PERKINSCOIE

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

+1.425.635.1400
+1.425.635.2400
PerkinsCoie.com

May 11, 2018

Mr. Mark L. Johnson
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. Johnson:

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 April 11, 2018 regarding proposed amendments to Part III B and Part III C through Part IV in the Washington Administrative Code ("WAC") Chapter 480-07. PSE appreciates the revisions made to the proposed rules based on PSE's earlier comments and the comments of other parties. PSE appreciates the opportunity to further comment on the proposed rules, and its comments are set forth below.

PART III B GENERAL RATE PROCEEDINGS

A. Supplemental Filings in General Rate Cases

There are two subsections in the general rate proceeding rules where the company's direct case is defined narrowly to include only the initial filing. In certain circumstances, the Commission has allowed a supplemental filing after the initial filing to address matters that require updating from the time of the initial filing such as power costs and for other reasons.[1] In such cases, when the Commission authorizes a supplemental filing prior to the filing of response testimony by other parties, such a filing should also be considered as part of the company's direct case. The proposed rule, as written, would prohibit the Commission from considering Commission authorized supplemental testimony as part of the company's direct case. PSE believes it is not appropriate to limit the Commission's discretion in this manner. Accordingly, PSE requests the following changes:

[1] *See, e.g., WUTC v. PSE,* Dockets UE-170033 & UG-170034, Order 03, App. B (February 15, 2017) (authorizing supplemental testimony filing date); *WUTC v. PSE*, Dockets UE-111048 & UG-111049, Order 03 App. B (authorizing company to file supplemental direct testimony and exhibits on decoupling). *WUTC v. PSE,* Dockets UE-060266 & UG-060267, Order 05 (July 13, 2006) (authorizing supplemental power cost filing).

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

> The company's initial filing and any supplemental filings authorized by the commission must include all testimony and exhibits the company intends to present as its direct case. The company must serve a copy of the initial filing on the public counsel unit . . . .

WAC 480-07-540 General rate proceedings --Burden of proof. (last sentence)

> The commission will consider the company's initial filing and any supplemental filings authorized by the commission to be its full direct case in support of its rate change request for purposes of deciding any prehearing motion to dismiss under WAC 480-07-380.

B. Level of Detail Required for Testimony and Exhibits

PSE suggests the following change to the proposed rule language:

WAC 480-07-510(3) Detailed support for proposals.

> (a) General. The company must include in its initial testimony and exhibits, including those addressing accounting adjustments, ~~all detail,~~ calculations, information and descriptions necessary to support its requests and proposals and meet its burden of proof.

Requiring "all detail" to support a company's requests and proposals would result in a company filing exorbitant amounts of information in its initial testimony and exhibits in order to include "all detail" that supports the company's case. Documents that otherwise would have been workpapers now will need to be filed as exhibits. To demonstrate this concern, PSE served the following workpaper in its most recent general rate case: *PKW-WP(C) Hopkins Ridge Day-Ahead Cost 17GRC Rebuttal.xlsx*. If printed, this confidential workpaper would exceed 15,000 pages. Under the proposed rules, which require five paper copies of all exhibits, PSE would submit more than 75,000 pieces of paper, not including a redacted version, for this one workpaper. To put this effort into perspective, PSE submitted 741 workpapers in its most recent general rate case. The language "all detail" is an overly broad description of the data needed in evidence and will result in the Commission being inundated with minute details that feed into a company's revenue requirement, power costs, and rate spread/rate design. Removing "all detail" allows a company to exercise limited discretion to determine which data is necessary to include as evidence to support its requests and proposals.

PART III, SUBPART D: ALTERNATIVE DISPUTE RESOLUTION

A. Confidentiality of Settlement Correspondence and Draft Settlement Agreements

PSE is concerned about recent Public Records Act ("PRA") requests seeking disclosure of mediation and settlement correspondence, negotiations, and documents, pursuant to Chapter 42.56 RCW. There is an expectation among parties engaged in settlement negotiations—whether in mediation or settlement conferences—that settlement correspondence and draft agreements should be treated as confidential and should be privileged from disclosure in discovery and under the PRA. To allow public disclosure of sensitive settlement negotiations will have a chilling effect on parties' willingness to participate fully in settlement discussions.

The rules, as proposed, make some positive steps in terms of establishing the confidentiality of settlement discussions by the Commission. We appreciate the acceptance of PSE's proposed change to WAC 480-07-700(4)(b) that sets forth a default rule of confidentiality for settlement negotiations. However, we suggest the following changes to WAC 480-07-700(4)(b) to prevent disclosure of settlement correspondence in the future:

> (4) Settlement negotiation guidelines.
>
> . . . .
>
> (b) 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 and in the same manner as mediation correspondence under the Uniform Mediation Act, Chapter 7.07 RCW.

In addition to this language, PSE suggests additional steps that could be taken by the Commission to better protect confidential settlement negotiations from disclosure.

- Amend the standard protective order to make clear that settlement discussions are to be treated as confidential and settlement negotiations, draft agreements, and communications are privileged from disclosure. The standard protective order could also require designation of confidentiality on documents and correspondence exchanged in settlement negotiations: "Designated information is confidential per protective order in Docket [insert docket number]."

- Use a mediator (ALJ or other neutral party) to convene the settlement conference and to be available, as needed, to assist with issues in the mediation/settlement. This will ensure

that the statutory exemption to the PRA for mediation correspondence under the Uniform Mediation Act, Chapter 7.07 RCW applies. *See* RCW 42.56.600.

B. Time Limit for Party to Join Settlement Agreement

PSE is concerned regarding recent cases in which one party has been unwilling to commit to a settlement agreement—either for or against the agreement—which has delayed, or potentially delayed, the ability of the settling parties to provide timely notice to the Commission of the settlement. Because the proposed rules put pressure on a company to waive the statutory deadline when submitting a settlement, it is important to recognize one dynamic that has slowed down settlement negotiations and the process of finalizing settlements. To address the problem, PSE suggests the following revisions to WAC 480-07-730:

> **WAC 480-07-730 Settlement.** A settlement is an agreement among two or more parties to a commission adjudication that resolves one or more disputed issues in that proceeding. All settlements must be documented in a written settlement agreement that the parties submit to the commission as a proposed resolution of those issues. Once a settlement is reached, parties to the adjudication must timely notify the settling parties whether they intend to join in the settlement, oppose the settlement, or neither join or oppose the settlement. No settlement is effective unless and until the commission approves it.
>
> . . . .
>
> (4) **Notice to commission.** When submitting any type of settlement agreement for commission approval, parties must advise the commission if they have reached a full, partial, full multiparty, or partial multiparty settlement. Parties must also advise the commission of any parties who have failed to commit to a position with respect to the settlement.

C. Settlement Consideration Procedure

WAC 480-07-740(2)(d) Extension of Statutory Deadline.

PSE appreciates the revisions made to the proposed rules with respect to the proposed time frames for presenting settlements to the Commission. However, PSE remains concerned with the proposed rule and specifically the newly proposed subsection (2)(d) titled "Extension of statutory deadline," which is not in the existing rules. PSE suggests this section be deleted. The section requires the party that submitted the suspended tariff or other initial filing to inform the

Commission whether the party would be willing to extend the statutory deadline. This puts undue and inappropriate pressure on companies to waive the statutory deadline in order to obtain a settlement, and it allows other parties to drag their feet on settlement and delay the implementation of a rate increase. This will have a chilling effect on settlements. When there is a statutory right for a company to have its case heard within a specific time frame, neither the Commission nor other parties should pressure the company to waive its statutory right in order to have a settlement considered. Even though the proposed rule allows a company to state that it is unwilling to extend the statutory deadline, requiring a company to make that decision and file it in the record inappropriately changes the dynamics of a cooperative settlement negotiation.

D. Conditions to a Settlement

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

PSE suggests the following changes to subsection (2)(b)(ii) and the addition of subsection (2)(b)(iii) as shown below:

> (ii) If a party to the settlement rejects any of the commission's conditions ~~or does not unequivocally and unconditionally accept all of those conditions~~, the settlement is deemed rejected without further action from the commission, and subsection (c) of this section applies. A party may seek clarification or reconsideration of a commission order approving a settlement agreement with conditions pursuant to WAC 480-07-835, 480-07-840, or 480-07-850.
>
> (iii) If a party takes no action and neither accepts nor rejects the commission's conditions to a settlement, the party is deemed to have accepted the conditions.

PSE's proposed changes are intended to address two issues. First, PSE is concerned that the proposed rule creates a default position of rejection of settlement conditions. Under the proposed rule, the failure of one settling party to take action—either to accept or reject the conditions—results in the settlement being "deemed rejected without further action from the commission." A party with a limited interest in the subject matter of a settlement should not be able to cause a complete rejection of the settlement, simply by inadvertently failing to accept the terms of the settlement.

Second, the rule, as currently proposed, is ambiguous in terms of the level of acceptance required. In WAC 480-07-750(2)(b)(i) the proposed rule requires only "acceptance" of the conditions:

> (i) If all parties to the settlement agreement timely notify the commission that they *accept the conditions*, the terms in the settlement agreement and the commission's conditions will resolve the issues identified in the settlement agreement. [Emphasis added].

In contrast, WAC 480-07-750(2)(b)(ii) requires "unequivocal and unconditional acceptance":

> (ii) If a party to the settlement rejects any of the commission's conditions *or does not unequivocally and unconditionally accept all of those conditions*, the settlement is deemed rejected without further action from the commission, and subsection (c) of this section applies. [Emphasis added.]

As stated in PSE's previous comments, the proposed subsection (ii) creates the possibility that a settlement could be deemed rejected because a party did not accept the conditions to the settlement with a sufficient level of enthusiasm. PSE's suggested language avoids these situations.

CONCLUSION

Thank you for the opportunity to file comments on behalf of PSE. 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