



ATTORNEY GENERAL OF WASHINGTON

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December 20, 2013

VIA ELECTRONIC FILING & ABC/LMI

Steven V. King
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Pk. Dr. S.W.
P. O. Box 47250
Olympia, WA 98504-7250

Re: Rulemaking to Consider Possible Corrections and Changes in Rules in WAC 480-07,
Relating to Procedural Rules
Docket No. A-130355

Dear Mr. King:

Pursuant to the Commission's November 14, 2013, Notice of Opportunity to File Written Comments, enclosed please find Second Comments of Public Counsel for filing in the above-entitled docket. A copy was also sent via e-mail on December 20, 2013.

Sincerely,

LISA W. GAFKEN
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Public Counsel Division
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LAG:cjb
Enclosure



**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

Rulemaking to Consider Possible Corrections
and Changes in Rules in WAC 480-07,
Relating to Procedural Rules.

DOCKET A-130355

SECOND COMMENTS OF PUBLIC COUNSEL

December 20, 2013

I. INTRODUCTION

1. Pursuant to the Commission's Notice of Opportunity to File Written Comments, dated November 14, 2013, Public Counsel submits the following comments regarding the draft procedural rules found in WAC 480-07-010 through -180 (Part I). Public Counsel appreciates the Commission's work to date to move toward clarity and efficiency in its rules. We look forward to discussing the draft rules with the Commission and other stakeholders at the January 15, 2014 workshop.

**II. WAC 480-07-110 (EXEMPTIONS FROM AND MODIFICATIONS TO
COMMISSION RULES)**

2. The proposed language in WAC 480-07-110(2)(a) contemplates a company providing a copy of its petition for exemption to Public Counsel by email only. Public Counsel would prefer to receive a single paper copy in addition to the emailed copy provided for in WAC 480-07-110(2)(a).¹ The paper copy could be provided the next business day.

¹ This issue will be discussed in greater detail below in comments to the proposed language of WAC 480-07-150.

3. WAC 480-07-110(2)(b) provides that the petition would be considered at a regularly scheduled open meeting or in an adjudicative proceeding. It might be helpful to explain how the determination to proceed through an open meeting or adjudicative proceeding would be made, who would make the decision, and what criteria would determine which petitions would be appropriate for consideration at an open meeting rather than an adjudicative proceeding. Additionally, the notice described in WAC 480-07-110(2)(b) should be sent to the person requesting the exemption, parties (to the extent parties have been established), and other interested persons.

4. WAC 480-07-110(2)(c), as written, has an unintended consequence of diluting the public interest standard. As written, the proposed language makes the public interest standard optional by making the public interest a “factor” the “commission may consider.” Public Counsel believes this is not the intent of the Commission and recommends the following language for Section (2)(c), which incorporates the proposed changes, but clarifies how the public interest standard applies in such proceedings. Public Counsel’s proposed language is underlined.

In determining whether to grant an exemption, factors the commission may consider include whether the rule imposes an undue hardship on the requesting person of a degree or a kind different from hardships imposed on other similarly situated person, and whether the effect of applying the rule to the requesting person would be contrary to the underlying purposes of the rule. No exemption will be granted that is not in the public interest.

5. WAC 480-07-110(2)(d) has been deleted in the proposed rule, but this should not alter the Commission’s duty to enter an order granting or denying the petition, or setting it for hearing. The Washington Administrative Procedures Act (APA) would require such action from the

Commission. If, for some reason, the APA does not require such action from the Commission, WAC 480-07-110(2)(d) should be retained.

6. Public Counsel continues to believe that a person requesting an exemption or modification should be required to list the exemptions or modifications they currently have authorized. This information is relevant in considering the effects of granting the current request. The added burden on the petition is minimal while providing valuable and relevant information to the Commission, its Staff and other stakeholders in an efficient manner.

III. WAC 480-07-140 (COMMUNICATING WITH THE COMMISSION)

A. WEB PORTAL VERSUS FILING VIA EMAIL.

7. In WAC 480-07-140(1)(b), the proposed language contemplates mandatory use of the Commission's web portal. WAC 480-07-140(1)(d) states that if a person is unable to use the web portal, the Commission will accept filings via email sent to the Records Center. WAC 480-07-140(5)(d) provides instructions regarding how to send messages containing documents to be filed. However, WAC 480-07-145(2) provides that documents in adjudications may be filed through the web portal or via email. It is clear that the Commission desires that the parties who appear before it utilize the web portal when filing documents. This is not an unreasonable desire. Unfortunately, when these sections are read together, they create some confusion.

8. For example, will the Commission continue to accept filings received by email to the Record Center when such an email is presented? Or, if a party is deemed able to use the web portal, will its filing be rejected if submitted by email? Would the Commission ever reject a filing based on it being presented by email instead of through the web portal? If so, under what circumstances would this occur? One idea to clarify the Commission's expectation and

requirement would be to clearly mandate use of the web portal (as done in the proposed language of WAC 480-07-140(1)(b)) and develop exceptions to the mandate (for example, members of the public who are not parties and who wish to comment).

B. FILING DATE.

9. The proposed language in WAC 480-07-140(1)(b) contemplates the electronic filing to be made the day the filing is due, followed by the submission of the original plus one copy “to complete the official filing.” The Commission should clarify whether the date of filing is the date the submission is due and the electronic filing is submitted, or whether it is the date the paper copy is received.

C. WAC 480-07-140(5)(d), ELECTRONIC FILE REQUIREMENTS, ORGANIZATION OF SUBMISSION.

10. WAC 480-07-140(5)(d) provides that parties must submit their electronic documents for filing in one message, unless prohibited from doing so due to size constraints. It is unclear how or whether this proposed section applies to submissions made through the web portal. Parties using the web portal may upload up to six documents or two zip files totaling 40 megabytes in combined size. If a party submits its filing through an email to the Records Center, service to the parties is often accomplished through the same email. Size issues may not be apparent until the filing party attempts to send the message. If the size issue is due to a constraint on the recipients’ end, different recipients will be affected differently.

11. One solution is to allow flexibility to organize the filing in a manner that provides consistence. For example, the Commission could provide acceptable options, such as submitting the filing in a single message or organizing the messages by witness. The Commission could include the requirements in the draft provision regarding identifying the sequence of messages

(“Message 2 of 4”), including the cover letter and certificate of service in the first message, and sending multiple messages as simultaneously as possible.

IV. WAC 480-07-141 (COMMISSION RECEIPT OF A DOCUMENT IS NOT FILING OR ACCEPTANCE)

12. Public Counsel supports the intent behind the proposed language of WAC 480-07-141. The Commission should be able to evaluate a submission and reject it, or provide a way to cure the deficiency, when faced with a filing that does not meet the filing requirements prior to accepting the filing. To make the proposed rule stronger, the Commission should clarify who would make the determination of whether a filing complies with requirements, the mechanics of this process, how parties are notified, and whether there are filings to which this proposed rule would not apply.

V. WAC 480-07-145 (FILING DOCUMENTS IN ADJUDICATIVE PROCEEDINGS)

13. As noted above in comments, WAC 480-07-145(2) provides that filings in adjudications may be made through email while WAC 480-07-140(1)(b) requires submission through the web portal. This inconsistency should be eliminated.

14. WAC 480-07-145(4)(a) provides that hard copies filed with the Commission should consist of the original plus one copy, “unless the commission specifies a different number of copies.” Public Counsel strongly supports the proposed language that one copy in addition to the original be provided. Public Counsel is concerned, however, that allowing for a different number of copies may open the door for large number of copies to be produced in particular dockets and that we might revert back to the current situation with respect to the number of copies required by the Commission.

VI. WAC 480-07-150 (SERVICE OF DOCUMENTS IN ADJUDICATIVE PROCEEDINGS)

15. The proposed changes to WAC 480-07-150(5) provide parties with an either/or option to receiving documents: either parties consent to electronic-only service, or they refuse electronic service and receive only paper. Public Counsel believes that there is a middle ground for service to parties who require a paper copy, but also desire an electronic copy.
16. The current practice has developed to provide electronic copies and paper copies of filings to parties. Some parties request electronic-only service. Generally, this seems to work quite well for service among parties. Public Counsel supports moving towards reducing the amount of paper the parties are required to produce. Reducing the amount of copies required by the Commission under the proposed language in WAC 480-07-145(4)(a) goes a long way in reducing the administrative (and environmental) burden carried by parties.
17. Public Counsel would prefer to receive a single paper copy of filings from the filing party in addition to the electronic copy. Parties should have the option of requesting a paper copy to supplement the electronic delivery made on the date of filing. This paper copy could arrive the business day following the electronic copy, consistent with the practice proposed in WAC 480-07-145.
18. There are many reasons to request a single paper copy. For example, Public Counsel maintains a paper file for each of its matters, and we are required to retain our records according to the records retention policy of the Attorney General's Office. At this time, the AGO does require us to maintain our paper records as they do not yet have an agreement with Digital

Archives. Those paper records are archived and retained for the required amount of time.²

Additionally, the party making the filing is in the best position to create a “correct” paper copy of its filing. This “correct” paper copy would be used during hearings or other proceedings to ensure correct pagination and references. The “correct” paper copy would also have the appropriate page coloring to designate confidential or highly confidential material. For a receiving party to prepare a paper copy from an electronic-only submission could result in pagination errors or missed confidential material being placed on white paper.³

19. Public Counsel urges the Commission to allow parties to continue to provide both paper and electronic copies to each other without creating an unnecessary either/or situation.

VII. WAC 480-07-160 (CONFIDENTIAL INFORMATION UNDER RCW 80.04.095)

20. Public Counsel recommends that the following language (indicated by underline) be included in the definition of confidential information contained in WAC 480-07-160(2):

Confidential information is valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information, the disclosure of which would result in private loss, including unfair competitive disadvantage.

This language is consistent with RCW 80.04.095 and provides the standard by which confidential designations should be measured. Washington has a very strong open-government policy, and companies and parties should be appropriately discouraged from over-designating material as confidential.

² We also maintain electronic records, usually email, in our cases. The pleadings, testimony, exhibits, discovery, and other such items are maintained in paper. Those items are stored on the AGO servers for the required duration.

³ The .PDF version of documents may minimize the pagination errors that may occur, but they do nothing to ensure proper colors are used where necessary.

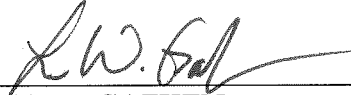
21. WAC 480-07-160(3) provides that failure to comply with the rule requirements “may result in the submission being rejected and returned to the provider or in waiver of any claim of confidentiality for information improperly submitted.” It is unclear what the process would be to determine whether something is rejected or whether confidentiality is waived, or whether neither result would occur. It is also unclear regarding who would decide what result would be realized.

VIII. CONCLUSION

22. Public Counsel appreciates the opportunity to submit these comments. We will attend the workshop scheduled for January 15, 2014, and will be prepared to discuss the proposed language with the Commission and stakeholders.

23. Dated this 20th day of December, 2013.

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Attorney General



LISA W. GAFKEN
Assistant Attorney General
For Public Counsel Division