

March 3, 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:

This letter is to comment on Commission Staff's preliminary draft rule for WAC 480-80-335, the special contract rule. Puget Sound Energy ("PSE" or the Company) appreciates the opportunity to offer these comments on Staff's preliminary draft. These comments are organized to provide discussion of specific suggested revisions, section-by-section, of Staff's preliminary draft rule. Attached hereto, please find a copy of Staff's preliminary draft rule, with PSE's suggested changes shown in legislative format. PSE is hopeful that continued dialogue among all interested parties will help provide clearer understanding of each other's interests and will result in a rule that advances the public interest and otherwise supports the Commission's objective to implement Executive Order 97-02.

Paragraph 4—Filing and Effective Dates

The current language has been a source of confusion in the energy industry for several years. PSE does not propose any changes to Staff's language—Staff's proposal will help avoid confusion in the future.

Paragraph (5)(a)(i)—Documentation

PSE recommends deleting proposed (5)(a)(i), which assumes special contracts will be used only in response to bypass threats. While this is typically how special contracts are used, the authorizing statute, RCW 80.28.074(4), was enacted to "Permit flexible pricing of natural gas and electric services." This statute does not address competitive situations like the equivalent telecommunications statutes. Additionally, paragraph 1 of Staff's draft does not limit application special contracts to bypass threats, so retention of this

paragraph would conflict with paragraph (1). Finally, (5)(b)(iv) requires an explanation of why a special contract is used instead of filed tariffs; thus, the more comprehensive (5)(b)(iv) renders the proposed (5)(a)(i) redundant.

Paragraph (5)(b)(i)—Documentation

This new provision may be redundant relative to (5)(b)(iv), especially in situations where special contracts are used to address bypass threats. Additional discussions may be helpful to understand why Staff is proposing this new provision.

Paragraph (5)(a)(iii)—Documentation

The proposed language indicates that an analysis based upon economic, incremental cost will be applied, thus PSE recommends using the word “incremental.” Referring to incremental cost here is not a perfect solution, but it is an improvement over the existing language and will incorporate the Commission’s clear policy that incremental cost is relevant for reviewing the appropriateness of special contract charges.

Paragraph (6)—Duration

Language stating the contract is not determinative for ratemaking has little connection to duration. Therefore, PSE suggests moving the language to a separate paragraph.

PSE Proposed Paragraph (7)—Approval

The existing and preliminary draft rule both state that unless otherwise provided, the Commission’s action allowing a special contract to take effect is not determinative regarding future regulatory treatment. PSE suggests the Commission consider revising this language so that in general, Commission approval or action allowing a special contract to take effect creates a rebuttable presumption that the utility’s decision to enter the contract was prudent.¹ The proposed language does not foreclose the situation where

¹ PSE acknowledges this proposed revision was not offered in PSE’s initial comments. Based on the Commission’s December 27 Notice in this proceeding, we believed the primary scope of the inquiry was to “describe and define the essential terms and conditions of a special contract” to “be made available to the public.” It is apparent from the January 20 workshop and the extent of revisions in Staff’s preliminary draft rule, however, that the Commission desires feedback on the entire rule. Additionally, please note part of the reason for expanding our recommendation to include prudence determination is understanding Staff’s position explained at the January 20 workshop regarding the Commission’s desire to know a special contract has withstood public scrutiny, which PSE believes supports determining prudence in conjunction with a special contract filing. Accordingly, PSE offers this proposed revision to an aspect of the rule which should be considered as well, given the objectives of Executive Order 97-02.

prudence determination will be deferred, but makes taking such risk an option for the utility rather than a requirement. This option language is suggested as a way to allow utilities to assume the risk of future prudence review in extraordinary circumstances, such as where the contract needs to be acted upon quickly.

PSE offers the following two points to support its proposed change, both of which are supported by Executive Order 97-02. First, deferring prudence determination until a general rate proceeding may not be an efficient regulatory process, thus contrary to the review criteria established in Executive Order 97-02. At the time the Commission is considering a special contract, any and all information used by a utility to make its decision is available to the Commission, Staff, and Public Counsel. Additionally, at the January 20 workshop, Staff explained one of the benefits of disclosing essential terms and conditions is so the Commission knows the contract has withstood public scrutiny; thus, even more parties will have access to more information if the Commission adopts Staff's disclosure rule. If the contract is allowed to take effect, yet the determination of prudence is reserved until some later time, the Commission, Staff, other parties, and utilities will be required to review the same information again in a rate case. In addition to duplicating the same effort, a second source of inefficiency is created because turnover of individuals at the Commission and utilities means the people involved in the second review may have no first-hand experience with the issues. All parties may have to waste time becoming re-educated about all the nuances of the specific unique situation. Overall, requiring a second review of the same contract does not appear to be an efficient regulatory process.

Second, routinely deferring prudence determination does not result in fair and equitable treatment for the utility and its shareholders. Fairness and equity are required to be considered in connection with rule reviews under Executive Order 97-02.² Commission, Staff, Public Counsel, and possibly other parties, have access to all the information used by the utility management to make decisions regarding the special contract at the time it is filed. If there are prudence or other concerns, it is most appropriate for those issues to be addressed before allowing the special contract to become effective. First, in deciding whether to allow the special contract to become effective, the Commission can affect the efficient investment of resources. Forcing utilities to be at risk of a later re-examination of the long-term contract, with a potential disallowance of cost recovery, is not equitable to the utility and its shareholders, as the utility is already locked into the contract and both the utility and customer have made long-term investment decisions based on the Commission's review. Second, the utility is in the position of having to make a decision it believes is in the best interest of its customers and shareholders. The utility cannot defer the decision. The Commission will have access to all the information that will ever exist which bear upon the circumstances that the utility considered (or should have considered) at the time the contract was executed. It seems reasonable that the decision by the Commission to allow the contract to become effective constitutes some action of ratemaking significance. Under PSE's proposal, the decision would create a rebuttable presumption for future ratemaking treatment that the utility's actions were reasonable. Parties would be free to challenge this issue in subsequent rate proceedings, but would bear the

² Executive Order 97-02 suggests the inquiry "[d]oes the rule result in equitable treatment of those required to comply with it?"

burden of showing that the utility's actions were unreasonable based on the circumstances that existed at the time the contract was executed.

Staff's Paragraph 7—Disclosure

Overall, PSE continues to support its position that on balance, the information listed in Staff's new disclosure section is not essential to support the public interest as described in our initial comments and discussed at the January 20, 2000, workshop. PSE suggests it is important for the Commission to weigh the possibility that this new disclosure language may lead to greater shifting of fixed, common cost recovery to core customers. PSE recommends this paragraph be deleted. However, PSE provides the following specific recommended changes in the event the Commission determines that adding this disclosure section is, on balance, in the public interest.

As written, the draft language appears to exceed the Commission's statutory authority under Chapter 42.17 RCW and RCW 80.040.095. The latter specifically defines a process for the handling of "...valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information,...." In other words, the law makes specific provision for some information to be accorded confidential protection under certain circumstances, and these provisions of the law must be accommodated in any Commission rule. PSE's suggested language is intended to ensure the rule is consistent with underlying statutes.

PSE suggests this rule should define what is meant, inclusively, by essential terms and conditions, not leave the designation open ended. This change will help improve the efficiency of applying the rule.

PSE recommends including waiver provisions that will help the rule conform to statutes mentioned above.

Finally, PSE suggests adding a requirement that the explanation of why a special contract is being used rather than a tariff be defined as essential. As discussed in PSE's initial comments and the January 20 workshop, this is the only information "essential" for other parties to determine if the contract results in discrimination between customer receiving like and contemporaneous service under the same or substantially similar circumstances.

Paragraph 9—Waiver of Disclosure

As noted above, this paragraph is included to ensure the rule does not exceed the statutory protections afforded to utilities and customers in Chapter 42.17 RCW and RCW 80.040.095. As drafted in the preliminary draft rule, PSE is concerned that a special contract could administratively be rejected by the Commission or Commission Staff because information Commission/Staff believes is "essential" has been marked confidential, even though the utility/special contract customer may have a legal right to prevent public disclosure, or at least have the legal right to a process defined in RCW 80.040.095. This problem could be exacerbated if the Commission adopts the "...but are not limited to..." language in defining essential terms and conditions.

Under the first waiver provision, if a utility or customer can demonstrate a legal right to protect some of the "essential" information, the Commission would be precluded from administratively rejecting the contract. This kind of waiver language would not expand the amount of information that could be kept confidential, but would help ensure customers and utilities' rights under existing law are not administratively threatened. While PSE and other parties may disagree over the public interest advanced by requiring any disclosure of special contract terms and conditions, it seems reasonable to provide for some kind of case-by-case situation for extreme circumstances if the Commission chooses to adopt disclosure language. This is the purpose of PSE's second proposed waiver provision in (9) (b). Additionally, this provision would help this specific rule revision meet the review criteria of Executive Order 97-02 by ensuring the benefits of the rule are greater than its costs.

Conclusion

PSE appreciates the opportunity to submit these comments. PSE looks forward to continuing to work with all interested parties in this proceeding to improve the special contract rule under WAC 480-80-335. If the Commission, Staff, or other interested parties have 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)