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January 31, 2018

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 C through E, Part IV)

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 December 11, 2017 regarding proposed amendments to Part III C through E and Part IV in WAC 480-07. PSE appreciates the opportunity to comment on the proposed rules, and its comments are set forth below.

PART III, SUBPART C: ABBREVIATED AND SPECIALIZED FORMS OF ADJUDICATIVE PROCEEDINGS

WAC 480-07-610 Brief adjudicative proceedings.

- In subsection (3)(a), PSE suggests deleting language, as shown below.

  (a) The commission may set a matter for brief adjudication on its own initiative ~~when doing so will not prejudice the rights of any~~ ~~person~~.

  The conditions for use of brief adjudications are already addressed in earlier subsections of the rule. Subsection (1) of this rule describes when a brief adjudicative proceeding can be used, and subsection (2) describes the matters suitable for brief adjudicative proceedings. Therefore, it is unnecessary to address this in subsection (3)(a), and the stricken language introduces some inconsistency with the earlier subsections.

  Focusing on the rights "of any person" is unduly broad in this context, and WAC 480-07-610(1)(b) already provides adequate protections for non-parties by stating that brief adjudicative proceedings can be used when the "[p]rotection of the public interest does not require the commission to give notice and an opportunity to participate to persons other than the parties." If the Commission determines to retain the stricken language PSE alternatively suggests substituting "any person" with "the parties."

- In subsection (5)(b)(i)(C),PSE suggests including a reference to highly confidential information as well as confidential information, as shown below:

> (C) Place the capital letter "C" immediately after the number of the exhibit if the exhibit includes information designated as confidential under WAC 480-07-160. Place the capital letters "HC" immediately after the number of the exhibit if the exhibit includes information designated as highly confidential under WAC 480-07-160.

- In subsection (5)(b)(ii), PSE suggests including a reference to the filing of Excel files for spreadsheets, as shown below:

> (ii) Format. All exhibits must be filed and served electronically in searchable .pdf (Adobe Acrobat or comparable) format. Any exhibit in the form of a spreadsheet that displays results of calculations based on formulas must also be filed in its native Excel format in compliance with WAC 480-07-140(6)(a)(ii).

PART III SUBPART D: ALTERNATIVE DISPUTE RESOLUTION

WAC 480-07-700 Alternative dispute resolution.

In subsection (4)(b), PSE suggests two changes as shown below:

> (4) Settlement negotiation guidelines. In any settlement negotiation, including collaboratives, settlement conferences, and mediations, the following apply unless all participants agree otherwise:
>
> . . . .
>
> (b) ~~Parties may agree that i~~Information exchanged exclusively within the context of settlement negotiations will be treated as confidential and will be privileged against disclosure to the extent permitted by law~~, subject to the requirements of RCW 5.60.070~~

- The default position should be that information exchanged within the context of settlement negotiations—including mediations, settlement conferences and collaboratives— is treated as confidential. The language at the beginning of subsection (4) provides that "the following apply unless all participants agree otherwise." Thus, it is confusing to begin subsection (4)(b) with the language "Parties may agree that . . .". By striking the language "Parties may agree that" in subsection (4)(b) there is a presumption of confidentiality and privileged against disclosure for information exchanged in settlement negotiations, unless all participants agree otherwise.

- In subsection (4)(b), the reference to RCW 5.60.070 is outdated; it governs only mediations pursuant to a referral or an agreement made before January 1, 2006. After that date, chapter 7.07 RCW applies. RCW 7.07.070 provides that mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state. Accordingly, if the Commission adopts this rule providing that settlement negotiations will be treated as confidential, unless participants agree otherwise, it is consistent with RCW 7.07.070.

It is good policy to encourage free flow of information in negotiations, and it is consistent with state law to consider settlement negotiations as confidential and privileged against disclosure, unless parties agree otherwise.

WAC 480-07-710 Mediation.

PSE suggests the following change to subsection (4)(g):

> (g) The mediation process is confidential and privileged against disclosure to the extent permitted by law~~, subject to the requirements for a written agreement or other record indicating an expectation that mediation communications will be privileged against disclosure as required under RCW 7.07.020~~; and

The reference to RCW 7.07.020 in this rule is confusing and should be deleted. First, RCW 7.07.020 addresses the scope of proceedings in which mediation communications are treated as privileged and not admissible in evidence; it does not address confidentiality of mediations, which as discussed above, is addressed in RCW 7.07.070. As written, subsection (4)(g) conflates confidentiality and privilege/admissibility, and cites to the statute addressing privilege/admissibility to support the confidentiality of mediations.

Second, the reference to a requirement for a written agreement in RCW 7.07.020 is confusing and should be deleted. The only place in the cited statute that a written agreement is referenced is where the parties to mediation agree the privilege will not apply to the mediation. RCW 7.07.020(3) states that "If the parties agree in advance in a signed record . . . that all or part of a mediation is not privileged, the privileges under RCW 7.07.030 through 7.07.050 do not apply. There is no explicit requirement for a written agreement in order for mediation communications to be privileged against disclosure or to be treated as confidential.

With respect to confidentiality, RCW 7.07.070 provides that mediation communication are confidential to the extent provided by a rule of the state. With respect to privilege from admissibility, RCW 7.07.030 provides that a mediation communication is privileged and not subject to discovery or admissibility in evidence, and RCW 7.07.020 clarifies that the scope of

this privilege includes where the mediation parties are referred to mediation by the administrative agency—including the WUTC. For these reasons, the Commission should make clear in its rules that mediations are to be treated confidential and are subject to the privilege against disclosure, unless the parties agree otherwise. PSE's suggested changes accomplish this.

WAC 480-07-720 Collaboratives.

- In subsection (2), PSE suggests the following changes to add clarity:

  (2) **Establishment.** ~~Any person may petition the commission to establish a collaborative. The petition must state the issues on which the petitioner seeks consensus, identify potential participants, and explain why a collaborative would be beneficial to resolve the issues.~~ The commission may establish a collaborative on its own initiative or in response to a petition. A petition seeking to establish a collaborative must state the issues on which the petitioner seeks consensus, identify potential participants, and explain why a collaborative would be beneficial to resolve the issues. The commission may, in its discretion, approve the petition and establish a collaborative, or it may deny the petition.

- In subsection (5), PSE suggests the following change to address situations when partial consensus is reached (i.e., by some but not all of the parties, or on some but not all issues):

  (5) **Conclusion.** The participants must inform the commission when they have reached consensus on the issues to be addressed in the collaborative, when they have reached partial consensus on the issues to be addressed in the collaborative and believe that further negotiation would not be fruitful, or when they have reached an impasse and believe that further negotiations would not be fruitful.

WAC 480-07-730 Settlement

PSE suggests the following changes to WAC 480-07-730(3) to avoid confusion and potential conflict with WAC 480-07-740(3)(c),[1] which sets forth the "Rights of parties opposed to settlement."

> (3) A multiparty settlement is an agreement among some, but not all, parties in an adjudication to resolve one or more disputed issues. If the agreement does not resolve all issues, the ~~settling~~ parties may litigate the issues the agreement does not resolve. ~~Non-settling parties may litigate all issues presented for resolution in the adjudication.~~

The last sentence is unnecessary and can be deleted because the rights of parties opposed to a settlement are described in a later rule, WAC 480-07-740(3)(c),[2] and retaining the sentence creates potential conflict with that rule. The stricken sentence would allow a non-settling party to litigate "all issues presented for resolution in the adjudication," which could be interpreted to include issues that were proposed in the settling parties' litigation positions but have since been revised and compromised in settlement. It has been the Commission's practice to limit non-settling parties to oppose the settlement rather than allowing them to oppose the litigation positions of the settling parties.

Alternatively, PSE suggests deleting the proposed last sentence, as shown above, and retaining the last sentence of the existing rule with a minor modification, as shown below:

> (3) A multiparty settlement is an agreement among some, but not all, parties in an adjudication to resolve one or more disputed issues. If the agreement does not resolve all issues, the ~~settling~~ parties may litigate the issues the agreement does not resolve. Non-settling parties may offer evidence and argument in opposition to the settlement as set forth in WAC 480-07-740(3)(c). ~~litigate all issues presented for resolution in the adjudication.~~

WAC 480-07-740 Settlement consideration procedure.

PSE has three proposed changes to this rule:

- In subsection (1)(b), PSE suggests the following change to clarify that a time period for public comment is not necessary for every settlement. This proposed change is consistent with the existing rule.

[1] This subsection is incorrectly marked as WAC 480-07-740(2)(c) in the proposed rules. Since there was an earlier subsection 480-07-740(2), the referenced subsection should be WAC 480-07-740(3)(c).
[2] *Id.*

(b) consider evidence and argument from all parties ~~and any public comments~~ on why the commission should or should not approve and adopt the settlement, and any public comments when the commission determines, after consulting the parties, that such comment is needed.

- In subsection (2)(d)"Extension of Statutory Deadline," PSE has general concerns with the proposed time frames for presenting settlements to the Commission, and PSE is concerned with the punitive consequences if the settlement presentation time frame is not met. The proposed rule requires parties to bring a settlement in a GRC or other tariffed matter to the Commission at least thirty days before the scheduled hearing and at least sixty days before the tariff suspension date, or risk (1) rejection of the settlement, or (2) refusal of the Commission to suspend the procedural schedule. PSE has three concerns with this rule.

  First, it is not reasonable to expect that GRC settlements will routinely be filed more than thirty days prior to the scheduled evidentiary hearing, with the current structure of the GRC procedural schedules.[3] In a GRC, it is not uncommon for a settlement to be reached after parties have reviewed rebuttal testimony, which is typically filed approximately three weeks before the scheduled evidentiary hearing. Moreover, the procedural rules require that the settlement be filed with supporting documentation, which takes additional time to complete after a settlement has been reached. PSE's 2017 GRC illustrates PSE's concerns. Although the Prehearing Conference Order set the first settlement conference more than 90 days before the evidentiary hearing, Commission Staff was not prepared to meet on that date.[4] Ultimately, the parties held their first settlement conference on August 11, less than three weeks prior to the evidentiary hearing, and a settlement in principle was reached less than a week before the scheduled hearing. Similarly, PSE's prior rate cases in 2011, 2009 and 2007 all have included settlements that were filed less than 30 days prior to the evidentiary hearing.[5] If the

[3] If the Commission would like settlements to be presented at an earlier date, more time should be built into the procedural schedule between the response testimony filing date and the rebuttal/cross answering filing date. This is a time period when productive settlement negotiations can take place, as all parties have placed their positions at issue. However, when the procedural schedule allows five weeks or less for preparation of rebuttal testimony and cross-answering testimony, parties—and in particular regulated companies—have insufficient time to prepare rebuttal testimony in response to multiple parties while also engaging in settlement negotiations.

[4] Dockets UE-170033/UG-170034, Staff Letter to ALJ (May 18, 2017); *id*, Staff Letter to ALJ (June 2, 2017) (stating Staff would not be able to meet at all on certain issues and for other issues, Staff "had not yet finished its analysis and believes that its valuable time ought better be spent preparing its testimony.")

[5] Dockets UE-111048/UG-111049 (settlement agreements filed 1/17 and 2/15; evidentiary hearings began 2/14); Dockets UE-090704/UG-090705 (multiparty settlement agreement filed 1/15; hearings began 1/19); Dockets UE-072300 & UG-072301 (five separate settlement agreements filed between 8/12 and 8/22; hearing held 9/3).

Commission believes it is necessary to set a cutoff date for filing of a settlement, PSE suggests that ten days prior to the evidentiary hearing is a more reasonable time frame.

Second, regulated companies should not be coerced into surrendering their statutory right to a ten-month tariff suspension time frame, in exchange for entering into a settlement. But, as the heading to this subsection indicates—"Extension of statutory deadline" —that is what this rule fosters. Such a rule will not encourage settlements; it will discourage them. Regulated companies will be hesitant to risk the certainty of the statutory suspension period in exchange for a possible settlement. The proposed rule change will also allow parties to game the settlement process. When a rate increase is proposed, parties opposing the rate increase have no incentive to engage in early settlement and would be rewarded for entering into the settlement at the latest possible date in order to extend the suspension period and the proposed effective date of the rate increase. In the 2017 PSE GRC, although PSE was willing to begin settlement discussions in May and was not the party seeking delay of the settlement conference, under the proposed rules, PSE would have been pressured to extend the suspension deadline.

Third, the two consequences for failing to extend the statutory suspension date are punitive. The first consequence—that the Commission may refuse to suspend the procedural schedule if the regulated company does not agree to extend the statutory deadline— means that parties would need to prepare for both a litigated hearing and a settlement hearing, at the same time, in a short time period. Under such a scenario, the quality of information the Commission receives for settlement will suffer. Ultimately, parties can be expected to determine that it is too time consuming and risky to enter into a settlement—unless the company extends the suspension date—as they cannot prepare for both the settlement and the litigation at the same time. The second consequence is that the Commission may elect to reject the settlement if it is not filed (with supporting testimony) at least thirty days before the scheduled evidentiary hearing. The prospect of Commission rejection of the settlement will likewise discourage settlements. Parties will be less willing to use precious time that could be used preparing for an evidentiary hearing if they believe that the Commission is likely to reject a settlement as untimely. Both of these potential consequences depart from the Commission's stated policy of encouraging settlements.[6] For the above reasons, PSE proposes that subsection (5)(d) be stricken in its entirety.

[6] *See* RCW 34.05.060; *see e.g., WUTC v. Verizon Northwest, Inc.*, Docket UT-061777, Order 01 ¶ 11 (June 30, 2008) ("The Commission supports and encourages informal resolution of disputes, including settlement agreements.").

Alternatively, if the Commission believes it is necessary to set timelines, PSE proposes the following changes to the proposed rule:

> (d) Extension of statutory deadline. When requesting to suspend the procedural schedule for commission consideration of a settlement agreement in general rate proceedings or other proceedings in which a statute requires final commission action within a specified time period, the party that submitted the suspended tariff at issue or otherwise benefits from that time period must inform the commission whether the party agrees to extend the statutory deadline, if necessary, to add the amount of time the commission requires to consider the settlement. A party is under no obligation to agree to extend the statutory deadline, but the settling parties should attempt to present the Commission with a settlement agreement no less than ten days prior to the evidentiary hearing and no less than sixty days prior to the deadline for final commission action. ~~The commission may refuse to suspend the procedural schedule if that party does not agree to extend the statutory deadline for commission action. The commission may decline to consider a settlement agreement if the parties present it less than thirty days prior to the evidentiary hearing or less than sixty days prior to the deadline for final commission action if the party that filed the suspended tariff at issue or otherwise benefits from that deadline does not agree to extend it.~~

- The subsection titled "Settlement presentation" that is listed as subsection (2) should be changed to subsection (3), as subsection (2) has already been used in this section of the rule.

WAC 480-07-750 Commission discretion to consider and approve or reject.

PSE questions whether the proposed changes are needed to this section with respect to requiring all parties to affirmatively state that Commission conditions to a settlement agreement are accepted. The existing rule assumes the conditions are accepted unless a party expressly rejects a condition. Alternatively, if the Commission elects to make changes to this section, PSE suggests subsection (2)(b)(ii) be revised as follows:

> (ii) If a party to the settlement rejects or does not ~~unequivocally and unconditionally~~ accept any of the commission's conditions, the settlement is deemed rejected without further action from the commission, and subsection (c) of this section applies. Parties may seek clarification or reconsideration of a commission order

approving a settlement with conditions as set forth in WAC 480-07-835, WAC 480-07-840, and WAC 480-07-850.

The rule, as proposed, removes discussion of the parties ability to seek reconsideration of a settlement approved with conditions[7] and fails to recognize that parties who have reached agreement on a settlement may need some further clarification from the Commission before they can accept, what is in essence, a new deal that differs from what was agreed to by the settling parties. It is important to have a clear path for seeking such clarification from the commission, if needed, before parties accept or reject a new condition to their negotiated settlement.

Also, PSE questions whether it is necessary to qualify "accept" with the language "unequivocally and unconditionally." Doing so may introduce a subjective component into the acceptance process that could result in unintentional but automatic rejection of a settlement if one party does not accept the settlement with a sufficient level of enthusiasm and firm language.

SUBPART E: ORDERS AND POST-ORDER PROCESS

WAC 480-07-880 Compliance filings.

- In subsection (3), PSE suggests the following change to the last sentence to reflect that work papers supporting a compliance filing should be provided to the parties, but not filed:

> A compliance filing that includes a tariff also must be supported by ~~include~~ work papers, provided to the parties, that demonstrate the derivation of the proposed rate or charges in that tariff.

- In subsection (4), PSE suggests the following change to the first sentence to allow for a more fair and realistic timeframe for responses to compliance filings. PSE believes that five business days for a response to a compliance filing is reasonable except in unusual and complicated cases, in which case the Commission may allow a longer time period for review of the compliance filing:

> (4) **Responses.** Any party in the docket may file a response to the compliance filing within ~~10~~ five business days from the date it is submitted or by such other deadline as the commission may establish.

[7] *See* proposed WAC 480-07-750(2)(b)(i), striking the following language from the existing rule: "parties may seek reconsideration of the decision and the settling parties must within the time for reconsideration state their rejection of the conditions."

PART IV: OTHER COMMISSION PROCEEDINGS

WAC 480-07-915 Penalty assessments.

PSE suggests that subsection (8) be modified as shown below, to reflect that contesting a violation or requesting mitigation, as set forth in subsection (3) suspends the collection of the penalty until the Commission issues a final order concerning the penalty or the mitigation of the penalty, as provided in RCW 19.122.150(4).

> (8) **Enforcement.** Failure to pay an assessed penalty by the due date, unless the person receiving the notice of assessed penalty timely contests the violation or requests mitigation as provided in this section, is a violation of law for which the commission may take additional enforcement action, including but not necessarily limited to one of the following . . . .

Thank you for the opportunity to file comments. Additionally, PSE is available to participate in a workshop if the Commission determines one would be beneficial in resolving any issues raised in these or other comments. If we can be of any further assistance, please contact Donna L. Barnett or Sheree Strom Carson at 425-635-1400.

Sincerely,

Sheree Strom Carson