

[Service Date June 30, 2003]

June 30, 2003

**NOTICE OF OPPORTUNITY TO COMMENT
(July 11, 2003)**

RE: Procedural Rules, 480-09 WAC and 480-04 WAC
Docket No. A-010648

TO INTERESTED PERSONS:

The Commission Staff has completed a second discussion draft of the proposed new procedural rules chapter 480-07 WAC, which may replace existing chapter 480-09 WAC. This revised draft reflects the previous round of written comments, and the discussion we had during our workshop on June 9, 2003. A summary of Staff's responses to the comments is attached as an Appendix to this Notice. We wish to offer you another opportunity to comment before finalizing the draft for presentation to the Commission as part of a CR-102 on **August 13, 2003**.

Interested persons may file written comments on this draft by July 11, 2003.

We will take your comments into account when we finalize the CR-102 draft, which will be made available during the week of July 28, 2003. You also will have an opportunity to comment orally to the Commission on August 13, 2003, when Staff presents the final CR-102 draft to the Commission.

The current version of the proposed draft rules is available for inspection on the Commission's web site at <http://www.wutc.wa.gov/010648> in both legislative and "clean" versions. If you are unable to access the Commission's web page and would like a copy of the proposed draft rules, please contact the records center at (360) 664-1234.

The Commission requests that comments be provided in electronic format to enhance public access, for ease of providing comments, to reduce the need for

paper copies, and to facilitate quotations from the comments. Comments may be submitted by electronic mail to the Commission's Records Center at records@wutc.wa.gov . Please include:

- The docket number of this proceeding (A-010648)
- The commenting party's name
- The title and date of the comment or comments

An alternative method for submitting comments is to mail/deliver an electronic copy on a 3 ½ inch, IBM-formatted, high-density disk, in .pdf Adobe Acrobat format or in Word 97 or later. Include all of the information requested above. The Commission will post on the Commission's web site all comments that are provided in electronic format. The web site is located at <http://www.wutc.wa.gov/010648> .

If you are unable to file your comments electronically or to submit them on a disk, the Commission will always accept a paper document. Submit your written comments to: Secretary, Washington Utilities and Transportation Commission, 1300 S. Evergreen Park Drive SW, P.O. Box 47250, Olympia, Washington 98504-7250. Please reference Docket No. A-010648 in your communication.

Sincerely,

CAROLE J. WASHBURN
Secretary

APPENDIX**Staff rationale for the changes to 480-07-150(5)(c) [Service of documents].**

On further consideration Staff believes it would be a mistake to assign risk for failure of electronic service. This might discourage use of electronic service and hence is counterproductive to our goal of reducing the flow of paper. Subsection (9)(e) of this rule encourages parties to verify effective service by electronic means.

Staff rationale for the changes to WAC 480-07-400 [Discovery]

The stricken language reflects the need to be flexible in managing discovery process depending on the needs of the case and the parties' preferences. Discovery scheduling and timing issues, including response "black out" periods for certain parties, will simply be explored thoroughly at a prehearing conference.

Staff rationale for the changes to 480-07-405 [Discovery—Data requests, record requisitions, and bench requests].

Several stakeholders commented that subsection (6), as originally drafted, is vague and establishes a procedure for objections to data requests that is cumbersome and inefficient. Staff agrees that the simpler approach suggested by the stakeholders is the better approach. The rule is revised accordingly.

Because the default timing under draft chapter 480-07 WAC is the "calendar day," it is important to specify when a time interval is to be measured instead by the "business day." All commentators on the subject support a ten business day default rule for discovery responses, consistent with current practices under chapter 480-09 WAC. Subsection (7)(b) of this rule now reflects this preference. *See, supra*, Legal Research Note.

Staff considered the comments that called for all parties to automatically receive all responses to all data requests with an "opt-out" process for those who may not wish to receive all data request responses. Staff believes that the current "opt in" procedure is more efficient.

**Staff rationale for the addition of WAC 480-07-423 [Protective Orders—
designation of Confidential information]**

This subject generated considerable discussion among the stakeholders and the Commission's staff at the workshop. Generally, comments favored including in the rules provisions that reflect recent practices, with certain refinements. Staff drafted this rule in response to those comments. ALD also will consider revisions to the standard protective order and so-called highly confidential provision that sometimes is a part of a protective order.

Staff rationale for the changes to 480-07-460 [Prefiled testimony].

Qwest and others commented during our stakeholder meeting concerning the proper use and potential abuse of our rules governing submission of revised testimony. The commentators proposed changes to draft WAC 480-07-460 to address these concerns. Based on these comments, Staff has edited WAC 480-07-460 as reflected here.

Draft rule WAC 480-07-460 is derived from WAC 480-09-736. The purpose of subsection (1)(b) in draft rule WAC 480-07-460 is very limited, as are the subsections of the existing rule from which subsection (1)(b) is derived. The only purpose is to permit parties to correct mistakes in prefiled testimony. Mistakes may arise from a variety of causes such as scrivener's error, error in calculation, error of misreported fact. With a little diligence on the part of each witness, such errors should be discoverable promptly after the testimony is filed and promptly corrected. If discovered later due to the development of new information that could not reasonably have been known at the time the testimony was filed, that would establish good cause for allowing a correction later in the process, perhaps even at hearing.

A change in position, however, is not a mistake. The rules governing revision of testimony are not to be used to introduce what is actually new testimony not submitted in accordance with the procedural schedule and process requirements established for the proceeding.

One of the principal purposes of prefiled testimony is to eliminate surprise and allow adequate intervals for discovery, analysis, and preparation for examination of the prefiled testimony at hearing. That purpose is undermined, and may even

be defeated, if parties use the rules governing revisions to prefiled testimony to announce changes in their position. If a party's position changes for some reason after the party has prefiled its testimony, the party may seek leave by motion to file additional testimony as a substitute for or a supplement to its earlier submission.

Staff elected not to adopt the following specific language proposed by one stakeholder:

If such correction is proposed more than fourteen (14) days after the original prefiled evidence is filed, or less than thirty (30) days before the start of hearings in which such prefiled evidence will be examined, such correction shall be permitted only if authorized by the commission for good cause shown, after consideration of the impact of such correction or modification on other parties.

The reason is that the Commission's paramount interest is in having a complete and accurate record. To the extent that this might prevent correction of an obvious error, or a significant error, it may be problematic. We believe presiding officers can be relied on to police the intent of the revised rule, which is more clear than in the existing rule.

Staff rationale for changes to WAC 480-07-470(6) [Hearing guidelines].

One stakeholder expressed concern that the express reference to surrebuttal testimony could be read to preclude additional rounds of testimony so that a party proponent might be denied the "last word." Although the words were not meant to have such an implication, Staff acknowledges the ambiguity. The sentence can simply be struck with no loss of meaning or substance to this subsection. The deletions in this subsection remove unnecessary language (i.e., Staff is a party so need not be separately identified). The additional language in this subsection reflects that broader considerations than simply "the parties' preferences" will be taken into account.

Staff rationale for addition of WAC 480-07-470(12) [Hearing guidelines].

This subsection reflects the Commission's long-standing practice of permitting redirect when a party's witness is cross-examined.

Staff rationale for addition of WAC 480-07-498 [Hearing—Public Comment]

Public Counsel recommended that current public comment hearing process, with certain refinements, be reflected in the procedural rules. This draft rule is Staff's response.

Staff rationale for changes to WAC 480-07-510(3)(f) [General rate proceedings].

Several stakeholders commented that subsection (f), as originally drafted, created an unnecessary burden given that regulated companies already are required to make periodic reports to the Commission that contain this information. Stakeholders noted that the rules requiring such reports are themselves being revised at this time in a separate rulemaking docket. Staff agrees that parties should not be put to the burden of providing the same information twice.

Staff rationale for changes to WAC 480-07-740(2)(c) [Settlement consideration procedure].

This new section reflects the Commission's current practice.

Staff rationale for changes to WAC 480-07-750(2) [Commission discretion to accept settlement].

This new section makes explicit the options available to the Commission vis-à-vis a proposed settlement, and clarifies the process results when a settlement is rejected or accepted subject to conditions.

Staff rationale for changes to WAC 480-07-835(4) [Clarification of final order by motion].

This new section treats motions for clarification in a manner consistent with petitions for reconsideration for purposes of judicial review timeframes.

Staff rationale for changes to WAC 480-07-900(7) [Open public meetings].

This new section responds to a stakeholder request that the open meetings rules describe how interested persons and the public can participate, and to describe the staff recommendation process.

Legal Research Note:

Staff agreed to research the question whether there is any definitive authority concerning the interpretation of the word “days” when used in statutes and not otherwise defined (i.e., the “business day” versus “calendar day” question). Staff did a Lexis search and found:

- No cases appear to concern directly the use of “days” in RCW 80.04.095.
- *Canterwood Place L.P. v. Grace Thande*, 106 Wn. App. 844; 25 P.3d 495; 2001 Wash. App. LEXIS 1357; and *Washington Federation of State Employees v. The State Personnel Board*, 54 Wn. App. 305; 773 P.2d 421; 1989 Wash. App. LEXIS 148 both involve court interpretation of statutory language concerning measurement of “days.”

The cases stand for no more than the proposition that there is no definitive answer. Staff remains of the view that it is best to be conservative and treat statutory references to days as being calendar days unless otherwise specified. We have inserted “business” before “days” in several places in the current draft rules considering comments during our workshop.