

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Rule-Making
Proceeding Related To

Commission General – Procedure:
Chapter 480-09 WAC

Preproposal Statement of Inquiry
(CR 101)

DOCKET NO. A-010648

**COMMENTS
OF PUBLIC COUNSEL
ATTORNEY GENERAL OF WASHINGTON**

April 30, 2003

INTRODUCTION

Public Counsel files these comments in response to the Commission's April 4, 2003, Notice of Opportunity to File Written Comments. The comments are directed to the draft rules in Appendix A to the Notice, replacing the existing rules of procedure in WAC 480-09.

Public Counsel supports the Commission's efforts in this docket to revise the procedural rules to increase public access to information, to reflect current practice before the Commission, and to improve Commission proceedings. The improvements to the Commission's internet web site and the consequent improved access to dockets on file with the Commission exemplify this commitment.

The ultimate goal of the procedural rules should be to ensure that all parties affected by Commission decisions, in particular the customers of regulated utilities, have a fair opportunity

to be heard, and that the Commission has the best possible record upon which to base its decision.

COMMENTS ON DRAFT PROCEDURAL RULES (Appendix A)

General Comments

Public Counsel requests that Staff assist stakeholders and rulemaking participants by preparing a summary of the major changes reflected in the new draft, compared with the existing rules. Because this is a rewrite of an extensive set of rules, and there is no “mark up” of the old rules, such a guide to the draft would be helpful to ensure that parties do not overlook major changes staff is proposing.

In general, the terms “shall” and “may” continue to be used as terms of art in legal proceedings, statutes and rules. Public Counsel recommends their continued use here, rather than terms with less commonly agreed meaning in the legal context such as “should” and “must”.

Part I: General Provisions

WAC 480-07-143 - Submitting documents in rulemaking proceedings

Public Counsel supports the Commission’s willingness to accept electronic filings without the accompanying paper copy where doing so meets statutory and practical requirements.

WAC 480-07-145 - Filing documents in adjudicative proceedings

WAC 480-07-145(2)(d) - Filings must be supplemented by an electronic version of the document. The electronic filing rules should address the situation where documents cannot be put in electronic format.

WAC 480-07-145(3)(a) - Number of copies. The Commission should determine whether the “19 copy” requirement remains a necessary standard in all cases. A alternative

would be to establish some smaller number by rule, with any greater number of copies being determined on a case by case basis by the presiding officer. This would save paper and expense to the parties.

WAC 480-07-145(6)(b) - Where to send electronic mail message or telefacsimile transmission. Public Counsel supports the Commission's acceptance of electronic filings. The ALD may wish to have the subsection also require electronic delivery to the presiding administrative law judge in adjudicated matters.

WAC 480-07-145(6) - Electronic mail or telefacsimile transmission may be used to expedite the filing process, when authorized. Presumably authorization to file electronically need not be shown when electronic filing accompanies timely paper copy filing under WAC 480-07-145(2)(d). This might need clarification.

WAC 480-07-150 - Service of documents in adjudicative proceedings

WAC 480-150(4) - Contact information. Add "Relationship to the party (e.g., attorney, Executive Director, etc.)"

WAC 480-07-160 - Confidential Information

WAC 480-07-160 – In general. If the rules address the issue of "highly confidential" protective orders, this section may need to be amended to reflect that.

WAC 480-07-160 (3)(b) - Marking. The rules should require confidential filings to be submitted on colored paper. Unless there are serious practical objections, we recommend color use be standardized (e.g. yellow for confidential, pink or blue for highly confidential).

WAC 480-07-160(9)(a) - Designation or Redesignation of confidential information in adjudications. This section needs clarification. Although strongly implied, it is unclear if this subsection requires parties to file a pleading with the Commission at the end of an adjudication.

Are all parties whose filings include confidential information required to make a designation, or only the party(s) from whom data was received who have asserted the confidentiality of that data? For example, Public Counsel rarely generates confidential data but quite commonly submits testimony and exhibits containing data which another party has designated as confidential. Public Counsel recommends that only the party-source of confidential information have an affirmative duty to file a certification at the conclusion of an adjudication verifying the accuracy of all confidential designations in the record.

The declaration in the draft rule that a designation is “deemed conclusively accurate” may be problematic if it precludes any later reexamination of the confidential treatment of the information by the Commission or at the request of any party. In some cases, significant amounts of data are designated confidential. The designation may not be challenged by other parties for a range of reasons, having more to do with issues of interest, or resources, than the merits of the designation. Requiring parties to “speak now or forever hold your peace” could generate significant end-of-case workload for parties and the Commission in reviewing confidential data. It is unclear if the intent here is to preclude later challenges that might arise in reopened litigation or follow-on proceedings, or in public disclosure requests. Public Counsel would not support such a blanket preclusion to later challenges.

Part II: Rulemaking Proceedings

This section should contain a cross-reference to the filing requirements for rulemakings

Part III: Adjudicative Proceedings

Subpart A: Rules of General Applicability

WAC 480-07-305 - Commencement of an adjudicative proceeding

WAC 480-07-305(1) - Commencement. The point of commencement is somewhat vague as stated in the rule. It is unclear if the point when “the commission or presiding officer notifies a party” that a proceeding will be conducted is the same as the time when formal notice is provided, or whether some other time is meant. For example, does a proceeding commence when a Commission representative informally tells a regulated company that a recommendation to initiate a complaint will be taken up at the next open meeting? It would seem advisable to select a point in time that can be readily ascertained from the public record.

WAC 480-07-305(3) - Types of pleadings that may initiate an adjudicative proceeding. Add to the types of pleadings that may initiate an adjudicative proceeding: (1) Applications for transfer of property, merger applications, or other approval under RCW Ch. 80.12., and (2) petitions under the AFOR statute, RCW 80.36.135.

WAC 480-07-310 - Ex parte communication is not allowed

The rule should include a provision to require disclosure of ex parte communications which occur during a specified period before the commencement of an adjudicative proceeding, and which concern the matters at issue in the adjudication.

WAC 480-07-310(1) - General. The Commission may wish to clarify this subsection to indicate that the ex parte “firewall” exists as to communications between the advocacy or prosecutorial commission staff and the commissioners and their advisors. For example, after the word “outcome” insert, “including Commission advocacy staff”, or use the terms “investigative or prosecutorial staff” that are used later in WAC 480-07-310(2)(c).

WAC 480-07-310(2)(c) - Commission employees and consultants. This section should also be clarified to reflect the distinction between legal counsel to the Commission and counsel to the advocacy staff.

WAC 480-07-310(4) - What is required if an ex parte communication occurs. To make this section more clear in its application, the first sentence should begin “A Commissioner, or any other presiding officer who receives etc.” In cases (rare in Washington) where the Commissioners do not sit as presiding officers, the ex parte prohibition should still apply, since the Commissioners will still sit as the final decision makers.

WAC 480-07-310(5) - Sanctions. Consideration should be given to stating in the rules that recusal, either on the Commission’s own motion, or on request of a party, is a potential remedy for violation of the ex parte rule.

WAC 480-07-345 - Appearance and practice before the commission

WAC 480-07-0345(1) - Minimum qualifications. This section addresses the minimum qualifications for persons appearing in a representative capacity. A separate section of the rule should be added to address pro se appearances.

WAC 480-07-350 - Access for limited English speakers and hearing-impaired persons

WAC 480-07-350(2) - Notice to limited-English-speaking parties. There appears to be a typo in the fourth line, “of the party” should be redacted.

WAC 480-07-355 - Parties--Intervention

WAC 480-07-355(1)(a) - Who may petition; when petitions must be filed. The rule language should be clarified to remove the apparent inconsistency between rules and timelines for written and oral filings for intervention.

WAC 480-07-355(1)(c)(iii) - Contents of petition. A party should only be required to make a brief general statement of position that is not preclusive. It may also be appropriate to insert the phrase “if known”. Some parties may wish to intervene, and be able to state interests clearly, e.g. “concern about rate impact on my customer class”, but not have a position at time of intervention on what the specific rate impact should or should not be.

WAC 480-07-370 – Pleadings—General

Some statutes in RCW Ch. 80 refer to “applications” to the Commission. There has been some flexibility in practice before the Commission in the use of “petitioner” and “applicant” in cases, with preference for the latter. These procedural rules should be consistent in use of these terms.

WAC 480-07-370(1)(b)(ii)(C) - Contents. Add at beginning: “Law that constitutes the basis of the petition, including citations to relevant statutes etc.”

WAC 480-07-370 (1)(d)(i) - Defined. Amend second sentence to read: “Replies are not permitted without authorization from the presiding officer upon a showing of good cause.”

WAC 480-07-370 (1)(e) – Application. In the second sentence, insert after “transfer”:
“property or to transfer or”

WAC 480-07-370 (1)(f) – Protest. This protest procedure does not reflect the procedure employed in merger cases, or in transfer of property cases like the current Qwest Dex case.

WAC 480-07-380 – Motions that are dispositive—Motion to dismiss; motion for summary determination; motion to withdraw

Public Counsel recommends that this subsection also permit a party to make an oral motion to dismiss during an adjudicative hearing after the close of the evidentiary presentation of the party bearing the burden of persuasion in the matter.

WAC 480-07-385 – Motion for continuance, postponement, or extension of time

The Commission may wish to consider addressing the question of a motion to shorten time in this rule. This commonly occurs prior to an adjudicative hearing when a party files another motion and seeks an accelerated review of the motion by the Commission.

WAC 480-07-385(3)(a) – Timing. The timing requirements in this rule are fairly complicated. It may be useful to review and simplify this section. For example, the rule should specify how “agreed requests” are treated, and whether the same timelines apply to agreed and contested requests. Shorter timelines would seem to be an option for agreed requests.

WAC 480-07-385(3)(b) – Timing. The rule should clarify whether this subsection applies only during a hearing.

WAC 480-07-385(4) – Date certain—Indefinite continuance is disfavored. The provision for “dismissal of the proceeding without further notice” for failure to file a status report seems unduly harsh. We would recommend use of a “show cause” type of notice to the parties prior to any dismissal.

WAC 480-07-390 – Briefs; oral argument; findings and conclusions

With regard to “proposed findings of fact and conclusions of law”, if it is the intent of the rule to enable the adoption of the state court procedure in which parties, in effect, prepare all or part of the substantive order of the court, Public Counsel would request that this approach receive serious review before it is adopted. There are both advantages and disadvantages to this approach, and its use does not necessarily translate to the administrative setting in a number of respects. Ordinarily, the Commission does not rule for one side or the other at hearing and then direct that “counsel, prepare an order.” A party may be the prevailing party on some issues and not on others. Reviewing courts are particularly interested in the reasoning of administrative

agencies and the nexus of that reasoning with the record. Participating parties and the public in general are interested in guidance as the policy and factual analysis brought to bear by the Commissioners. Simple adoption of findings prepared by parties does not accomplish these goals well.. In addition, requiring counsel to prepare detailed sets of findings, particularly in complex cases such as rate cases, may be burdensome and may add delay to proceedings, especially if briefs are also required.

WAC 480-07-395 – Pleadings, motions, and briefs—Format requirements; citation to record and authorities; verification; errors; construction; amendment

WAC 480-07-395(1)(c)(vi) - Citations to authority. Public Counsel recommends against a blanket requirement that copies of non-Washington authorities be supplied. As a practical matter, this could substantially increase the size and expense of document filings where motions or briefs cite even a handful of non-Washington cases, not to mention where more numerous authorities are cited. Most such authorities are available electronically, as well as in published reporters. Perhaps this could be handled at the discretion of the presiding officer, who could request copies of authorities not readily obtainable by the Commission. It may be appropriate to ask counsel to provide a compendium of authority in the most significant cases where the briefs are extensive, but, again, the requirement should not apply as a general rule.

WAC 480-07-400 – Discovery

WAC 480-07-400(3) - Signature on discovery requests. The rules should clarify that the signature requirement for data requests can be met by signature of the transmittal letter serving one or more discovery requests.

WAC 480-07-405 – Discovery—Data requests, record requisitions, and bench requests

WAC 480-07-405(2) – Service of data requests, records requisitions, and responses to parties.. Public Counsel supports a requirement that all data request responses are served

upon all parties to an adjudicative proceeding unless a party expressly requests not to receive them.

WAC 480-07-405(5) - Responding party to seek clarification. The Commission may wish to include the term “vague” in this subsection to clarify that existing Washington legal analysis applicable to vagueness objections is applicable.

WAC 480-07-405(7)(a) – Data requests and records requisitions. Public Counsel is concerned that the first sentence of this subsection appears to create a conflict with subsection (2) regarding service of data request responses to “all other parties” (§2) versus “to any other party who requests a copy.” Public Counsel recommends that the language of subsection (2) be imported to subsection (7)(a) so that the obligation is to serve copies of all data request responses on all other parties. Further, the Commission may wish to consider adding language to subsection (2) and/or (7) clarifying that the rule is applicable “unless a party expressly opts not to receive data request responses in writing to all parties or orally at a prehearing conference.”

WAC 480-07-405(4) – Limitation on numbers of data requests. The phrase “without a certification” is unclear.

WAC 480-07-405(6)(a) – Objections in lieu of full response. It may be best to have the objection stated both in the body of the response, as is the current practice, and separately, so that the requesting party is more easily given notice of the objection. The rule is unclear as to the treatment of objections to the full request, as opposed to partial responses with a partial objection.

WAC 480-07-405(6)(b) – Objection when full response is provided. Replace “lost the opportunity” with “waive the right”. In general, the preservation of objections for hearing needs to be clarified.

WAC 480-07-410 – Discovery—Depositions

WAC 480-07-410(2) – Required notice; deposition conference. Public Counsel recommends that the deposition conference be discretionary only (change “will” to “may” in the first sentence.) Scheduling of depositions may be difficult and occur under expedited timelines. Requiring a conference could compound these problems. If there are no disputes regarding the setting of the deposition, conferences may not be necessary in many cases.

WAC 480-07-415 – Discovery conference

The term “advisers” needs clarification. Public Counsel supports the discovery conference as contemplated in this rule. A conference expressly designed to elicit information to assist parties in the resolution of the case, including at hearing, albeit in an informal manner, can be very valuable and efficient. This is not a “settlement conference” however. The provision that statements made will not be admissible needs to be carefully considered and drafted. The purpose of discovery, after all, is to assist in preparation of a party’s case. Unless the conference is held to discuss settlement, the expectation of the parties is that the information gained will indeed be used in testimony and hearing. The distinctions need to be clear so that the discovery conference remains a useful mechanism.

WAC 480-07-420 – Discovery—Protective orders

Public Counsel is concerned with the increasingly frequent requests for “highly confidential” protective order amendments and the scanty support accompanying such requests. A request for higher levels of confidentiality should be measured even more strictly against the policy of openness. The starting point is a presumption that proceedings and documents related to those proceedings will be open to the public. As a result, the mere request or assertion by a

party of a desire to protect information should not end the inquiry. Such a requesting party must overcome the presumption of openness by a sufficient showing.

If the issuance of “highly confidential” protective orders is to remain a part of Commission practice, Public Counsel recommends that the Commission expressly set forth by rule the criteria it will apply in considering whether to provide a “highly confidential” amendment to a protective order. Further, the Commission should specify the terms of such a highly confidential protective order amendment and to whom they will apply. A number of current highly confidential amendments contain terms purporting to limit future employment that are of dubious merit, let alone legal enforceability. It is Public Counsel’s position that any highly confidential amendment to a protective order should be a rare occurrence to address a specific, articulated concern and not develop into a matter of course in adjudications before the Commission. Further, the party requesting such an amendment should bear the burden of persuasion to demonstrate not only the need for highly confidential treatment but also why the Commission’s standard protective order is insufficient.

WAC 480-07-430 - Prehearing conferences

WAC 480-07-430(1) – General. Include the following additional topics:

Initiation of discovery
Need for issuance of a protective order
Scheduling for the case, including public comment hearings where appropriate

WAC 480-07-430(2) – Notice. The term “reasonable notice” in this section may need to be made consistent with specific timelines elsewhere in the rules, for example in WAC 480-07-440(1).

WAC 480-07-440 – Hearing notice

WAC 480-07-440 (1)(a) – Timing. In cases with a statutory timeline, Public Counsel recommends that a prehearing conference be required to be held ten days after the filing of a pleading which would independently initiate an adjudicative proceeding or the Commission’s

suspension of a filing which initiates an adjudicative proceeding. The earlier an initial prehearing conference can be held the less time is lost to the parties to an adjudicative proceeding.

WAC 480-07-460 – Hearing—Pre-distribution of exhibits and prefiled testimony

WAC 480-07-460(1)(a) – Number of copies to be filed or submitted; service. Clarify when the “20 copy” rule applies versus the “original and 19” rule. It might be helpful to break this rule apart into the sections applicable to cross-examination exhibits as compared with other exhibits. The application of the last sentence of the section may also need to be clarified to reflect the practice regarding predistribution of cross-examination exhibits.

WAC 480-07-460(2) – Prefiled testimony. Public Counsel suggests there is a need to discuss whether there should be any restrictions, or procedural requirements, for the adoption of prefiled testimony of one witness by another witness. In some cases substitutions have been fairly casual and on the eve of hearing. It is not always clear that the substituted witness has adequate knowledge regarding the subject matter of the prefiled testimony. Cross-examination and the quality of the record may be impaired by the practice. One approach might be to require a showing that meets criteria established in the rule, notice and an opportunity to object, and leave of the bench for such substitutions.

WAC 480-07-470 – Hearing guidelines

WAC 480-07-470(3) – Matters to be handled at beginning of session. The first sentence should be clarified. A party’s obligation should be limited to motions that it intends to present, since it is not possible to “anticipate” motions that may arise later. The foundational objection example is unclear, since that objection usually arises most commonly in the course of testimony on the stand.

WAC 480-07-470(4) – Summary of Public Counsel. There are a number of issues for discussion around the format of public comment hearings and the role of Public Counsel. This rulemaking may present an opportunity to review those issues.

Public Counsel looks forward to working with the Commission to clarify its role at hearing sessions where testimony from members of the public is received by the Commission.

WAC 480-07-490 – Hearing—Exhibits and documentary evidence

WAC 480-07-490(2) – Official records. The rule should be clarified to state whether a certified copy is required.

WAC 480-07-470(5) - Documents from the public. The Commission may wish to indicate that public comments, letters, and other documents will be aggregated and assigned a single exhibit number and thereby made a part of the record of the proceeding.

Subpart B: General Rate Cases

WAC 480-07-505 – General rate cases--Definition

WAC 480-07-505(1) - Rate filings that are considered general rate cases. Public Counsel recommends inclusion of an additional subsection to preclude a filing which would otherwise trigger the requirements of this and other rules and treatment as a “general rate case” where (a) the filing is not in the form of tariffs that purport to initiate a general rate case, and (b) is filed in a proceeding not initiated as a general rate case.

This amendment would assure the public that general rate increases would not arise without notice to the customer in unusual procedural contexts, such as in the responsive case of a utility involved in an on-going adjudication on other issues.

WAC 480-07-505(1) - General rate cases—Definition. For clarity, make the rule citation more specific as follows: WAC 480-07-500(1).

WAC 480-505(1)(x). Add a new subsection to read: “The amount requested would increase basic residential or business flat-rated local rates by 3 percent or more.”

WAC 480-07-510 – General rate cases—Electric, natural gas, pipeline, and telecommunication companies

WAC 480-07-510(1) – Testimony and exhibits. Add: “A copy of the testimony and exhibits filed under this section shall be served on Public Counsel at the time of filing with the Commission.”

WAC 480-07-510(3)(f) - Work papers and accounting adjustments. Add the requirement that the contract and any other transactional documents also be provided.

WAC 480-07-510(5)(d) – Required service of summary documents. The last sentence of this subsection is unclear in its effect. The sentence should either be deleted or clarified.

Subpart D: Alternative Dispute Resolution

WAC 480-07-700 – Alternative dispute resolution

WAC 480-07-700(4) – ADR guidelines. Include a subsection clarifying that staff involved in ADR as neutral third parties will not participate in a later adjudication, parallel to WAC 480-07-710(3) for mediators.

Include a section stating a preference for settlement talks to begin with all party negotiations. Public Counsel believes it is better as a general policy matter for settlement talks to begin with an invitation for all parties to come to the settlement table. Parties with an interest in ongoing participation are then notified of further talks as they are scheduled. If parties later decide not to participate, or the dynamic of negotiations later creates different groupings of parties, that is a different matter. The procedural structure of the successful settlement in the PSE general rate case settlement last year provides a good model in this regard. Public Counsel

recommends that the guidelines discourage initial bilateral talks, for example, between company and Staff only, or between company and Public Counsel only, as counterproductive to achieving broader settlements with multiparty support.

WAC 480-07-710 - Mediation

WAC 480-07-710(4) – Process. The general procedures for mediation should include the broad notice and invitation to participate discussed in the previous section.

WAC 480-07-730 – Settlement

WAC 480-07-730(1) – Full settlement. Modify the rule to make clear that pre-filed direct testimony may be used as the “supporting evidence” referred to in the rule.

WAC 480-07-730(4) – Notice to commission. Add: “Presentation of a partial settlement does not modify the pre-existing procedural schedule for the proceeding, and non-settling parties may present their case according to the previously adopted schedule, unless otherwise ordered by the Commission.”

Part IV: Other Commission Proceedings

WAC 480-07-900 – Open public meetings

WAC 480-07-900(4) – “Discussion” agenda. Discontinuance of distribution of the open meeting agenda has made it more difficult to keep track of meeting dates and agenda items.

Public Counsel requests that the rule provide that: “The open meeting agenda will be distributed by electronic mail to all parties who request that their name be placed on an email service list for that purpose.” In addition, the Commission should maintain a distribution list for persons who do not have email to receive the agenda.

While time constraints in preparing these comments have not allowed for legal research on this point, Public Counsel is also concerned that the language allowing for the Commission to take up items outside the published agenda for action, apparently without notice, may run afoul of legal requirements.

WAC 480-07-910 – Informal complaints

WAC 480-07-910(3) – Commission response; result. Add: “Commission employees assisting consumers with informal complaints shall advise them of the availability of the formal complaint process and provide them basic information necessary for pursuing such complaints.”

WAC 480-07-920 – Interpretive and policy statements

The rule as written does not contain any provision for process, for example, to allow for responsive comments from other interested parties. Public Counsel recommends that the rule provide that the rule (1) provide for notice to the “roster of interested persons” and (2) make some provision for responsive comments or other appropriate procedure as determined by the Commission.