BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION Complainant, v. PUGET SOUND ENERGY, INC., Respondent, ...	)	DOCKET NO. UE-011163
In the Matter of the Petition of PUGET SOUND ENERGY, INC. for an Order Authorizing Deferral of Certain Electric Energy Supply Costs.	)	DOCKET NO. UE-011170 FIFTH SUPPLEMENTAL ORDER PREHEARING CONFERENCE ORDER

1 The Commission convened a prehearing conference in this matter before Administrative Law Judge C. Robert Wallis on September 18, 2001. This order sets out the agreements reached during the conference and rules on matters posed at the conference.

2 By prehearing conference order of September 14, 2001, a schedule was established for this request for emergency or temporary rates that culminates in a hearing to begin on November 6, 2001. The conference of September 18, 2001 was established for parties to present scheduling concerns, to address discovery concerns, and to address other matters of a procedural nature that the parties might raise.

3 **Appearances.** The following parties entered appearances: Puget Sound Energy, by Markham A. Quehrn, attorney, Bellevue; Public Counsel, by Simon ffitch, assistant attorney general, Seattle; City of Bremerton, by Angela Olsen, attorney, Tacoma; Industrial Customers of Northwest Utilities, by Bradley Van Cleve, attorney, Portland, Oregon; City of Tukwila, by Carol S. Arnold, attorney, Seattle; Microchip Technology, by Harvard P. Spigal, attorney, Portland; King County, by Donald

Woodworth, deputy prosecuting attorney, Seattle, and the Commission Staff, by Shannon Smith and Robert D. Cedarbaum, assistant attorneys general, Olympia.

4 **Late-filed petition for intervention.** A petition for intervention was filed following the first prehearing conference. It was uncertain whether the petitioner received notice of the prehearing conference, so discussion of the petition was deferred. Parties have been given the opportunity to comment on the petition and a ruling will be made expeditiously.

5 **Substitute pages.** One of the specific matters called for discussion was the means of review of substitute pages that PSE has filed to clarify the application of its proposed tariff to certain of its customers. Question arose as to whether all parties had received the proposal, so discussion was deferred. It appears that PSE served the parties on September 18, 2001 . Parties are invited to comment on the appropriate means to deal with the substitute pages by comments filed no later than noon on Friday, September 28, 2001.

6 **Scheduling.** Parties were offered the opportunity to comment on the schedule established in the third supplemental (prehearing conference) order for hearing on the substance of the dockets in November, 2001. All scheduling discussions may be moot if the Commission rules in favor of a motion to dismiss the proceedings, as the schedule will then be vacated. Public counsel, with support from Commission Staff and Intervenors, objected to two aspects of the schedule. The first was the timing of hearings and the second the timing of rebuttal and cross rebuttal filings.

7 **Timing of hearings.** Public Counsel and Commission Staff repeated two objections made initially at the first prehearing conference. Public counsel also contends that the proposed schedule will deny parties' due process rights.

8 1. Public Counsel contends that the Commission should not schedule any further activity in the dockets pending resolution of motions to dismiss. We reject this objection. There is no demonstration that there is an undue burden in proceeding pending resolution of the motions and no demonstration that the work product of undertakings pending resolution of the motions would be wasted if the motions were granted, given PSE's stated intention to file a general rate case in November.

9 2. Commission Staff, supported by Public Counsel and ICNU, contends that the schedule does not afford them sufficient opportunity to prepare responding evidence. In particular, they contend that they must engage in discovery to acquire information that the Company has declined to present in its direct case, in order to make a complete record for Commission decision by presenting and responding to the information. They contend that three to four months is required, after receipt of that information, to prepare and present a response.

10 The parties' logic in this argument appears to be that the evidence in petitioner's direct evidence is insufficient to support its request; that it then becomes the obligation of Staff, Public Counsel and Intervenors to obtain the evidence, in order to provide or refute it in their own presentations.

11 Parties have contended that the Company's case is insufficient and have moved for dismissal on the basis that the evidence supporting the pleadings is insufficient. Even if the evidence on its face is sufficient to pass a motion to dismiss, PSE has stated several times that it understands and accepts the risk that it may be insufficient to persuade the Commission to act.

12 We understand that the parties have legitimate and sincere concern about the status of the record. We understand that the parties believe that a study of the sort requested is a necessary prerequisite to any thorough and studied evaluation of a power cost adjustment. But in this extraordinary setting, where the Company is alleging a need for immediate relief to bridge the time until it files and prosecutes a full rate proceeding, the delay necessary to conduct a full review of evidence would deny the Company the opportunity to seek expedited relief. The parties will have full opportunity to respond to, and to comment on the deficiencies of, evidence that the Company has not presented.

13 3. Public Counsel states that failure to afford additional time will deny parties Constitutionally protected due process rights. Although counsel cites no authority for this proposition, we take the concerns seriously and respond to them.

14 Procedural due process is afforded to litigants in the United States. The Fifth Amendment to the U.S. Constitution states:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

15 The Fourteenth Amendment applies those limitations to state governments, as well:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law.

16 Article I, Section 3 of the Washington State Constitution also contains a due process provision:

> No person shall be deprived of life, liberty, or property without due process of law.

17 The State Constitution provides no greater protection than the Federal provisions. *Sherman v. State, 128 Wn.2d 164, 905 P.2d 355 (1995). See also, In re Deming, 108 Wn.2d 82, 736 P.2d 639 (1976).*

18 The state may not deprive a person of protected rights without appropriate procedural safeguards – they must be "preceded by notice and opportunity for hearing appropriate to the nature of the case." (Emphasis added.) *Cleveland Board of Educ. V. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985).*

19 The nature of required process depends on the nature of the interest and the severity of the deprivation. *Tellevik v. Real Property, 125 Wn.2d 364, 884 P.2d 1319 (1995).* Due process is a flexible concept and it does not require procedural perfection; so long as a party is given adequate notice and an opportunity to be heard and any procedural irregularities do not undermine the fundamental fairness of the proceedings, [the State Supreme] court will not disturb the administrative decision. *Sherman v. State, 128 Wn.2d 164, 905 P.2d 355 (1995).*

20 To judge the nature of the notice and opportunity for hearing that are required,

> . . .the specific dictates of due process generally require consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous determination of such interest through the procedures used; and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed. 2d 18, 96 S.Ct. 893 (1976).

21 Reviewing the three prongs of this test, it appears that the interest affected by the official action is a temporary financial interest, i.e., the rates they will be required to pay pending the Commission's opportunity to examine the issues in a general rate case. The risk of an erroneous decision is that rates may be temporarily higher than otherwise necessary. If rates are approved that are not subject to refund, the rates during the interim period may result in a non-recoverable expense. The risk exists that an erroneous determination may result without the requested extended review period, but it is reduced by the parties' opportunity to argue that the information supporting the request is insufficient and by their opportunity to argue that any financial relief must be made subject to refund, and any accounting relief must be subject to reversal, in a general rate proceeding. Finally, the governmental interest here is its responsibility to regulate in the public interest and determine rates for electric service at rates that are fair, just reasonable, and sufficient to support the stability of the company for the benefit of ratepayers, in light of the Company's contention that extraordinary circumstances exist.

22 On balance, we believe that the timing of the hearing is the best available given the conflicting needs of the parties' opportunity to prepare for the hearing and the Commission's obligation to regulate in the public interest by considering promptly any contentions that without relief a company is subject to a risk of financial circumstances sufficiently dire to affect its ability to provide service. The schedule affords time for discovery and the presentation of evidence. It provides more than two months from the time of filing until the hearing, and more than 60 days from the date of the first prehearing conference. The time affords opportunity for parties to present argument as to the sufficiency of evidence and to respond to the evidence that has been prefiled. The risk of loss is moderated by the temporary nature of the determination and the opportunity to present additional analysis and argument in a general rate case. We reject the contentions that the current schedule is a violation of parties' due process rights.

23 **Opportunity to review prefiled rebuttal evidence**. Public Counsel contends that parties are entitled as an element of due process to review and conduct discovery upon evidence offered by the Company and other parties in rebuttal to parties' responsive testimony. We are not aware of such a right, given parties' opportunity to inquire of witnesses on cross examination, to request additional evidence on the record, and to argue that the scope and volume of rebuttal mandate the extension of time for preparation.

24 **Status report on Discussions regarding the Company's Public Notice**. The Company reported it is distributing to customers a modified version of the notice of the pending proceeding that Commission Public Affairs staff has approved and that it believes meets the Commission's requirements. Mr. ffitch agreed to respond to Mr. Quehrn within two days after receiving a copy of the notice. Parties who moved or supported a motion to dismiss on the basis of insufficiency of the Company's first notice should advise the Commission no later than noon on Thursday, September 27 , 2001, if they have continuing concerns that the Commission needs to address in its review of the motions.

25 The modified schedule for submissions is modified as follows, with the modified dates shown in boldface type:

Schedule for hearing on request for emergency relief:

Responding parties file evidence	**October 23, 2001**
Company and cross-rebuttal; parties file simultaneous opening briefs on legal issues not addressed on motions	**October 29, 2001 (10:00 a.m.)**
Prehearing conference to mark	October 31, 2001 (10:00 a.m.)

exhibits and resolve objections and process issues	
Hearing begins	November 6, 2001
Hearing(s) for members of the public	To be determined

26 **Time for Responses to Discovery Requests**. The parties agree that the time for responses to data requests is five business days. Parties should notify requesting counsel immediately upon discovering that any request will take longer than five days. Parties are also directed to address questions to requesting or responding counsel immediately, rather than state them for the first time in the response or an objection.

27 **Schedule of "public" hearings**. The parties have agreed to consult amongst themselves and with Commission's Public Affairs staff, to prepare a recommendation for the number and the timing of hearing sessions for members of the public. Parties concerned about the logistics for this phase of the hearing are asked to respond with an agreed recommendation no later than noon, September 28, 2001.

Dated at Olympia, Washington, and effective this 25th day of September, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

C. ROBERT WALLIS
Administrative Law Judge

NOTICE TO PARTIES: Any objection to the provisions of this Order must be filed within ten (10) days after the date of mailing of this statement, pursuant to WAC 480-09-460(2). Absent such objections, this prehearing conference order will control further proceedings in this matter, subject to Commission review.