above.

5. Please describe how the nature of the commission's proceedings differs materially from other civil litigation insofar as settlements and the settlement process is concerned, and how any differences should be reflected in the settlement rules or practice.

13. As described above, Commission proceedings can be very different from civil litigation because of the number of participants in Commission proceedings with very different, and often narrow, interests.

14. Other parties argued at the Commission workshop that Commission proceedings are different from civil litigation in that in civil litigation, aside from class actions, the judge has no obligation to inquire into the reasonableness of the settlement. By contrast, the Commission ultimately retains the obligation to ensure that the rates of regulated companies are fair, just, reasonable and sufficient.

15. This observation is correct as far as it goes. However, in civil litigation, all parties impacted by an issue must agree to a settlement or there is no settlement. A single objecting party can insist that the matter proceed to decision. By contrast, in most Commission cases – in particular rate cases – intervening parties do not have the power to veto settlements. While a regulated company is entitled to significant procedural protections pursuant to the utility statutes and in light of the property interests at stake, this is not the case for intervenors, which typically represent various customer groups. As the Washington Court of Appeals recently made clear, for intervenors "the only due process right is in nonarbitrary rates." *Washington State Attorney General's Office v. WUTC*, 128 Wn. App. 818, 116 P.3d 1064 (2005), at ¶ 42. Thus, it is appropriate for the Commission's rules to place limits on the process associated with review of settlements to which a regulated company has agreed.

16. Commission settlement proceedings are also different from civil litigation in that in most civil cases now, the parties are required to engage in formal mediation with a third-party neutral at some point in the case before the case can go to the decisionmaker. The Commission has recently moved toward encouraging settlement negotiations by including dates for settlement negotiations in procedural schedules. However, there is no requirement that a third-party neutral be involved. In PSE's experience, there tends to be a resistance among parties to agree to involving a third-party neutral. In the absence of such a neutral, there can be less pressure for parties to engage in good-faith negotiations within their sphere of interest, and more leeway to game negotiations. PSE is concerned that expansion of the settlement rules as proposed would only increase the likelihood of such behavior.

6. Would it be improper under the proposed amendment to WAC 480-07-730 for a settlement judge to caucus with one or more, but not all, parties to resolve issues between two or more parties? Should rules restrict parties' ability to caucus with one or more other parties, but not all, during a scheduled settlement conference?

17. Any revisions to the proposed settlement rules should specifically permit settlement judges to caucus with one or more, but not all, parties to a proceeding. Mediators to private disputes make extensive use of this technique. It is difficult to see how a settlement judge could do his or her job without such authority.

7. Concerning the proposed amendments to WAC 480-07-740, do the requirements in RCW 34.05.461(3) meet the concerns of the proponents for an order addressing all material issues of fact or law? If not, please discuss why the statute does not address the concerns.

18. The requirements of RCW 34.05.461(3) should be adequate to meet the concerns of non-settling parties without any need to revise WAC 480-07-740. The statute requires "a statement of findings and conclusions, and the reasons and basis therefor, on all the *material* issues of fact, law, or discretion presented on the record…." (Emphasis added). This requirement is supplemented by legal requirements including that Commission orders be based on substantial evidence, that they be neither arbitrary nor capricious, and that they not violate the constitution or any statutes. *See, e.g.* RCW 34.05.570(3).

19. The Commission should reject the proposal to require the Commission, under its own rules, to address "all *disputed* issues of fact, law or discretion" in its final orders. Just because something is disputed does not make it material, and the Commission should retain the ability to address in each case and for each settlement the issues that are material to the outcome of the case.

20. The current version of WAC 480-07-740 already provides sufficient opportunity for non-settling parties to create the record they need to challenge a settlement to which they object. It provides: "The right to cross-examine witnesses supporting the proposal; the right to present evidence opposing the proposal; the right to present argument in opposition to the proposal; and the right to present evidence or, in the commission's discretion, an offer of proof, in support of the opposing party's preferred result." WAC 480-07-740(2)(c). In addition, "The presiding office may allow discovery on the proposed settlement in the presiding officer's discretion." *Id.*

8. Is discovery under the proposed amendment to WAC 480-07-740 intended to be an absolute right? Would an absolute right allow abuse of the process and irrelevant discovery? Why should parties opposing a settlement have discovery rights greater than those afforded under the discovery rules during other stages of a proceeding (*i.e.*, why should the commission's discretion to control discovery, considering the needs of the case be constrained, when a settlement is filed)?

21. Strictly speaking, there is nothing in the proposed new language that should limit the presiding officer's discretion to control discovery. The general discovery rules contain numerous provisions limiting the scope of discovery. *See, e.g.* WAC 480-07-400(4)-(5), WAC 480-07-420. However, PSE is concerned that, whether or not intended, the language of the proposed revision to WAC 480-07-740 would be interpreted in the future by presiding officers or reviewing courts as providing an absolute right because it would add to the list of "Rights of opponents of a proposed settlement" the "right to conduct discovery" and because it would eliminate the current reference in the rule to the presiding officer's discretion.

22. PSE also notes that the suggestion has sometimes been made that non-settling parties should have a right to conduct discovery on communications that gave rise to the settlement. Such discovery should not be permitted because it would chill the frank exchange of positions that can be required to reach a settlement. The value of protecting such communications is recognized in Evidence Rule 408, which requires exclusion of evidence of offers to compromise or conduct or statements made in settlement negotiations.

23. PSE believes the current formulation of potential discovery in WAC 480-07-740 should remain as-is. At a minimum, the rule should clearly and explicitly state that the presiding officer retains the authority to limit the scope of any discovery.

9. Should the commission change the description of the "highly confidential" designation in WAC 480-07-423(1)(b)? If so, please explain how and why.

24. The current definition should remain as-is. The use of the term "for example" in the first sentence makes the definition flexible enough to be applied across a variety of materials or cases and over time. At the same time, the example that is provided, when read in comparison with the definition of the "confidential" designation, conveys the point that the risks and concerns at issue must be significant to rise to the level of obtaining the "highly confidential" designation and any requested enhanced protections.

10. Please identify circumstances that justify use restrictions for persons given access to documents designated confidential or highly confidential.

25. "Use restrictions" are justified in all cases involving confidential and highly confidential materials. Persons who obtain access to such materials are able to do so only because of their participation in a Commission proceeding where such materials are filed or produced in response to data requests. Their use of such materials should be limited to that proceeding.

26. PSE submits that the below text is appropriate for Commission protective orders (*see WUTC v. PSE*, Docket No. UE-050870, Order No. 03, Protective Order (June 24, 2005). PSE does not believe this text needs to be added to the Commission's rules, as specific terms can continue to be addressed on a case-by-case basis. However, PSE would not object to addition of the below language to the procedural rules.

> **Purpose of Access and Use; Confidentiality**. No Confidential Information may be requested, reviewed, used or disclosed, directly or indirectly, by any party, expert or counsel or any other person having access pursuant to this Protective Order, except for purposes

of this proceeding. Persons having access to the Confidential Information pursuant to this Order must request, review, use, or disclose Confidential Information only by or to persons authorized under this Order, and only in accordance with the terms specified in this Order. Without limiting the foregoing, persons having access to Confidential Information shall not use any Confidential Information to design, develop, provide, or market any product, service, or business strategy that would compete with any product or service of the party asserting confidentiality.

Persons Permitted Access. No Confidential Information shall be made available to anyone other than Commissioners, Commission Staff, the presiding officer(s), and counsel for the parties for this proceeding, including counsel for Commission Staff, and attorneys' administrative staff such as paralegals. However, access to any Confidential Information may be authorized by counsel, solely for the purposes of this proceeding, to those persons designated by the parties as their experts in this matter. Except for Commission Staff, no such expert may be an officer, director, direct employee, major shareholder, or principal of any party or any competitor of any party (unless this restriction is waived by the party asserting confidentiality). Any dispute concerning persons entitled to access Confidential Information must be brought before the presiding officer for resolution.

Nondisclosure Agreement. Before being allowed access to any Confidential Information designated for this docket, each counsel or expert must agree to comply with and be bound by this Order on the form of Exhibit A (counsel and administrative staff) or B (expert) attached to this Order. Counsel for the party seeking access to the Confidential Information must deliver to counsel for the party producing Confidential Information a copy of each signed agreement, which must show each signatory's full name, permanent address, the party with whom the signatory is associated and, in the case of experts, the employer (including the expert's position and responsibilities). The party seeking access must also send a copy of the agreement to the Commission and, in the case of experts, the party providing Confidential Information shall complete its portion and file it with the Commission or waive objection as described in Exhibit B.

> **Access to Confidential Information**. Copies of documents designated confidential under this Order will be provided in the same manner as copies of documents not designated confidential, pursuant to WAC 480-07-423. Requests for special provisions for inspection, dissemination or use of confidential documents must be submitted to the presiding officer if not agreed by the parties. The parties must neither distribute copies of Confidential Information to, nor discuss the contents of confidential documents with, any person not bound by this Order. Persons to whom copies of documents are provided pursuant to this Order warrant by signing the confidentiality agreement that they will exercise all reasonable diligence to maintain the documents consistent with the claim of confidentiality.

11. Please identify circumstances that justify employment restrictions for persons given access to documents designated confidential or highly confidential.

27. The appropriateness of imposing employment restrictions on persons given access to commercially sensitive material has been explored in employment cases in which courts have developed what is sometimes called the "inevitable disclosure doctrine." Typically in such cases the question is whether the court should issue an injunction prohibiting an employee from working for a competitor of his or her former employer. The answer turns on whether the employee could not help but disclose his or her former employer's trade secrets in performing the new job. As stated in one such case:

> [U]nless [the former employee] has an uncanny ability to compartmentalize information, he would necessarily be making decisions about Gatorade and Snapple by relying on his knowledge of [the former employer's] trade secrets.

PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995).

28. A court's willingness to apply this doctrine in a particular case may be influenced by evidence of bad faith or wrongdoing by an employee, but such a showing is

not required. *See Air Products and Chem., Inc. v. Johnson*, 442 A. 2d 1114, 1118 (1982) ("The record indicates that Johnson is an honest man. There is no dispute as to his integrity. It is certain that he intends to refrain from disclosing any of the proven trade secrets of Air Products."). *See also Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1460 (M.D.N.C. 1996).

29. Consistent with these decisions, the public policy of this state is to provide strong protection to competitively-sensitive information. *See* RCW 4.24.601 (Legislature declared that protection of confidential commercial information "promotes business activity and prevents unfair competition"; it is consistent with the State's public policy that the "confidentiality of such information be protected and its unnecessary disclosure be prevented"). This policy is reflected in other statutes as well, including the Uniform Trade Secrets Act, RCW 19.108 *et seq.* ("the Act"), which provides a civil cause of action for misappropriation of trade secrets. The remedies provided in the Act, including attorneys' fees and exemplary damages, reflect the strength of the Legislature's commitment to protecting confidential information. *See* RCW 19.108.020-040; *see also* RCW 80.04.095 (confidential marketing, cost, and financial information is not subject to public inspection).

30. Washington courts enforce noncompete agreements that contain employment restrictions where such agreements are found to be reasonable under the circumstances of the case. Whether a noncompete covenant is reasonable involves consideration of three factors: (1) whether the restraint is necessary for the protection of the business or goodwill of the employer; (2) whether it imposes upon the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill; and (3) whether the degree of injury to the public is such loss of the service and skill of the employee as to warrant nonenforcement of the covenant. *See Perry v. Moran*, 109 Wn.2d 691, 698 (1987). Courts also consider the scope of the restriction. *Id.* at 700.

31. In *Perry v. Moran*, the Washington Supreme Court found that a covenant prohibiting an accountant from providing services to clients of his former employer for a period of three years after terminating his employment was valid and enforceable. *Id.* at 691. Similarly, in *Knight, Vale, & Gregory v. McDaniels*, 37 Wash. App. 366, 370 (1984), the court upheld a three-year noncompete agreement that prohibited an accountant from performing accounting services for clients of his former employer.

32. This Commission should be even less concerned than civil courts about establishing employment restrictions related to access to highly confidential information. Unlike an employer who voluntarily provides employees with access to highly confidential materials, and who is in a position to control or condition the terms of such access, the regulated companies that appear before the Commission are typically compelled to provide highly confidential information through the discovery process or in order to meet their burden of proof in a proceeding. In addition, unlike an employee of a single employer, the counsel and consultants who would have access to highly confidential material in a Commission proceeding are typically engaged by more than one client. It is not unusual to have to make choices about representing one client versus another on one type of proceeding versus another due to ethical or practical constraints involving conflicts of interest.

33. With respect to the types of information that would justify access and employment restrictions, the fundamental questions are: (1) whether a reviewer is in a position to make competitive use of or facilitate the competitive use of the information, and (2) whether that reviewer can reasonably be expected to avoid making use of the information once it is in his or her brain. PSE submits that the question should be considered on a case-by-case basis. In some cases, it may be necessary to answer that

question on a person-by-person basis because it may depend upon the type of consulting they provide as well as the type if information at issue.

34. By way of example, PSE believes that its request for access and employment restrictions in its 2005 power cost only rate case, Docket No. UE-050870, was reasonable. Most of the material that PSE designated "highly confidential" in that case was highly sensitive commercial information that was provided to the Company by third parties that participated in PSE's 2003-2004 competitive bidding process under WAC Chapter 480-107. That material included detailed, extensive information about each bidder's generation resources (many of which were in the development stage) and the terms of the transactions they proposed to the Company. Such information is extremely commercially sensitive because these owners and developers are competing against each other to sell their projects or power from their projects, to obtain financing for their projects, and in some cases to obtain the necessary permits and real estate rights for their projects. In many cases, if the bidders were not successful in reaching an agreement with PSE to purchase the project, they planned to re-bid the projects to other utilities.

35. PSE argued that such materials should not be viewed at all by persons involved in development of energy projects or resources, or their consultants or advisers. There was a highly significant risk of competitive harm to PSE and/or the project owners and developers that submitted their commercially sensitive information to PSE if parties who were competitors or potential competitors of each other, or who were counterparties or potential counterparties to PSE with respect to such transactions, were able to access the information PSE designated "highly confidential" merely by intervening in the proceeding. At least one of the intervenor experts in the case provided consulting services to entities that were potentially in a position to compete with other providers of energy resources.

36. PSE believes that those circumstances justified imposition of employment restrictions as a condition of access to the highly confidential materials.

12. Please provide proposed language for WAC 480-07-160 and WAC 480-07-423 describing how confidential or highly confidential information should be marked or identified in a document.

13. Please provide proposed language for WAC 480-07-160 and WAC 480-07-423 describing how confidential or highly confidential documents should be filed with the commission.

37. **WAC 480-07-423** currently states that "Designation of documents as highly confidential is not permitted under the commission's standard form of protective order, and may only occur if the commission so orders." Yet **WAC 480-07-423(1)(b)** states that "A party that wishes to designate information as highly confidential must first *file a motion* for an amendment to the standard protective order…." (Emphasis added). PSE understands the reasons the Commission requires parties to file a motion for an amendment to the standard protective order if its wishes to designate documents as "highly confidential" and is not concerned about that requirement. However, PSE believes that the rules should be clarified to remove any suggestion that there is a prohibition on such designations until the Commission actually issues a "highly confidential" protective order.

38. There are circumstances in which it serves the interests of the Commission and all parties for a party to designate material as "highly confidential" while awaiting Commission action on an order for highly confidential protective order. For example, in PSE's 2005 power cost only rate case, Docket No. UE-050870, PSE filed a motion for "highly confidential" protective order along with its initial filing in the case. PSE also filed with the Commission at that time a complete initial filing, including a number of pages

designated as "Highly Confidential per WAC 480-07-160." PSE's motion did not seek to restrict Commission Staff or Public Counsel employees (but not their outside consultants) from reviewing such material.

39. By proceeding in this manner, PSE permitted Commission Staff and Public Counsel to immediately begin reviewing the complete filing, including all prefiled testimony and exhibits. Although intervenors and Public Counsel's external expert received redacted versions of the filing, they were thereby in a position to see exactly where in the filing PSE had designated material as "highly confidential" and the related context. In the end, no Commission order ever issued granting or denying PSE's motion because the parties were able to resolve all disputes regarding access to specific highly confidential information in that case, while agreeing to disagree about fundamental issues of principle related designation of "highly confidential" materials.

40. The revisions proposed below are intended to accomplish such clarification:

> **WAC 480-07-160(3)(a) Contents.** The provider must submit the claim of confidentiality in writing, in the same form (i.e., paper or electronic) and at the same time the information claimed to be confidential is submitted. The provider must state the basis upon which the information is claimed to be confidential under this rule, and must identify any person (other than the provider) that might be directly affected by disclosure of the confidential information. A person that wishes to designate information as "highly confidential" must file a motion and sworn statement in support of such designation at the same time the information claimed to be highly confidential is submitted, consistent with WAC 480-07-423(1)(b).
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> **WAC 480-07-160(3)(b)(i) Paper copies.** When the document is in paper format, the provider must clearly mark each copy with the designation "confidential per WAC 480-07-160." or "highly confidential per WAC 480-07-160". The provider must place this mark on the first page of a multipage document and each specific page where the provider claims there is confidential information.

WAC 480-07-160(3)(b)(ii) Electronic copies. When the document is in electronic format, such as an electronic mail message, or a word processing or spreadsheet file, the "[highly] confidential per WAC 480-07-160" mark must be inserted on the first page in the file and on each page that the provider claims contains confidential information.

WAC 480-07-160(3)(b)(iii) Protective order, if any, must be cited. If the provider submits confidential information under the provisions of a protective order, the "[highly] confidential" mark on each page that includes confidential information must state: "[Highly] Confidential per protective order in WUTC Docket No. [insert docket number]."

41. PSE proposes the following revisions to clarify the manner in which confidential documents must be filed and to permit greater flexibility in how confidential materials are highlighted on a page. PSE's proposed revisions also eliminate the reference to the protective order for highly confidential information, for the reasons described above:

WAC 480-07-160(3)(c) ***Unredacted version under seal; redacted version.*** The provider must submit a version of the document as to which confidentiality is claimed as a complete document (unredacted version) and a version of the document with the information claimed to be confidential masked (redacted version). The redacted version will be available for public disclosure if requested. The redacted and unredacted versions must have the same pagination and line numbering. The redacted version must be so labeled and submitted at the same time as the unredacted version. Only one copy of the redacted version of each document is required to be filed. ~~along with a set of any confidential documents in a sealed envelope or similar wrapping.~~ The unredacted version must be so labeled and submitted in a sealed envelope or similar wrapping that clearly indicate that the enclosed material is "confidential" or "highly confidential". A party submitting multiple confidential documents must collate the documents into unredacted version sets such that the confidential pages of such documents appear in the appropriate location in the filing and do not require the commission records center to insert the confidential pages into the appropriate locations in the filing. ~~and, t~~To the extent feasible, the filing party must enclose ~~each~~ a complete

set of ~~confidential and each set of highly confidential documents for~~a filing containing confidential or highly confidential documents in a single envelope or multiple envelopes, collated with any non-confidential materials, and bundled together such that each set can be distributed internally without further sorting or packaging by the records center. Each page of the unredacted version that includes information claimed to be confidential must be printed on yellow or canary paper with the confidential information marked by contrasting highlighter or other marking showing the material on the unredacted page that is designated confidential. Each page of the unredacted version that includes information claimed to be highly confidential must be printed on~~or, if designated highly confidential under a protective order,~~ light blue paper with the highly confidential information marked by contrasting highlighter or other marking showing the material on the unredacted page that is designated highly confidential. ~~The redacted version must be submitted in the same manner as a document as to which confidentiality is not claimed. The redacted version will be available for public disclosure if requested. The redacted and unredacted versions must have the same pagination and line numbering.~~

WAC 480-07-423(2)(a) Confidential information. The first page and individual pages of a document determined in good faith to include confidential information must have the legend that reads: "Confidential per protective order in WUTC Docket No. [insert]." Placing a confidential legend on the first page of ~~an exhibit~~a document indicates only that one or more pages contain confidential information and will not serve to protect the entire contents of the multipage document. Each page that contains confidential information must be marked separately to indicate where confidential information is redacted. Confidential information must be submitted on yellow or canary paper with contrasting highlighter ~~(e.g., gray or blue)~~ or other marking showing the confidential portions of each page.

WAC 480-07-423(2)(b) Highly confidential information. The first page and individual pages of a document determined in good faith to include highly confidential information must have the legend~~be marked by a stamp~~ that reads: "Highly confidential per protective order in WUTC Docket No. [insert]." ~~A~~Placing a "highly

> confidential" ~~stamp~~legend on the first page of a document indicates only that one or more pages contain highly confidential information and will not serve to protect the entire contents of ~~a~~the multipage document. Each page that contains highly confidential information must be ~~highlighted~~ marked separately to indicate where highly confidential information is redacted. ~~The unredacted versions of each page containing highly confidential information, and provided under seal, also must be marked with the "highly confidential. . . " stamp and~~ Highly confidential information must be submitted on light blue paper with contrasting highlighter ~~(e.g., gray or yellow)~~ or other marking showing the ~~used to mark the~~ highly confidential portions of each page.

14. Please comment on Public Counsel's August 26, 2005, proposal to amend WAC 480-07-310(b), concerning ex parte communication.

42. The ex parte rule should not be amended as proposed. Public Counsel's comments recognize that "the Commission has an exemplary record of dealing with matters of ex parte communications and commends the Commission's sensitivity to matters that might create an impression of impropriety as well as impropriety in fact."

43. Public Counsel states that it is concerned that representatives of regulated companies meet with Commissioners and discuss issues and policies "when the company intends to make a related filing in fairly short order with the Commission." This suggests that Public Counsel is concerned about meetings that happen immediately before a filing. However, Public Counsel's proposed revision to the ex parte rule is far more extensive. It states:

> When a regulated company has communicated directly with one or more commissioners regarding *an issue which was later set for adjudication* by the Commission, the nature and content of the communication shall be disclosed by the company in a filing in the docket established by the commission.

(Emphasis added). This is an ambiguous standard that is not limited in scope or in time. It is difficult to see how regulated companies or Commissioners are to interpret and implement such a standard.

44. Public Counsel's far-reaching proposal is particularly concerning to PSE because PSE believes it is critical that Commissioners and their advisors be kept informed on an ongoing basis about a wide variety of issues related to the companies they regulate. Such issues include the investment and business climate relevant to regulated companies, company initiatives or efforts within the service area or industry, and federal legislative or regulatory developments that may have some bearing on the regulated company or this Commission's jurisdiction or authority. Regulatory filings that may be made at some later point in time by a company may involve such issues. But it would chill regulated companies and the Commissioners from discussing such issues if they need to track in detail each such communication for some undefined period of time for later filing in an adjudicative docket.

45. It is important to remember in this regard that a great deal of the Commission's work is legislative in nature. It is perfectly appropriate for the entities that are impacted by legislative decisions to make their views known to the persons who make such decisions. Public Counsel and other interested persons are free to meet with the Commissioners as well on topics of concern to them.

46. The current ex parte rule appropriately balances the Commissioners' legislative and judicial roles by setting a bright-line standard as to which ex parte communications must cease with Commissioners and when. It should not be revised as proposed by Public Counsel.

15. Please state your observations or concerns about any of the commission's procedural rules, and propose specific language changes to address your concerns.

47. Please see Section III, below.

III. ADDITIONAL PROPOSED RULE CHANGES

Part II: Rule-Making Proceedings

48. PSE shares the concerns raised by other parties in this proceeding that potential changes to existing rules, including revisions to discussion drafts of proposed new or revised rules, should be more clearly identified. In particular, it would be helpful if: (i) proposed revisions were blacklined or otherwise identified to show all proposed changes to current rules, and (ii) a brief explanation were provided of the reason(s) for each proposed change.

49. When a rulemaking goes through one or more rounds of informal comment, it would also be helpful if Staff would provide some explanation of the reasons it is accepting, rejecting or modifying proposals set forth in the various comments. Among other things, this would likely streamline future rounds of comments, alert interested persons to the existence of any misunderstandings regarding a proposal that has been rejected, and assist all parties in creatively addressing fundamental interests that may be at issue in a rulemaking.

50. Proposed language to implement this requirement is set forth below:

> **WAC 480-07-215 Additional protocol for rule-making proceedings** When the commission issues a notice seeking comment on a proposed new rule or on proposed revisions to existing rules or

to prior versions of draft rules considered in the same proceeding, the notice

(1) will clearly identify the text of any proposed new rule as well as all proposed revisions to a current rule or to prior versions of draft rules that are under consideration in the rule-making proceeding; and

(2) will provide a brief explanation of the reason(s) it is proposing each new provision or each revision. Where more than one new rule subsection is proposed or more than one revision to the text of an existing rule, the reason(s) for each such change will be described. In the event the notice seeks comment on revisions to prior versions of proposed rule text on which participants in the rule making have already submitted comments, the notice will also provide a brief summary of all such comments and whether each comment has been accepted, rejected or modified in developing the proposed revisions to the prior versions of the proposed rule text.

Part III: Adjudicative Proceedings

A. Information and workpapers supporting proposed general rate case adjustments.

51. PSE made the suggestion earlier in this proceeding that for general rate cases, a requirement should be added that each adjustment offered by any party be accompanied by a full explanation in testimony and exhibits or workpapers. Similarly, PSE believes it would be helpful and would streamline the process to require all parties to provide workpapers to other parties along with their pre-filed testimony and exhibits, just as companies are required to do with their initial rate case filings (WAC 480-07-510(3)). Proposed language is set forth below:

> **WAC 480-07-545 General rate proceedings – subsequent submissions by all parties** Any party proposing an adjustment to the company's filing or to another party's proposed adjustment must provide a full explanation of such adjustment in the party's direct,

> rebuttal, or cross-rebuttal testimony and exhibits. Workpapers supporting a party's direct, rebuttal, or cross-rebuttal testimony must be served on the other parties to the case with the party's direct, rebuttal or cross-rebuttal testimony and exhibits.

B. Correction of hearing transcripts.

52. PSE supports adding a rule providing that parties may make a motion to correct hearing transcripts, but need not do so for readily identifiable typographical errors or errors that are not material to the issues in dispute. Proceedings before the Commission often include technical terms or terms of art with which court reporters are not familiar. It is not uncommon for transcripts to contain errors such that all parties would agree that the official transcript is *not* an accurate record of what was said and heard by everyone in the hearing room.

53. Yet, the transcript is what is cited in briefs and the Commission's orders and any appeal therefrom, as well as in future Commission proceedings that may involve persons who were not in the hearing room or who are less familiar with the terms or issues in dispute at the time. Indeed, because Commission proceedings involve the same regulated companies and potentially similar issues over time, errors that may exist in transcripts filed in Commission proceedings arguably are potentially more harmful to the parties and public than errors in transcripts in civil cases.

54. Taken all together, it would appear to be better practice to correct the record and address any disputes regarding such corrections very shortly after the hearing rather than leaving substantive errors in the record. PSE submits that in most cases, proposed corrections would not be controversial. In that regard, PSE has in mind corrections regarding what was actually said in a question or answer, not what someone "meant to say."

Explanations or changes to testimony should be addressed only through a motion to reopen the record and not to correct a transcript.

55. To the extent the Commission looks to civil rules in considering this matter, PSE notes that the Federal Rules of Appellate Procedure provide: "If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record confirmed accordingly." FRAP 10(e)(1). Both the district court and court of appeals are empowered to correct the record "[i]f anything material to either party is omitted from or misstated in the record by error or accident." FRAP 10(e)(2).

56. Proposed rule language is provided below:

> **WAC 480-07-470(15) Transcript Corrections** Any party may file a motion to correct a hearing transcript if the party believes it omits or misstates anything material to that party. Such motions are to be limited to proposed corrections of transcription errors, and are not to be used to submit explanations of or changes to the testimony or argument that occurred in the proceeding.

B. Changes or corrections to prefiled materials.

57. WAC 480-07-460(1)(b)(iii) currently provides that "revised portions must be highlighted, in legislative style or other manner that clearly indicates the change from the original submission." PSE generally supports the continuation of a requirement to bring revisions in prefiled testimony or exhibits to the attention of other parties. However, PSE has encountered difficulties in meeting this requirement when applied to accounting spreadsheets that roll up information from other spreadsheets. It can take hours to individually mark each figure that is changed as an underlying number flows through the various accounting spreadsheets. Such marking can be difficult or impossible due to

spreadsheet formatting and the requirement to submit both electronic and paper versions of exhibits.

58. PSE proposes the following changes to the rule:

> **WAC 480-07-460(1)(b)(iii)** …. Parties that submit revisions to predistributed or previously admitted testimony or exhibits must prominently label them "REVISED" and indicate the date of the revision. The revised portions must be highlighted, in legislative style or other manner that clearly indicates the change from the original submission. This practice must be followed even with minor changes that involve only one page of an exhibit except that in the case of accounting exhibits that roll up an adjustment shown on a more detailed exhibit, only the revision on the initial, detailed exhibit need be highlighted. In the latter case, the party submitting the revision may provide new, substitute summary pages containing the impact of the revision without highlighting the revisions on each page, provided that such substitute pages are prominently labeled "REVISED" with the date of the revision. Counsel must identify partial revisions by page and date when an exhibit is presented for identification, sponsored, or offered into evidence, as appropriate.

DATED: January 17, 2005.

PERKINS COIE LLP

By _____
Kirstin S. Dodge
Attorneys for Puget Sound Energy, Inc.