PERKINSCOIE

The PSE Building
10885 NE Fourth Street, Suite 700
Bellevue, WA 98004-5579

T +1.425.635.1400
F +1.425.635.2400
PerkinsCoie.com

Donna L. Barnett
DBarnett@perkinscoie.com
D. +1.425.635.1419
F. +1.425.635.2419

December 1, 2017

Mr. Steven King
Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

Re: Docket A-130355, Rulemaking to Consider Possible Corrections and Changes in WAC 480-07, Relating to Procedure Rules (Part III B)

Dear Mr. King:

These comments are submitted on behalf of Puget Sound Energy ("PSE") in response to the Commission's Notice of Opportunity to Submit Written Comments dated October 16, 2017 regarding proposed amendments to Part III B in WAC 480-07 (General Rate Proceedings). PSE appreciates the responsiveness to its prior comments submitted on May 15, 2017, and the several revisions made to the proposed rules in response to PSE's comments.

WAC 480-07-505(1)(a)

The current rule states that a filing that would *increase* a company's gross annual revenue by three percent constitutes a general rate case filing. In contrast, the proposed rule states that any company request to "*alter* its gross annual revenue . . . by three percent" will initiate a general rate proceeding. The rules should not *require* the Commission to treat a filing that decreases rates by three percent as a general rate case. PSE proposes that the rule retain the current language that treats rate *increases* of three percent as general rate cases.

In the alternative, if the proposed language is adopted, the Commission should have discretion to determine whether a filing that meets the criteria set forth in WAC 480-07-505(1)(a) should be treated as a general rate case. PSE has proposed language that gives the Commission such discretion in WAC 480-07-505(4), discussed below.

WAC 480-07-505(1)(b)

PSE continues to believe that the Commission should retain the language "on common equity" in this subsection. A minor change to the cost of debt should not be a mandatory trigger for a

general rate case. Under the proposed rule, the Commission would be required to treat a submission as a general rate case even if (i) the filing proposes a rate decrease, or (ii) the filing proposes a rate increase of less than three percent, if the company also proposes to lower its debt costs. An update to the cost of debt, without other changes to capital structure or ROE, should not trigger a general rate case.

In the alternative, if the proposed language is adopted, the Commission should have discretion to determine whether a filing that meets the criteria set forth in WAC 480-07-505(1)(b) should be treated as a general rate case. PSE has proposed language that gives the Commission such discretion in WAC 480-07-505(4), discussed below.

WAC 480-07-505(2)(c)

PSE seeks clarification of what is intended by the language in this subsection "or to comply with federal or state rules concerning the level of rates."

WAC 480-07-505(4)

PSE appreciates the language that has been added requiring notice and an opportunity to comment before the Commission converts a proceeding to a general rate case. PSE proposes minor edits to the language added by Staff, shown below, for purposes of clarity.

Additionally, as discussed above, the rules should provide the Commission discretion to determine that a submission does not need to be treated as a general rate case. The rules, as proposed, only give the Commission discretion to convert a submission to a general rate case, but the Commission has no discretion to determine that a filing that meets the technical criteria set forth in WAC 480-07-505(1) need not be treated as a general rate case. As discussed above, such discretion may be appropriate if a filing proposes a rate decrease of three percent, or if a company proposes a rate increase of less than three percent with a minor adjustment to its cost of debt, as was the case in PSE's 2013 expedited rate filing. Under the rules as proposed, the Commission is *required* to treat such filings as a general rate case and has no discretion to treat them otherwise. Accordingly, PSE proposes the first sentence of WAC 480-07-505(4) be revised as follows:

> (4) **Commission discretion.** The commission retains discretion to consider any submission described in this section as initiating a general rate proceeding, ~~or~~ to convert any rate proceeding to a general rate proceeding, or to elect not to consider any submission described in this section as initiating a general rate proceeding, if the commission finds that such action is consistent with the public interest, following notice and an opportunity to comment.

WAC 480-07-510(1) Testimony and exhibits

Staff's proposed change to the first sentence of WAC 480-07-510(1) goes far beyond the substance of the existing rule and can be interpreted to limit the evidence the Commission could consider as part of a company's direct case. The first sentence of the existing rule simply sets forth the number of copies of testimony and evidence the company must file as its direct case. Staff's proposed revision to the first sentence substantially changes the sentence and would limit what the Commission can consider in terms of the company's direct case. Staff's proposed revision to the rules can be read to limit the Commission to considering only a company's "initial submission for filing" as its direct case. Staff's revised rule would arguably preclude the Commission from considering supplemental testimony, revised testimony, or rebuttal testimony as part of a company's direct case. This is inconsistent with the Commission's policy to have the most up to date information available for the Commission's consideration.[1] The rule should not limit the Commission's discretion in terms of what can be considered in a company's direct case.

PSE proposes the following change to the first sentence of WAC 480-07-510(1) to be consistent with the intent of the existing rule.

> The company~~'s~~ must submit for filing ~~initial submission for filing must include~~ all testimony and exhibits the company intends to present as its direct case.

WAC 480-07-510(3) Work papers and accounting adjustments

WAC 480-07-510(3)(a)

PSE continues to recommend rejection of the proposed amendment, "Every party must submit for filing and serve work papers that support its position and the testimony of each of its witnesses when the party submits that testimony." PSE recommends that the current rules remain unchanged with regard to filing and service of work papers. That is, work papers are not to be filed but the company must serve them on Public Counsel and Staff. If helpful, the work papers could also be provided to the Commission's policy staff working on the case. The rule, as proposed, would require substantially more company-specific information to be made available to the general public by posting it on the website, even though such information is not a part of the evidence in the case.

[1] *See, e.g., WUTC v. PSE*, Dockets UE-090704 & UG-090705, Order 06, ¶¶ 10-11 (August 12, 2009) ("The Commission's paramount interest is in having a full record with the best available evidence upon which to base its decisions."); *WUTC v. PSE*, Dockets UE-072300 & UG-072301, Order 08, ¶ 10 (May, 5, 2008).

Additionally, this subsection, along with subsection (b), would require published and copyrighted treatises, reports, studies, analyses, surveys, and articles that are relied upon by a witness, to be filed as work papers, which could potentially expose the Commission and the filing party to copyright infringement suits. While it is true that distributing a copyrighted treatise for regulatory purposes "*may be* fair use" as noted in Staff's October 16, 2017 response, it also *may not be* fair use, and hundreds of thousands of dollars in attorneys fees' *may be* spent in defending against a copyright infringement claim, before it is determined whether the defense of fair use applies. The rules, as proposed, heighten exposure to a copyright infringement suit by requiring such copyrighted materials to be filed on a website for the world to see, rather than making them available to a few parties, as is the case under the current rules. The risk of such suits outweighs any potential benefits of filing workpapers, particularly if the company provides such materials directly at the initiation of a case or upon request.

A more reasonable approach is to provide copies of work papers to Staff, Public Counsel, intervenors, and if appropriate, the Commission's policy staff, rather than submitting the work papers for filing. Copyrighted materials can be made available for review on an as needed basis, rather than posting them on a public website.

If Staff's proposed revisions to the rule are accepted and work papers are required to be filed, the second sentence of WAC 480-07510(3)(a) should be amended as follows:

> Every party must submit for filing and serve work papers that support its position and the testimony of each of its witnesses when the party submits that testimony~~.~~, subject to the exceptions set forth in subsection (b).

WAC 480-07-510(3)(b)

As discussed above, companies should not be required to file (and the Commission should not post on the website) work papers that contain copyrighted materials. If the Commission accepts Staff's proposal to require filing of work papers, then PSE proposes adding the following language to WAC 480-07-510(3)(b):

> (b) Referenced documents. If a party's testimony, exhibits, or work papers refer to a document, including but not limited to a report, study, analysis, survey, article, or court or agency decision, that document must be included in the party's work papers except for the following:

(i) a party may include an official citation or Internet Uniform Resource Locator (URL) to a commission order or to a court opinion or other state or federal agency decision, rather than the document itself, if that decision is reported in a generally accepted publication (e.g., Washington Reports Second (Wn.2d), Public Utility Reports (P.U.R.), etc.) or if the document is readily available on the website of the agency that entered that decision; ~~and~~

(ii) a party may include only the relevant excerpts of a voluminous document if the party also provides a publicly accessible Internet URL to the entire document or describes the omitted portions of the document and ~~their~~ its content and makes those portions available to the other parties and the commission upon request~~.~~; and

(iii) a party is not required to file or distribute copyrighted materials, but should describe the copyrighted materials and their content and make the copyrighted materials available for inspection by the parties or the commission, upon request.

WAC 480-07-510(3)(c)

It is not clear as to whether the requirements in this section are intended to apply only to paper copies of work papers, or whether they are intended also to apply to electronic versions of work papers. If this section applies to electronic work papers, it should be included in subsection (d) addressing electronic documents.

It would be helpful to get a better understanding of what Staff expects in terms of the cross referencing and the description of the cross-referencing methodology. Mixed messages regarding cross referencing have been received from Staff in recent cases.

WAC 480-07-510(3)(d)

It is not clear whether this rule requires a redacted version of a spreadsheet or model containing confidential information to be filed. If a redacted version is required, it will not be fully functional. To create the redacted version, the data in the spreadsheet would be converted into pasted values with confidential data deleted. All links to upstream or downstream worksheets would need to be broken within the workbook and other workbooks to prevent backing into confidential information. Additionally, the formulas themselves may be confidential. Therefore, a redacted spreadsheet or model would have no formulas, links or macros. While this type of redacted version can be created, it would have no real value, it can require significant effort to create, and it will not comply with the rule requiring the spreadsheet to be fully functional. If a redacted version of a confidential spreadsheet or model is required to be filed, PSE proposes adding the following as a final sentence to WAC 480-07-510(3)(d):

Redacted versions of confidential or highly confidential models or spreadsheets should be provided in .pdf format that masks the information claimed to be confidential or highly confidential in compliance with the requirements in WAC 480-07-160.

WAC 480-07-510(3)(h) Achievement of rate of return.

PSE proposes that the word "tangible" be removed from the first sentence. It is not clear what would constitute "tangible action" or how it would differ from "action."

WAC 480-07-510(4)(a)(v) Summary Document

Commission Staff has questioned PSE's determination of "typical residential customers" in the most recent general rate case, which prompted PSE to request a definition in the rules. If there is a specific methodology Staff prefers for determining the "typical residential customers" then that should be made clear so that all companies can follow the recommended methodology.

WAC 480-07-515 Limited rate proceedings--electric and natural gas companies.

PSE is disappointed that the proposed rules addressing limited rate proceedings have been pulled from the rulemaking. PSE does not agree that it is premature to adopt such a rule. It has been more than five years since Commission Staff proposed an expedited rate filing in PSE's 2011 general rate case, and the Commission agreed that such a proceeding deserved consideration.[2] Since that time PSE has filed one expedited rate filing[3] and if the recent rate case settlement agreement is approved, will submit a second filing in 2018.[4]

Further, in addition to this procedural rulemaking that has been ongoing for several years, the Commission held a workshop as a recessed open meeting to consider ratemaking mechanisms to decrease regulatory lag and address utility earnings attrition.[5] In written comments in the recessed open meeting workshop, both Public Counsel[6] and PSE[7] endorsed the expedited rate

[2] *See WUTC v. PSE*, Dockets UE-111048 & UG-111049, Order 08, ¶¶ 496-97, 506-07 (May 7, 2012) (encouraging Staff and PSE to meet and confirm mutual expectations for an expedited rate filing as proposed by Staff).
[3] *See WUTC v. PSE*, Dockets UE-130137 & UG-130138 et al., Order 07, Final Order Authorizing Rates (June 25, 2013).
[4] *See WUTC v. PSE*, Dockets UE-170033 & UG-170034, Multiparty Settlement Stipulation and Agreement ¶ 115 (September 15, 2017) (agreeing to ERF filing in 2018).
[5] *Investigation of Possible Ratemaking Mechanisms To Address Utility Earnings Attrition*, Docket U-150040, Notice of Recessed Open Meeting & Notice of Opportunity To File Written Comments (February 5, 2015).
[6] *Id.*, Initial Comments of Public Counsel dated March 27, 2015, ¶ 22 (listing the expedited rate filing as one of four regulatory mechanisms that are preferable to an attrition adjustment and stating it would be "useful in this docket to develop more clear parameters for the ERF mechanism.").

filing as a ratemaking mechanism to address regulatory lag. In sum, there is a good roadmap to follow, and there has been substantial process and opportunities for comment.

While there is nothing in the Commission rules or Washington law that prohibits a company from filing an expedited rate filing or limited rate proceeding even without a rule—if the requested rate increase is less than three percent and there is no request for a change to the return on equity—there is a benefit to promulgating rules for such proceedings. A rule creates more certainty in terms of the parameters for the proceeding, how the filing will be structured, what will be included in the filing, the procedural requirements and the timing of the final order. Without these types of established parameters, there is uncertainty and companies are hesitant to file such a case. Additionally, it will allow for intervening parties to be more prepared to engage in such a proceeding. For this reason, PSE encourages the Commission to adopt rules for an expedited rate filing that are consistent with the procedure used in Dockets UE-130137 and UG-130138, which is also consistent with the expedited rate filing that PSE will file pursuant to the Multiparty Settlement Agreement in Dockets UE-170033 and UG-170034. Briefly, these expedited rate filings include the following features:

- Based on a Commission Basis Report ("CBR") developed for a recently completed accounting period consistent with the approach defined in WAC 480-90-257 and WAC 480-100-257.

- Use only restating adjustments most recently approved by the Commission with the following exceptions:

    - Use of end of period rate base is acceptable.

    - Annualization of any revenues that occurred after the test period and annualization of the underlying costs associated with those revenues to the extent not fully included in the test year results.

- Remove power costs, purchased gas, and cost recovery mechanism related revenues, rate base and expenses, leaving only transmission, distribution, and administration and general costs and rate base that will be used to determine the electric and natural gas revenue requirements to be considered in the expedited rate filing.

- Maintain the rate of return established in the most recent general rate case except to update the interest rate on debt if needed.

[7] *Id.*, Comments of PSE dated March 27, 2015, p. 8 ("PSE views the expedited nature of the ERF as an important tool to address earnings attrition.").

- No changes to rate spread and rate design from the recently filed general rate case.
- Procedural schedule that allows rates to take effect within 120 calendar days after filing.

WAC 480-07-540

In the first sentence of the proposed rule, the following language has been deleted and should be retained: "that propose changes that would increase any rate, charge, rental, or toll." This language is in RCW 80.04.130(4), which is cited in the first sentence of the rule. RCW 80.04.130(4) places the burden of proof on the public service company for "any change in a schedule, classification, rule, or regulation the effect of which is to increase any rate, charge, rental, or toll theretofore charged . . . ." The Commission should not rewrite the statutory burden of proof through this rulemaking.

Further, the changes to the third sentence are not necessary and should be removed. The proposed revisions to the rule substantially alter the existing rule, which provides that the Commission will consider the company's "prefiled evidence" to be its full direct case. The rule, as revised, limits the Commission to consider only the "initial submission." Accordingly, under the proposed revisions, the Commission would not be permitted to consider any supplemental or rebuttal submissions in deciding a motion to dismiss. The rules should not limit the Commission's discretion in terms of what it may consider, as these proposed revisions would do.

Comment on Staff's General Change: "Target Rate of Return"

PSE questions the need to amend the rules in multiple sections from "authorized rate of return" to "target rate of return." The phrases "authorized rate of return" and "authorized return on equity" are well understood, accepted and pervasive in regulatory law. These phrases can be found in Washington statutes,[8] administrative rules,[9] Commission decisions,[10] and case law in Washington and across the country.[11] Staff's stated justification for changing from "authorized" to "target" is "to emphasize that rate of return is not guaranteed."[12] However, it is a well-established legal and regulatory premise that there is no guarantee a utility will earn its

[8] *See, e.g.,* RCW 80.04.570.
[9] *See, e.g.,* WAC 480-54-020 (defining "carrying charge used to calculate an "attachment rate" to include "commission-authorized rate of return").
[10] *See, e.g., WUTC v. Pacific Power & Light Co*., Dockets UE-140762 et al., Order 08, ¶¶ 144-146 (March 25, 2015) (discussing failure of utility to earn its authorized rate of return and use of EOP rate base).
[11] *See, e.g.US West, Inc. v. WUTC,* 134 Wn. 2d 74, 81-82, 113, 117 (1991); *Verizon Comm. Inc. v. FCC,* 535 U.S. 467, 556 (2002)(citing FCC regulations).
[12] *See* Revised Summary of Initial Comments on Proposed Revisions to GRC Rules at 11.

authorized rate of return. Rather, it must have the opportunity to earn its authorized rate of return.[13] Thus, PSE questions whether there is any benefit to this change in terminology. Whatever minimal benefit that might result from the proposed change in terminology is outweighed by the confusion that is likely to result from moving away from long-standing, generally-accepted ratemaking terminology.

Thank you for the opportunity to file comments. If we can be of any further assistance, please contact Donna L. Barnett or Sheree Strom Carson at 425-635-1400.

Sincerely,

Donna L. Barnett

[13] *See, e.g., In re Petition of PSE and NWEC For an Order Authorizing PSE to Implement Electric and Natural Gas Decoupling Mechanisms and To Record Accounting Entries Associated with the Mechanism*, Dockets UE-121697 et al., Order 07, Final Order Granting Petition, ¶ 171 (June 25, 2013), ("The escalation factors provide PSE an improved opportunity to earn its authorized return, but are set at levels that will requires PSE to improve the efficiency of its operations if it is to actually earn its authorized return."); Nichols & Welch, *Ruling Principles of Utility Regulation -- Rate of Return*, (Supp A) 1995 at 12 ("The general rule that a public utility is not guaranteed a fair return has been restated in several cases. A utility is never guaranteed any return, but it is entitled to rates which will give it an opportunity to earn a fair return.").