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

July 21, 2003

INTRODUCTION

Public Counsel files these comments in response to the Commission's June 30, 2003, Notice of Opportunity to Comment. These comments build upon our detailed comments filed April 30, 2003 and upon the Supplemental Comments filed May 29. A number of recommendations contained in the April 30 comments were accepted and incorporated in the most recent draft rules. A number of other changes were made as a result of the earlier comments of others and the workshop. In general, unless noted, Public Counsel supports these thoughtful improvements to the procedural rules.

A significant number of Public Counsel recommendations were not adopted or were not addressed. While this set of comments will highlight areas of particular concern in the most recent draft, as a general matter, Public Counsel also reiterates and reaffirms our earlier recommendations, and incorporates the earlier comments herein by reference. The failure to

address an issue in this round of comments does not indicate agreement with a draft rule about which we have earlier expressed concern.

COMMENTS ON JUNE 30 DRAFT PROCEDURAL RULES

Part I: General Provisions

WAC 480-07-160 - Confidential Information

WAC 480-07-160(9)(a) - Designation or Redesignation of confidential information in adjudications. Public Counsel believes this section needs further clarification on the two issues raised in our prior comments: (1) conclusiveness as to accuracy; and (2) which party has responsibility for designation.

Accuracy. The newly-added phrase" as to the party's designation" is helpful but does not fully clarify the rule. We understand the intent to be that designation under this subsection does not constitute a final determination as to whether the material itself is confidential, so as to preclude later challenges, for example under the public records law. Practically speaking its chief effect would be to preclude a party who fails to designate information confidential from later asserting confidentiality. In order to add further clarity, Public Counsel recommends the removal of the words "conclusively accurate" and the adoption of the amendment set out below.

Designating party: We continue to recommend that the rule make clear that the party with fundamental responsibility under this rule for designation or redesignation be the "source party," the party originally producing information claimed to be confidential. The rule also should address how different documents are treated. Cross-examination exhibits, for example, containing confidential data request responses should be the responsibility of the original "source party." On the other hand, for practical reasons, briefs and testimony containing confidential

information, where the designation is withdrawn, are most easily filed in unredacted form by the authoring party, to comply with subsection 9 (c). Finally, the rule should also reflect that in some cases, confidentiality may be withdrawn by ruling rather than voluntary party action.

Public Counsel suggests that the subsection 9 be amended to address these two issues as follows:

(9) Designation or Redesignation of confidential information in adjudications. At the conclusion of an adjudication in which confidentiality was asserted as to documents or portions of the record, ~~a~~ the party originally asserting confidentiality must, no later than the time for filing briefs or, if no briefs are filed, within 10 days after the close of the record, do the following:

(a) Verify the accuracy of all confidential designations in the record and in the exhibit list for the proceeding, and submit any needed corrections or changes. Absent a statement of needed corrections or changes, the designations in the record and in the exhibit list ~~are deemed conclusively accurate as to the party's designation~~. are final and may not later be changed by the original designating party. If there is conflict between designations, the designation that is least restrictive to public access will be adopted.

(b) File a redacted and unredacted copy of any document as to which confidentiality was asserted during the proceeding but which is not reflected in the record or exhibit list as a document designated confidential.

(c) File an unredacted version of any document designated as confidential during the proceeding, but as to which the party claiming confidentiality wishes to remove the confidential designation, or as to which confidentiality was terminated by order. In the case of briefs, testimony, and similar documents, the authoring party shall file the unredacted version.

Part III: Adjudicative Proceedings

Subpart A: Rules of General Applicability

WAC 480-07-300. Scope of Part III

Public Counsel recommends that the term "general rate case" be retained, rather than replaced by "general rate proceeding." The former term has been in common use for decades and is understood by industry and stakeholders. Its unclear why the change is necessary and it may add confusion rather than clarity.

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

Public Counsel strongly recommends retaining the existing title to this rule. The deletion of the phrase "is not allowed" sends an unintended but unfortunate symbolic message that ex parte limitations are to be weakened.

Public Counsel also continues to recommend that the changes suggested in our earlier draft[1] be adopted in order to: (1) cover communications before the filing of an adjudication on the merits of the anticipated filing; (2) codify and clarify the "firewall" that is established between trial and advisory staff and counsel during an adjudication; (3) clarify expressly that the rule applies to Commissioners who act on an adjudication, whether or not sitting as a presiding officer; and (4) add reference to recusal of a Commission or presiding officer as a potential sanction.

Because the credibility of the Commission and the integrity of its proceedings are dependent on the appearance and the reality of fairness which the ex parte rule and other provisions ensure, the current title language is valuable and the suggested changes would clarify and strengthen the existing rule.

WAC 480-07-340 Parties – General

Correction: In WAC 480-07-340(1), the new final sentence should be changed to read:

When the public counsel ~~division~~ section of the attorney general's office ~~division~~ appears as a party it will be called "public counsel."

WAC 480-07-370; WAC 480-07-375 – Commission Own Motion Actions

[1] April 30 Comments, pp. 5-6

WAC 480-07-370(1)(b)(i) regarding petitions, and WAC 480-07-375(1) regarding motions, allow the Commission to take action on its own motion without a petition or a motion. Public Counsel suggests that the rule clarify that any such action would occur after reasonable notice to and an opportunity to comment by the affected party or parties.

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

For the reasons set forth in our earlier comments, Public Counsel recommends against the use of proposed findings of fact and conclusions of law in Commission adjudications. 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 reiterates its earlier recommendation against a blanket requirement that copies of non-Washington authorities be supplied. We respectfully request the inclusion of this requirement be reconsidered. 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. We would suggest further workshop discussion of how to meet this Commission need without imposing undue burdens on filing parties.

WAC 480-07-420, 423 – Discovery—Protective orders

Public Counsel continues to be concerned about the level of confidentiality asserted by companies subject to Commission jurisdiction and the increased use of "highly confidential" protective orders. Regulation is intended to be conducted in public and this is a step further away from this goal. We recommend addition of a new last sentence to the beginning of WAC 480-07-423 as follows:

> Designation of documents as "highly confidential" is not permitted under a standard protective order, and may only occur after a party has received authority to do so by motion, supported by a sworn statement as set forth below.

Public Counsel further recommends amending the last sentence of WAC 480-07-423(1)(b) to read:

> A party that wishes to designate~~s~~ a document as highly confidential must first file a motion for an amendment to the standard protective order, supported by ~~furnish~~ a sworn statement which sets forth in detail the specific factual basis for the protection, and an explanation why the standard protective order does is inadequate. The motion and sworn statement must identify specific parties, persons, and categories of persons, if any, to whom it wishes to restrict access, and the reasons for such restrictions.

WAC 480-07-460(2) – Prefiled testimony.

For the reasons detailed in our earlier comments, we repeat our recommendation that there is a need for some restrictions, or procedural requirements, for the adoption of prefiled testimony of one witness by another witness. This section of the rules should include a requirement for notice, an opportunity to object, and leave of the presiding officer, for good cause shown, before adoption of testimony is permitted.

WAC 480-07-470(4) – Summary of Public Counsel.

Public Counsel recommends this section be amended to read:

> (4) **Summary by public counsel**. At the beginning of a hearing session during which the commission will hear testimony from members of the public, public counsel may inform the

public of the major contested issues <u>and state its position on those issues</u>. The commission will give other counsel an opportunity to respond.

This is change is consistent with the Supplemental Comments filed by Public Counsel recommending a modification in the approach taken at public comment hearings.

WAC 480-07-498 Hearing – Public Comment

Public Counsel supports the constructive changes reflected in the draft rule as consistent with the points raised in our Supplemental Comments. These changes should result in a better public comment hearing process.

Subpart B: General Rate Cases

This is an area of particular concern to Public Counsel. We repeat and reincorporate our April 30 comments on this issue and highlight main points below. We also urge retention of the term "general rate case."

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

WAC 480-07-505(1) - Rate filings that are considered general rate cases. Public Counsel again 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 480-505(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." In recent

proceedings, disputes have arisen regarding the interpretation of the current rule language. At least one party argued that all company revenue increases and decreases from any source were to be netted and allocated only to residential and business service. This type of approach means that residential and business customers could be faced with the raises of 25, 50 or 100 percent, indeed any amount, as long as other revenues decreased somewhere in the company so that overall there was less than a 3 percent increase. Public Counsel's proposed language would clarify that an increase that would be experienced by a residential or business customer as exceeding 3 percent would trigger rate case requirements.

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."

Subpart D: Alternative Dispute Resolution

WAC 480-07-700, 710 – Alternative dispute resolution; Mediation

Public Counsel urges further consideration of the points made in our April 30 comments. In particuar: (1) the rule should clarify, that like mediators, settlement judges will not later adjudicate the same case; (2) the ADR guidelines and settlement conference rule should disfavor partial agreements by require that settlement talks be initiated with all parties present.

Part IV: Other Commission Proceedings

WAC 480-07-900 – Open public meetings

WAC 480-07-900(4) – "Discussion" agenda. Public Counsel again respectfully urges the Commission to improve public notice of open meeting items by amending this rule to

provide: "The open meeting agenda will be distributed by mail to all parties who request that their name be placed on an email or regular mail service list for that purpose."

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