



conference on September 19, 2014. Second, PSE has not yet filed direct testimony setting forth its case. Until testimony is filed, it is premature for Public Counsel to undertake discovery.

## **II. MEMORANDUM IN OPPOSITION TO PUBLIC COUNSEL'S MOTION**

2 Pursuant to WAC 480-07-400(1)(b), parties may agree to engage in informal discovery outside of the Commission's discovery rules. In response to Public Counsel's inquiry about informal discovery on July 29, 2014, PSE advised Public Counsel that its preference was to wait until a procedural schedule has been set. This is a reasonable approach given that the scope of the issues to be addressed is still not clear, and PSE has not yet filed its direct case. It is highly unusual to begin discovery on a party's case when that party has not yet filed its direct case. Moreover, discovery at this early stage would interfere with PSE's ability to develop testimony and meet its burden regarding the return on equity component of PSE's cost of capital in the context of a multi-year rate plan.

3 The authority to which Public Counsel cites, WAC 480-07-400(2), does not answer the question raised in Public Counsel's motion – whether the Commission should order the commencement of discovery before a prehearing conference has been held to address the scope of the proceeding, and before PSE's direct case has been filed. WAC 480-07-400(2), cited by Public Counsel, simply addresses the type of proceeding for which discovery should be allowed – *e.g.*, adjudicative proceedings, proceedings that are potentially precedential in nature, *etc.* There is no dispute that the Commission should allow discovery in this remand proceeding. However, the authority cited by Public Counsel does not require that discovery be allowed prior

to a prehearing conference – particularly when the scope of the proceeding is in dispute and will be addressed at the prehearing conference. Nor does WAC 480-07-400(2) require that discovery be allowed prior to the filing of the direct case by the party that bears the burden of proof.

4           The more relevant question presented here is, when is the appropriate time for the discovery to commence. WAC 480-07-400(4) states that “[t]he commission may establish and set forth in a prehearing order a schedule for discovery.” This is consistent with the Commission’s usual procedure – to invoke the discovery rule and allow discovery effective with the order on prehearing conference, after a prehearing conference has been held. In those cases where discovery is allowed before the prehearing conference, it is typically done by agreement of the parties, after direct testimony has been filed by the party with the burden of proof, and when the scope of the proceeding is not in dispute. Such is not the case here. Public Counsel has cited no authority supporting its unusual request to begin discovery before the Commission has decided on the scope of the proceeding and before the direct evidence has been filed.

5           PSE disagrees with Public Counsel that expediting the start of discovery is an efficient use of the parties’ available time, and will lead to a better record for decision. On the contrary, the record will benefit if the Commission continues its usual method of invoking discovery after a procedural schedule has been established, after the scope of the proceeding has been determined, and after PSE files its direct case.

6           This proceeding, as Public Counsel acknowledges, is uncommon and potentially precedential in nature. The parties have expressed differing views as to the scope of the proceeding. For example, based on the proposals filed by the parties on August 26, parties disagree as to the time frame for a cost of capital analysis. Parties disagree as to the scope of the

issues on remand. Parties disagree on what evidence the Commission should consider in determining the return on equity. Therefore, it is particularly important that this matter proceed in a measured and thoughtful manner. The Commission, all parties, and the record will benefit if discovery is invoked after the scope of the proceeding is determined, and ideally, after PSE has filed its direct case.

7           Public Counsel’s motion should also be denied because it has not established good cause to expedite the discovery process in this case. Public Counsel’s support for its request is merely that it feels it does not need to wait for PSE’s testimony and that immediate discovery is an efficient use of the parties’ available time.<sup>1</sup> It will not be an efficient use of parties’ time to allow discovery on issues that the Commission may ultimately determine at the prehearing conference are outside the scope of this proceeding. It will not be an efficient use of PSE’s time, or other parties’ time, to allow discovery on PSE’s direct case, when PSE’s direct case is still being formulated and is not yet filed. As the court made clear, PSE bears the burden of proof in this proceeding. PSE should be permitted to file its direct case prior to responding to discovery on its case. Further, PSE should not be subject to discovery on issues that ultimately are determined to be outside the scope of this proceeding or that may be outside the scope of its direct filing. Responding to discovery while PSE is developing its case in chief is not fair to PSE and is not an efficient use of time.

8           Public Counsel claims, incorrectly, that PSE will not be prejudiced by early discovery. As discussed above, PSE will be prejudiced if it must respond to discovery now that ultimately is

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<sup>1</sup> Public Counsel Motion at ¶ 4.

determined to be outside the scope of the proceeding. PSE will be prejudiced if it must respond to burdensome discovery while it is developing its case in chief.

### III. CONCLUSION

9 The Commission should deny Public Counsel's motion. The Commission should first address the scope of the proceeding at the prehearing conference and allow PSE to file its direct case before discovery on PSE's direct case is permitted. It is inefficient and prejudicial to begin discovery before the scope and procedure of this unique case is determined at a prehearing conference. Further, PSE would be prejudiced if the Commission ordered PSE to respond to discovery addressing its direct case while it is in the process of developing its direct case.

Respectfully submitted this 3rd day of September 2014,

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