

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RULEMAKING TO CONSIDER RULES
IMPLEMENTING SHB 2426, 2006
SESSION, RELATING TO DELEGATION
OF CERTAIN COMMISSION DECISIONS

PREPROPOSAL INQUIRY (CR 101).

DOCKET NO. A-060357

INITIAL COMMENTS OF PUBLIC COUNSEL

April 24, 2006

The Public Counsel Section of the Washington Attorney General's Office submits these comments in response to the March 17, 2006, Notice of Opportunity to File Written Comments in the above captioned matter.

We appreciate the opportunity to offer these comments and look forward to being an active participant in the upcoming workshop. Our comments are regrettably somewhat generic in nature since we are not responding to a concrete proposal. Instead, we offer a discussion of the legal framework in which we believe this statutory change arises and how any rules implementing the new statutory language can be made consistent with this legal framework. We also address the specific questions posed by the Notice.

I. INTRODUCTION

Public Counsel is sympathetic to the Commission's goal of resolving uncontested matters quickly through delegation. The biggest practical challenge to faster action is that it is nearly impossible to know from an initial filing whether a matter is uncontested without some kind of

public vetting process. For the public process to be effective, however, it must involve sufficient notice and opportunity to comment. Otherwise, silence cannot truly equal acceptance. And while the delegation statute is trying to speed up the process, any process, almost invariably, requires time. Since the Commission navigates this kind of tension regularly, we look forward to the Commission's guidance on this issue.

Whatever delegation process is developed must be consistent with the Administrative Procedure Act, constitutional due process requirements, the Open Public Meetings Act, Titles 80 and 81 RCW and Commission rules. We examine some of these issues more specifically before turning to the questions contained in the Notice.

We urge that the Commission utilize existing processes as much as possible. The Commission has many time-tested procedural rules that work well. Wherever possible we should try to emulate and not muddle the Commission's current procedures.

Finally, we believe that twelve-months after the delegation rules take effect and every subsequent year, the Commission should issue a report detailing the decisions it delegated, to whom the decision was delegated, the process and the outcome. That report should also include probable cause determinations made by Administrative Law Judges (ALJs). In this way the Commission can preserve transparency in the process and evaluate the success of the delegation program.

II. GENERAL COMMENTS

We start by understanding the legal framework in which this statutory change arose and how any rules implementing the new statutory language can be made consistent with this legal framework.

The Commission is a state agency created by the Legislature and so it enjoys only those powers expressly conferred by statute or necessarily implied from its statutory delegation of authority. *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437 (2005). In this regard, the Commission may not re-delegate its functions absent express authorization. *Ledgering v. State*, 63 Wn.2d 94, 98 (1963).¹ Thus, unlike delegations of authority to agencies, re-delegation to agency assistants cannot be implied. *Id.* at 100.

It is this body of law that necessitated the Commission's request for re-delegation now embodied in RCW 80.01.030. This new statutory language says:

The commission may, by rule or order, delegate to designated assistants **any of the powers and duties vested in or imposed upon the commission by law except matters governed by chapter 34.05 RCW**; however, a matter may not be delegated to a person who has worked as an advocate on the same docket. Delegated powers and duties may be exercised in the name of the commission. The commission by rule shall implement a process by which notice shall be provided of matters designated for delegation. Any such matter shall be heard or reviewed by commissioners at the request of any commissioner or any affected person.

RCW 80.01.030 (emphasis added).

The re-delegation expressly authorized by the Legislature, therefore, is all of the Commission's authority except those matters governed by chapter 34.05 RCW.²

¹ This the "general principle of law, expressed in the maxim *delegatus non potest delegare*, that, absent consent of the principal, a delegated power may not be further delegated, especially when the power involved is one calling for the exercise of discretion." *Id.*, citing BLACK'S LAW DICTIONARY (4th ed.). p. 513.

² Chapter 34.05 RCW is the state's Administrative Procedure Act (APA). It contains six substantive parts: (I) General Provisions, (II) Public Access to Agency Rules, (III) Rule-Making Procedures, (IV) Adjudicative Proceedings, (V) Judicial Review and Civil Enforcement and (VI) Legislative Review.

A. The Administrative Procedure Act

Public Counsel makes three observations about the APA and its effect on this rulemaking. First, certain categories of issues require adjudication under the APA and therefore, should be foreclosed from delegation. Second, even where adjudication is not required, the APA mandates the public be given notice of an opportunity to request adjudication at least twenty days before a final agency determination. Third, any person to whom a decision is delegated is subject to the statutory prohibition on *ex parte* contacts and statutory separation of functions requirements. All three are further discussed below.

1. Issues Requiring Adjudication under the APA.

The APA defines adjudication as:

...a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied...or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

RCW 34.05.010(1).

The question of whether an adjudicative proceeding is required by law is not easily answered and, generally, the answer is derived from outside of the APA.³ The APA, however, contains some clear requirements for adjudication.⁴ First, all cases of licensing and rate making

³ William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 807 (1989).

⁴ In addition to those areas requiring adjudication under the APA, the WUTC's organic law or its regulations may also require adjudication. RCW 34.05.413(2). *See e.g.*, RCW 80.28.020 (“Whenever the commission shall find, after a hearing had upon its own motion, or upon complaint...”); RCW 80.28.030; RCW 80.28.190; RCW 80.36.135, et. al. Filings under Commission statutes requiring adjudication should also preclude delegation.

in which an application has been denied must be adjudicated. *Id.*; *See also*, RCW 34.05.422.⁵

Second, where a license is “revoked, suspended, or modified” adjudication is required. *Id.* Third, the granting of any application that is contested by a person with standing to contest the application must be adjudicated. *Id.* Fourth, applications for rate changes and uncontested applications for licenses *may*, in the agencies discretion, be conducted as adjudicative proceedings. But any refusal to adjudicate is still analyzed under the arbitrary and capricious standard. *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 393-94 (1997); RCW 34.05.570(4)(c)(iii).

Drilling deeper into the APA, a “license” is defined as “a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law...” RCW 34.05.010(9)(a). However, the statute expressly excludes (i) a license required solely for revenue purposes, or (ii) a certification of an exclusive bargaining representative, or (iii) a license, franchise, or permission for use of trademarks, symbols, and similar property owned or controlled by the agency. “Licensing,” as defined by the APA, means “the issuance, denial, revocation, suspension, or modification of a license.” RCW 34.05.010(9)(b).

Even with the APA’s definitions, determining what is a license is difficult in practice.⁶ When the Commission designated non-incumbent telephone companies as “Eligible Telecommunications Companies” (ETCs) at an open meeting in 1997, rural incumbent providers

⁵ RCW 34.05.422. Rate changes, licenses.

(1) Unless otherwise provided by law: (a) Applications for rate changes and uncontested applications for licenses may, in the agency's discretion, be conducted as adjudicative proceedings; (b) applications for licenses that are contested by a person having standing to contest under the law and review of denials of applications for licenses or rate changes shall be conducted as adjudicative proceedings; and (c) an agency may not revoke, suspend, or modify a license unless the agency gives notice of an opportunity for an appropriate adjudicative proceeding in accordance with this chapter or other statute.

⁶ Black’s Law Dictionary defines a “license” as “A permission, usually revocable, to commit some act that would otherwise be unlawful.” BLACK’S LAW DICTIONARY (Eighth Edition), p. 938.

sued, alleging a violation of due process and the APA. Since the “license” being granted to non-incumbents was solely for revenue purposes, the court of appeals held that ETC designation did not require APA adjudication.⁷ *Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 110 Wn. App. 498 (2002), *aff'd*, 149 Wn.2d 17 (2003). *But see, Watershed Defense Fund v. Riveland*, 91 Wn. App. 454, 459, *rev. den.* 137 Wn.2d 1009 (1998) (Department of Ecology’s approval of amendment to water district’s comprehensive water and sewer plan was a “license” under RCW 34.05.010(9)(a)).

2. Agency Notice of Opportunity to Request Adjudication Under the APA.

If adjudication is required, an agency must commence one upon the timely application of any person. RCW 34.05.419; RCW 34.05.413(2). An agency “shall allow **at least twenty days** to apply for an adjudicative proceeding **from the time notice is given of the opportunity to file** such an application.” RCW 34.05.413(3) (emphasis added).

Assuming that the Commission’s current procedures generally ensure adequate notice to the public, under the APA the process must still include twenty days to allow for an interested person to request adjudication. It is not possible to say that an interested party only has a right to twenty days’ notice when adjudication is required because such reasoning is clearly circular; the determination of whether one has a right to adjudication must be preceded by the ability to petition for that right.

⁷ We discuss the due process claim later.

3. Ex Parte Contacts and Separation of Function Requirements under the APA.

Delegation of an uncontested decision to a particular Staff member and his or her service as a “presiding officer” must be consistent with the prohibition on *ex parte* contacts and separation of function requirements. Given the historical role that Staff has played in the Commission as investigator, prosecutor and advocate, we are confident that adequate training will be provided to reinforce these principles.

RCW 34.05.425 defines who may serve as a “presiding officer” in an adjudication. The APA prohibits *ex parte* communications between the presiding officer and *any* employee of an agency regarding a hearing issue (except for routine procedural questions and *ex parte* matters expressly authorized by statute) without notice and an opportunity to participate being given to all the parties. RCW 34.05.455(1), (3). The presiding officer is also prohibited from *ex parte* communications with any outside person who has a direct or indirect interest in the proceeding without providing notice and an opportunity to participate to all parties. RCW 34.05.455(2). In turn, such outside persons are prohibited from engaging in *ex parte* communications with the presiding officer. RCW 34.05.455(3).

The APA also provides that if, prior to serving as a presiding officer, a person receives a communication that would be an improper *ex parte* communication were the proceeding pending, the person must place the contents of this communication on the record and allow for appropriate rebuttal once he or she serves as presiding officer. RCW 34.05.455(4).⁸

⁸ These requirements are similar to the fair and impartial hearing requirements of the appearance of fairness doctrine. *Magula v. Dep’t of Labor & Indus.*, 116 Wn. App. 966, 972 (2003). That judge-made doctrine applies to administrative tribunals acting in a quasi-judicial capacity. *City of Hoquiam v. Pub. Employment Relations Comm’n*, 97 Wn.2d 481,489 (1982).

Additionally, the APA requires a separation of agency functions in adjudicative proceedings; anyone who acts as an investigator, prosecutor, or advocate at any point in an adjudicative proceeding may not later serve as a presiding officer in the same proceeding. RCW 34.05.458(1). A similar requirement exists in the new delegation language.⁹ The APA goes further, however, by requiring any person who is subject to the authority, direction or discretion of a person who served as an investigator, prosecutor, or advocate in a matter is precluded from serving as presiding officer in the same proceeding. RCW 34.05.458(1). We anticipate that the more stringent APA standard will inform the Commission's practice in this area.

B. Due Process

The decision to delegate and the delegated decision must comport with procedural due process. Therefore, any procedural changes created by this rulemaking must take into account the need to protect procedural due process rights of those who have property interests at stake in any proceeding. We think this is best accomplished by removing decisions involving property interests from delegation.

Property interests include a very broad range of interests, including those secured by "existing rules or understandings." *Ritter v. Board of Comm'rs, Adams County Public Hospital Dist. No. 1*, 96 Wn.2d 503, 509 (1981).¹⁰ If a property interest exists, the question of what

⁹ "[A] matter may not be delegated to a person who has worked as an advocate on the same docket." RCW 80.01.030.

¹⁰ For instance, violation of a statute requiring a specific type of notice gives rise to a due process violation when the individual has been prejudiced by the lack of notice. *See, State v. Dolson*, 138 Wn.2d 773, 777-78 (1999) ("notice procedure that contradicts a licensee's legal expectations cannot be reasonably calculated to provide notice" when DOL failed to send notification to the address of record as required by statute); *Motley-Motley v. State*, 127 Wn. App. 62, 81 (2005), *rev. den.*, 156 Wn.2d 1004 (2006) (prejudice required). *Cf., Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 149 Wn.2d 17 (2003) (WITA members did not have a constitutionally protected property interest in their status as exclusive telecommunications providers in their service areas where there was no

process is due remains. “Procedural due process at a minimum requires notice and an opportunity to be heard.” *Rivett v. City of Tacoma*, 123 Wn.2d 573, 583 (1994). The opportunity must be “at a meaningful time” and occur in “a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Washington courts have held that this means prior to a final agency determination. *Motley-Motley*, 127 Wn. App. at 81.¹¹

C. Chapter 42.30 RCW and WAC 480-07-900

Both the decision to delegate and the delegated decision are “agency actions” and thereby subject to the Open Public Meetings Act (OPA). We make two observations related to this point. First, the current process of organizing the Commission’s Open Meeting agenda involves mostly ministerial decisions. Therefore, it is of no consequence that agenda-setting is neither noticed nor open to the public. However, if the Commission’s decision to delegate a matter occurs prior to its noticed designation on the Open Meeting agenda, that decision appears more discretionary in nature and potentially subject to the OPA. Secondly, the person to whom decisions are delegated, while an individual, is still subject to the OPA because she or he is exercising the authority of a multimember body. We explore this more below.

The purpose of the OPA is to allow the public to observe all steps in the making of governmental decisions. *Cathcart v. Andersen*, 85 Wn.2d 102 (1975). Any action taken in violation of the Act is null and void. RCW 42.30.060. Thus, the OPA requires that the public

law or regulation entitling association members to designation as exclusive eligible telecommunications carriers and WUTC had authority to designate more than one common carrier per service area).

¹¹ The APA offers a framework to meet due process requirements. Indeed, the Commission has held that a full adjudicative hearing under the APA can ensure due process. *See e.g., WUTC v. Pacific Northwest Bell Telephone Co. d/b/a U S West Communications*, Docket No. U-89-2698-F, Docket No. U-89-3245-P (Consolidated) Fourth Supplemental Order (January 1990), p. 22.

receive notice of the “meetings” of a public agency’s “governing body” and the opportunity to observe.

A “meeting” occurs whenever there is an “action” taken. An “action” includes discussion, deliberation or evaluation that may lead to a final decision even if no final official vote is taken. *Organization to Preserve Agr. Lands v. Adams County*, 128 Wn.2d 869 (1996); *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671 (1992), *rev. den.*, 121 Wn.2d 1011 (1993).

A “governing body” is defined as “the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.” RCW 42.30.020(2). Because the Act is directed to meetings of “governing bodies,” it does not apply to the activity of an agency which is governed by an individual. *Salmon for All v. Department of Fisheries*, 118 Wn.2d 270 (1992) (Agency not subject to the Act because it was governed by an individual director).

1. The OPA applies to Individuals Tasked with Delegated Agency Decisions.

Because the WUTC is subject to the requirements of the OPA, any individual who is delegated WUTC authority is also subject to the OPA. *Salmon for All*, at 277; *Cathcart v. Andersen*, 85 Wn.2d 102, 106-07 (1975). The fact that the Commission may review the delegated decision does not change the analysis. *Cathcart*, at 107.

2. The OPA Applies to Decisions Made Prior to An Open Meeting.

WAC 480-07-900 is the WUTC’s procedural rule implementing the Open Meetings Act. That rule outlines, *inter alia*, the scheduling of meetings, distribution of the meeting agenda, the

structure of the agenda and how orders are adopted. Currently, a process exists to divide the Commission's Open Meeting agenda into the discussion agenda, the no action agenda, and the consent agenda.¹² WAC 480-07-900(4). The Commission's Rulemaking Notice appears to contemplate that delegated decisions would be limited to those items on the consent agenda. The current process for determining where something goes on the Open Meeting agenda has generally been a ministerial act since someone wanting to move an item from the consent agenda to the discussion agenda simply requests the item be moved before or during the meeting. In this way, the initial agenda designations have not run afoul of the OPA. If policy decisions are frontloaded into the organization of the agenda, it seems that the Commission runs the risk of violating the OPA by not making its initial agenda determinations subject to notice and opportunity to observe.

III. COMMENTS IN RESPONSE TO THE NOTICE

Public Counsel reiterates the need to utilize existing processes as much as possible so as not to duplicate or confuse the Commission's current procedures.

A. Matters Amenable to Delegation

Predicated on the analysis above, Public Counsel urges that delegated matters be defined very narrowly. We propose that the guiding principle for matters subject to delegation is that these should be uncontested matters¹³ over which the Commission has very limited discretion.¹⁴

¹² It would be useful to this rulemaking to know what the Commission's current internal process is for determining where a particular item resides on its agenda. For instance, it is not clear how the current decision to list something in the consent agenda is made.

¹³ With regard to designation of uncontested matters, we reiterate the "silence does not equal acceptance" problem identified earlier. Without sufficient notice to the public and opportunity to object it is impossible to assume that a matter is uncontested.

At the very least, delegation should not include matters where a property interest is implicated, matters involving licensing or ratemaking and matters required to be adjudicated by Titles 80 and 81 RCW and Commission rule. For example, it would be inappropriate to delegate revenue affecting tariff changes, property transfers and compliance filings. Public Counsel also contends that any matters subject to potential delegation should be defined by rule. A rule is less likely to result in arbitrariness and would bring a degree of clarity and transparency to the process.

B. Process for Providing Notice

There is no question that SHB 2426's legislative history requires that only uncontested matters can be delegated.¹⁵ This understanding, therefore, should be reflected in the Commission's rules. With regard to how contested matters should be defined, the APA prior to 1988 utilized the term "contested case" in its statutory scheme. RCW 34.04.010(3). A "contested case" was defined as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Given how similar this definition is to the definition of an "adjudicative proceeding" in RCW 34.05.010, the discussion above regarding adjudication under the APA is extremely relevant.¹⁶ In particular, that discussion strongly supports our view that the Commission may not delegate matters involving licensing and ratemaking since these generally require adjudication and, therefore, should be presumed contested.

¹⁴ We note the SHB 2426 Final Bill Report: "According to the WUTC, the majority of items are uncontested and require little discretion on the part of commissioners."

¹⁵ See, *supra*, footnote 14.

¹⁶ Andersen, *supra*, at 789 ("The new definition of 'adjudicative proceeding' is similar to the old act's definition of 'contested case'").

The concept of a “contested matter,” however, is much broader than that of a “contested case.” For instance, while standing issues might arise in adjudication, the issue of standing should not arise where the question is one of delegation. Additionally, while requests for adjudication are generally formal and require written submissions, objecting to delegation should be informal and involve the opportunity for verbal requests. This is similar to the current practice of requesting the movement of items on the Open Meeting agenda. In short, a verbal statement to the effect of, “I object,” by any interested party should be sufficient to make a matter contested.

Along these lines, we suggest that there should be only one process for designating and objecting to the designation of delegated matters. Moreover, the process we envision utilizes existing systems to achieve a procedure consistent with the Commission’s legal requirements. Therefore, we start by identifying which of the current procedures might be used for delegation purposes.

The current process for notifying interested persons of weekly filings with the Commission is inadequate for the purposes of providing notice for delegation purposes. It does not identify a projected date for consideration on the Open Meeting agenda, does not identify who can be contacted to inquire about the item and contains only cursory information about the nature of the filing. In short, it would be almost impossible for someone to know from the initial weekly filing list which matters might be delegated at the next Open Meeting. In addition, the current process for notifying interested persons of possible agency action through publication and distribution of the Open Meeting agenda is also inadequate for delegation purposes since the notice generally does not precede the final action by twenty days, as required by RCW

34.05.413(3). Therefore, we offer a method for incorporating delegation into the current process while ensuring that notice is adequate.

When the Commission serves the weekly filing list, each listed item should contain a tentative designation regarding whether it might be delegated. Each item tentatively designated as delegable should also contain a projected date for consideration on the Open Meeting agenda and a Staff contact person in case of any questions or comments about the filing. In addition to current service practices, a link to the most current weekly filing list and an archive of past lists should be added to the Commission's main webpage.

Pursuant to the twenty-day notice requirement, the Open Meeting agenda can still be issued the Friday or Monday prior to the meeting as long as the item is not delegated at the first Open Meeting following the notice. Alternatively, current notice would suffice if the item is delegated at the first Open Meeting following notice but interested persons have a substantial opportunity (no earlier than the second Open Meeting following the notice) to object after the Open Meeting and such an objection would reverse the delegation, including after a delegated decision has already been made.

C. Process for Probable Cause Determinations

Public Counsel envisions very little rulemaking in this area. The rules should allow ALJs to make probable cause determinations subject to Commission review upon request of a party. The probable cause determinations made by ALJs must also be made subject to the notice and opportunity requirements described above and a rule describing this may be helpful.

We see no need for the rules to address the record required for a probable cause determination and note that Open Meeting memos from Staff along with the pleadings are

generally a sufficient record for Commission-issued probable cause determinations. However, parties should be allowed to supplement the record if the ALJ's determination is appealed. Moreover, since there would be a right to appeal an ALJ determination, we see no reason for different rules for the issuing of complaints and determinations of penalty assessments.

IV. CONCLUSION

Public Counsel appreciates the opportunity to submit these comments, we hope they assist the Commission in its decision and we look forward to participating in future discussions.