May 17, 2013

BY EMAIL (to records@utc.wa.gov)

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

Re: Docket No. A-130355: Joint Comments of Renewable Northwest Project and NW Energy Coalition

Dear Mr. King,

Renewable Northwest Project (RNP) and NW Energy Coalition (Coalition) submit these joint comments in response to the Commission's notice issued in this docket on April 16, 2013. We appreciate the opportunity to provide input on the Commission's procedural rules that could be supplemented, improved or clarified. We have provided comments on only a subset of the issues listed in the notice, but reserve the right to comment at the July 2 workshop regarding other issues on the list.

For ease of review, we organized our comments in the same order as the topics appeared in the Commission's Notice. However, we would like to call to the Commission's attention the issues of primary interest to us: exchange and portrayal of confidential information in non-adjudicated and adjudicated proceedings; enhancing the value of the Integrated Resources Planning (IRP) process through more structured information exchange, specific timetables, and issuance of a final Commission order; and reducing time and resources required to participate effectively in Commission processes.

Revisions to rate case filing requirements

Having participated in numerous general rate cases (GRC) and other adjudicated proceedings before the Commission, the Coalition continues to be dismayed by the amount of paper copies that are exchanged throughout the process. For example, we continue to receive entire boxes of rate case documents at the time of filing if we participated in the last GRC or any other rate proceeding for that utility during the past five years, even though the rules[1] provide that the utility can serve us with a summary document and we can request more information if desired.

Similarly, while the rules allow for parties to agree to electronic service,[2] that is not the assumed default. As a result, most data requests and responses are sent via first class

[1] WAC 480-07-510(5).
[2] *See, e.g.,* WAC 480-07-405(2),(7).

mail, even to parties who have requested electronic service only.[3] In the interest of saving time and resources, we recommend the rules be modified so that electronic service is assumed for all parties, and those who would prefer hard copies can separately request those.

Procedures for Commission review of company Integrated Resource Plans, Requests for Proposals, Conservation Plans, and other I-937 filings

The Commission's Notice specifies consideration of additions or modifications to WAC 480-07. The Notice also includes in its list of relevant topics, "Procedures for Commission review of company Integrated Resource Plans, Requests for Proposals, Conservation Plans, and other I-937 filings." Many of the procedural rules for those topic areas are included in the WAC outside of 480-07. Here, we focus our comments on IRPs. To be able to respond fully to the Commission's questions about how IRPs could benefit from changes to procedural rules, we found it necessary to examine the specific guiding rules for IRPs, as noted below.

IRPs: Improving Record-Keeping During Development of the Plan

As WAC 480-100-238(5) and 480-90-238(5) note, "consultations with commission staff and public participation are essential to the development of an effective plan. The work plan must outline the timing and extent of public participation." The rules recognize the value of stakeholder participation and require some level of reporting on the extent of public participation prior to the IRP submittal. In practice, the requirements create a valuable dialogue between the utility and stakeholders; however this valuable feedback is generally not captured by existing reporting practices.

While the IRP meetings themselves are substantive, the feedback exchanged in the meetings is not captured in the general meeting logs appended to the IRP. Further, in the absence of procedural rules, parties have relied on an ad-hoc practice of e-mailing questions about the IRP to which utilities voluntarily respond. Sometimes those e-mails are sent to all IRP advisory group members, and sometimes they are submitted only to the utility.

To improve the accessibility of information and usefulness of stakeholder participation in the IRP, we recommend that a more complete record of the public participation process be maintained throughout the advisory group process. The record should include copies of all the utility presentations, meeting minutes, and most importantly a record of comments and responses between the utility and stakeholders. The record need not accompany the final IRP filing but should be made available to the public electronically. Finally, to better serve the Commission's review of the final document, we recommend that the utility include in its final IRP an appendix reflecting the comments received on the draft IRP and how the utility responded to each comment.

[3] This may be due in part to WAC 480-07-150(5), which states, "Neither the commission nor any party is foreclosed from making service by statutory means upon a party who has waived such service, and timely service by a method specified in the statute will satisfy legal requirements for service when it is used."

PacifiCorp provides a good example of documenting the public process associated with its IRP. The electronic record, available online,[4] includes all IRP documents, copies of public meeting presentations, meeting minutes, and some summaries of stakeholder comments. For the 2010 wind integration study, the Company made available online all stakeholder comments, facilitating the review of the study and providing important context for the subsequent study.

We recommend that the procedural rules codify the best practices for documenting the IRP's public process. By making available stakeholder comments, utility responses, meeting minutes and presentations for subsequent review, utilities will maximize the value of the stakeholder involvement and will facilitate Commission and Staff review of the IRP.

IRPs: Specifying a Timetable for Review

WAC 480-100-238(5) and 480-90-238(5) state, "the commission will hear comment on the plan at a public hearing scheduled after the utility submits its plan for commission review." An electric utility's IRP is a determining factor in whether the utility issues a request for proposals (RFP) for new resources.[5] The rules governing RFPs include a specific timetable for public comment and Commission decision.[6] We recommend modifying the procedure for electric and gas IRPs related to public comment and Commission review to include a similar timetable. Such a modification would (1) signal the importance of the utility's planning process and filing, (2) provide more certainty to stakeholders interested in the IRP process with regard to Commission review, (3) reflect that an IRP is a snapshot in time, and a lengthy process may yield stale comments, and (4) result in improvements to potential electric RFPs based on stakeholder and Commission feedback regarding the plan. We are aware of at least one instance where an IRP acknowledgement letter was issued after the utility's subsequent IRP process already was well underway,[7] which may cause stakeholders to question the value and relevance of an IRP.

IRPs: Improving Public Participation after Submittal

When an IRP includes significant new or potentially controversial issues, the procedure for public comments may benefit from inclusion of an opportunity for cross-response, similar to what the Commission has allowed in several of its recent policy workshops. In such cases, replacing the traditional Olympia-based public hearing with a public hearing in the utility's service territory, or adding such a local hearing, also may facilitate Commission review of the IRP, enabling interested customers and other stakeholders who were unable to participate in the IRP advisory committee an opportunity to provide their data and perspectives. As noted above, WAC 480-100-238(5) and 480-90-238(5) note, "public participation [is] essential to the development of an effective plan."

[4] *See* http://www.pacificorp.com/es/irp/pip.html.
[5] WAC 480-107-015(3).
[6] *Id.*
[7] *See* Docket No. UE-080949, IRP filed on 7/30/09 and Commission acknowledgement letter sent on 6/30/2011; Docket No. UE-100960, initial filing from PSE notifying the Commission about commencement of its subsequent IRP on 5/28/2010.

IRPs: Replacing the Acknowledgement Letter with a Commission Order

The Commission's acknowledgement letter typically outlines how a utility's IRP does (or does not) address the requirements in the WAC. Those letters offer constructive comments and guidance for modifications and improvements in the next IRP. However, some parties interpret that guidance to be merely suggestive in nature, leaving it to the discretion of the individual utility as to whether to follow the recommendations provided. We believe that the IRP process would benefit from the Commission issuing a final order regarding the IRP rather than simply an acknowledgement letter. That order would not constitute preapproval of any particular resource mix or action plan, but rather would serve to make the Commission's recommendations and guidance more binding and of greater consequence in the utility's subsequent IRP.[8]

Interested party access to confidential documents in non-adjudicative cases

The Commission needs good information and effective stakeholder participation to achieve the best possible decisions and policy outcomes. Recently, the Commission's available procedures have not offered an entirely comfortable fit for important decisions and policy discussions occurring outside traditional rate cases. In particular, we believe that the Commission needs to use this rulemaking to look for ways to use and protect confidential information in non-rate-case settings where both non-utility stakeholder participation *and* development of a detailed record are desirable.

To give context for the issue of access to confidential information outside rate cases, we present two recent examples:

- First, the Commission must make an annual determination of utility compliance with I-937. One element of the Commission's reporting rules involves a calculation of the incremental cost of complying with the renewables target.[9] This potentially involves sensitive project cost data that, within a rate case, would be subject to the Commission's standard protective order. In the 2012 reporting cycle, because the compliance determination was processed as an open meeting item rather than in an adjudication, the Commission did not issue a protective order but instead requested that the utilities execute individual non-disclosure agreements with interested stakeholders. This is not an ideal procedure going forward. It imposed additional burden on utility legal staff and stakeholders and allowed the utility absolute discretion as to whether particular stakeholders were offered access. [10]

[8] For comparison, the Oregon Public Utility Commission issues orders in IRP proceedings that acknowledge a utility's IRP and action plan, but also may include exceptions to that acknowledgement. (*See, e.g.,* OPUC Order No. 12-082, Docket No. LC 52 (PacifiCorp 2011 IRP), *available at* http://apps.puc.state.or.us/orders/2012ords/12-082.pdf).

[9] WAC 480-109-040(1)(b).

[10] We note that the I-937 rules allow the Commission to establish "an adjudicative proceeding or other process" if additional review is needed based on open meeting comments. WAC 480-109-040(2)(b). The availability of adjudication does not resolve the need for protected access to confidential information in the

- Second, utility IRPs are beginning to evaluate large pollution control investments in aging coal plants as resource decisions. For an issue of this magnitude and public policy significance, commissions and stakeholders appropriately have sought advance analysis, rather than leaving a critical environmental and economic decision solely to post-hoc review in a rate case. To gain this insight, the Commission and stakeholders need access to detailed data and the ability to test assumptions and develop a record in the IRP. For 2013, PacifiCorp has made this work part of a confidential appendix to its IRP;[11] Puget Sound Energy, by contrast, has not revealed critical information to stakeholders, choosing instead to bundle data into higher-level analyses.

In both of these examples—and presumably in other important compliance and policy determinations in which stakeholders may question the utility's approach, but which occur outside of a rate case—improved ability to develop and promote discussion of the factual record would benefit the Commission's ultimate decisions. Yet, at the same time, no party wishes to advocate for a full-blown adjudication solely to secure protected access to confidential information that is central to the matter under consideration. We encourage the Commission to continue to right-size its processes to particular needs, but to consider making its standard protective order available outside of a full adjudication.

The Commission has broad statutory authority to regulate in the public interest,[12] which should give the Commission significant flexibility to fashion appropriate decision-making procedures. Statutes related to public access to confidential information do not appear to constrain the Commission's ability to grant protected access to confidential information, where it deems appropriate. Full public release of confidential information submitted to the UTC is governed by RCW 80.04.095 and RCW 42.56.330(1). Those statutes allow the UTC to delay public access to valuable commercial information in order to give the owner of the records time to seek a court order preventing full public release of the information. But the statutes do not constrain the Commission's ability to use a protective order in its proceedings. RCW 80.04.095 states: "Nothing in this section shall prevent the use of protective orders by the commission governing disclosure of proprietary or confidential information in contested proceedings."

The statutory carve-out makes clear that the Commission may use protective orders to grant limited access to confidential information, but raises the questions whether protective orders can *only* be used in "contested proceedings" and, if so, what those are. "Contested proceeding" is not a term of art specifically defined in RCW 34.05 (the Administrative Procedure Act) or the Commission's statutes or rules. Two interpretations of the term are possible. One interpretation would be that "contested proceeding" means the same thing as

---

open meeting phase. For one thing, it could promote unnecessary adjudications: if information demonstrating utility eligibility for an alternative compliance path was confidential, stakeholders not provided access to that information during the open meeting phase would have to press for an adjudication simply to determine whether to challenge the utility's eligibility for the cost cap off-ramp.

[11] The confidential portion of the IRP has been filed with the WUTC, but it is not clear that an interested party could present comments to the WUTC referencing that confidential appendix.

[12] RCW 80.01.040.

"adjudicative proceeding." The APA defines "adjudicative proceeding" to include any in which "the granting of an application is contested by a person having standing to contest under the law."[13]

On the other hand, had the Legislature meant to limit its comment about protective orders in RCW 80.04.095 strictly to "adjudicative proceedings" (as defined in the APA), it could very easily have said so. Not using that term suggests that the Legislature meant "contested proceeding" in a more colloquial sense, merely as one in which opposing views on particular issues or outcomes are present. Certainly, the bill reports on SSB 5679 in the 1987 Legislature did not make an issue of how the term "contested proceedings" might be limited, using instead the broad phrase "its own proceedings":

> "The provisions of the section do not affect the Commission's authority to designate certain types of information as proprietary in its own proceedings."[14]

This statement in the bill reports also reminds us that the Commission already *had* authority to use and protect information in its own proceedings; RCW 80.04.095 simply preserved that preexisting authority. The source of the Commission's authority to issue protective orders is not entirely clear.[15] The authority may flow from the Commission's broad enabling statute and general authority to manage its proceedings in pursuit of regulation in the public interest. Or, the Commission's authority could come solely from the APA. The APA's provisions on adjudicative proceedings authorize the presiding officer to enter protective orders.[16] If the APA were the only source of the Commission's authority to enter protective orders, that authority could be seen as more constrained, but RCW 80.04.095 clearly provides additional direction specifically to the Commission.

In short, the law offers the Commission a number of options for achieving more procedural flexibility to effectively develop the record outside rate cases. The Commission should experiment with issuing a form of its standard protective order in hybrid dockets that are "contested" but not strictly "adjudicated," like IRPs and I-937 compliance dockets. Any interested person could sign the standard protective order (subject, as always, to utility objection and Commission determination); or, alternatively, the Commission could create a more official party status for these hybrid dockets and restrict access to the protective order to parties granted intervention.[17] This approach would be similar to the one used effectively, in practice, by the Oregon PUC for IRPs and renewable portfolio standard filings.

---

[13] RCW 34.05.010(1). The Commission's rules define "adjudicative proceeding" a bit more flexibly, i.e., as "a proceeding in which an opportunity for hearing is required by statute or constitutional right before or after the commission enters an order, or as to which the commission voluntarily enters an adjudication, and as defined and described in chapter 34.05 RCW." WAC 480-07-300.

[14] 1987 Session of the Washington Legislature, Senate Bill Report on SSB 5679, House Bill Report on SSB 5679, Final Bill Report on SSB 5679 (all related to SSB 5679, adopted as 1987 Wash. Laws, Chapter 107, Sec. 1).

[15] The Commission's rules, *see* WAC 480-07-160(2)(b) and WAC 480-07-420, suggest that the UTC has previously associated protective orders only with adjudicative proceedings.

[16] RCW 34.05.446(2).

[17] Interested persons who did not seek party status could still provide public comment at the open meeting.

The Commission is already experimenting with more flexible processes by making decisions through "open meeting items"—effectively a hybrid process that can result in orders with binding effect on individual utilities. It would be difficult to say that the 2012 I-937 "open meeting item" reviews fell neatly within the APA's "adjudicative" or "rulemaking" category. Yet, this level and type of process worked reasonably well to reach final, utility-specific decisions (with the exception of the burden of one-to-one nondisclosure agreements). As we discussed above, we also support extending this type of process to IRPs, where more defined review and action is desired but full adjudication would not be desirable. Use of standard protective orders would allow continued expansion of these hybrid proceedings, but with better development of the record for decision.

One final, cautionary note: By advocating for use of standard protective orders in more types of proceedings, we are *not* advocating for more designation of information as confidential or highly confidential. We acknowledge that some highly sensitive information deserves protection as valuable commercial information whose public disclosure would result in competitive disadvantage. However, in the Coalition's experience with adjudicative proceedings at the WUTC in recent years, confidential and highly confidential designations seem to have expanded beyond what is reasonably necessary to protect utility competitiveness. (Both RNP and the Coalition have experienced this "confidentiality creep" at the Oregon PUC as well.) When wide swaths of information—sometimes representing entire subject areas—are allowed to be designated as confidential, this can compromise the basic public communication role that the Coalition, RNP, and the Commission share.

Creation and maintenance of official service list in adjudications (including courtesy email distribution)

We understand the rationale for having each party designate one individual for purposes of official service of any written documents (*i.e.*, in order to reduce time and resources spent on service), and we appreciate the administrative law judges' openness to including additional representatives for each party on a "courtesy list." Unfortunately, we have discovered on several occasions that different individuals use different service lists at different times during a case – the "official" list, the courtesy list, or some hybrid that also may include other members of the sending party's team. In major cases with lots of interveners, the list of recipients quickly can become confusing. That confusion escalates when parties add or subtract individuals during the course of the proceeding.

As we stated above, we recommend the default for receiving documents during an adjudicated proceeding should be electronic delivery, and within that, the default for service should be all entities listed by each party. We also recommend that the utility (or the ALJ) maintain the service list based on information provided by each party, including whether each individual has been designated to receive confidential or highly confidential information. From our perspective, it is a duplication of time and resources for each party to the case to need to continually track all of this information. We recommend that a header be added to each docket webpage that is the "service list" (*i.e.*, in addition to the standard "documents", "schedule", "orders", "misc", and "all docket sheets"). The Oregon PUC website for each of its dockets contains a tab that is the

service list; the records center can update the service list in one place as changes are made throughout a proceeding. A website service list would also be a good place to include any "Interested Persons" in accordance with WAC 480-07-340(c).

The administrative law judges frequently use listserves to distribute information (documents, notices, etc.) in a case. These would be even more helpful if accompanied by a list of the recipients, or a link to a service list maintained by the Records Department as recommended above.

Possible new or revised rules for settlements, including use of a qualified settlement judge for major cases

WAC 480-07-700 provides rules regarding alternative dispute resolution. The Commission adopted some of those rules in response to concerns raised in 2005-06 by stakeholders, including the Coalition, concerning inclusion of all parties in settlement discussions.[18] We continue to support Commission rules that will ensure an open and inclusive settlement process. We have found the presence of a qualified settlement judge to be helpful in ensuring an efficient and less contentious settlement process, particularly when (1) numerous parties and/or issues are involved, or (2) collaboration is challenging due to animosity between involved parties.

Other issues

The Commission's notice indicated that parties also could respond to the need or desirability of rule revisions in areas not explicitly included in the issues list. We take this opportunity to recommend the Commission establish general e-mail notification lists to provide open meeting agendas, rule-making notices, and other information of general interest. Individuals could register for such a list or lists via the Commission's website (akin to the practice of the Legislature for notifying interested parties of agendas for each committee, or Commerce and the Auditor's office for notifying persons of specific applications or reports). At a minimum, we envision separate lists for each of the Commission's major issue areas (*e.g.,* electricity, direct use of gas, pipelines, telecommunications, railroads, *etc*.), as well as a general list for open meeting agendas and general Commission information. Ongoing issues of public interest (*e.g.*, utility IRPs, I-937 dockets) also could benefit from having a specific listserve for notifications to interested persons (*e.g.*, to inform stakeholders when an IRP or I-937 docket has opened, when an IRP or I-937 compliance report has been submitted, and when an IRP or I-937 report will be considered at an Open Meeting.) Such a process also could replace arcane rules that require the Commission to send certain documents via first class mail, with no electronic service option provided.

Finally, while not explicit in WAC 480-07-405 (regarding discovery), in our experience, each party in an adjudicated proceeding issues an initial data request to all other parties asking for each party to provide responses to all data requests submitted by those other

[18] Docket No. A-050802. The genesis of that docket was HB 1800, considered during the 2005 legislative session. The Coalition was one of the primary proponents of that bill.

parties. This seems like an unnecessary expenditure of time and resources, particularly when parties frequently send these requests via first class mail as well as electronically, and parties similarly respond via first class mail. We recommend the Commission set a default in the rules for all parties to receive responses to all data requests with no need for a specified request. An individual party could opt out of that requirement if desired. And for all other data requests, electronic delivery should be the default whenever feasible. An effective alternative might be a practice that Portland General Electric has begun to use in its rate cases at the Oregon PUC: responses to data requests are posted to an external, password protected website (with confidential and non-confidential folders), so that parties have ready electronic access to the data responses that interest them, without having to manage receipt of those that do not.

Thank you again for the opportunity to submit these comments. We appreciate the Commission's interest in improving its processes. Representatives from RNP and the Coalition will attend the workshop on July 2.

Sincerely,

Megan Walseth Decker
Chief Counsel
Renewable Northwest Project

Danielle Dixon
Senior Policy Associate
NW Energy Coalition

/s/ Jimmy Lindsay
Jimmy Lindsay
Regulatory Analysis Manager
Renewable Northwest Project