

Pre CR-102 Comment Summary
July 23, 2003

Section	Provision	Comment	Staff Response
480-07-160	<p>(2)(b)— Confidential information defined</p> <p>(4)—Challenges to claims of confidentiality</p>	<p>ICNU proposes to eliminate this part of the definition, which includes ‘information protected under the terms of a protective order in an adjudicative proceeding.’ ICNU asserts that this may expand the definition of confidential information and result in the withholding of more information from public disclosure in proceedings before the Commission.</p> <p>ICNU proposes to strike “or a protective order” to achieve consistency with its suggestion to narrow the definition of confidential information, as discussed above.</p>	<p>Staff does not accept ICNU’s proposed edit.</p> <p>The Commission's authority to enter a protective order stems from RCW 34.05.446, which authorizes presiding officers to enter protective orders. A protective order allows parties to a proceeding to use and have access to specified information, much or all of which also could be designated as confidential under Chapter 42.17 RCW and/or RCW 80.04.095, and thus withheld from public disclosure. In other words, protective orders make information available to parties in adjudications that they otherwise might not be entitled to examine. To that extent, protective orders expand rather than restrict access to otherwise confidential information. The Commission’s standard form of protective order defines what can be designated as confidential information in language that is consistent with RCW 80.04.095. In some instances parties may designate information as confidential under a protective order even</p>

			though the information would not be confidential under RCW 80.04.095. Such designations are subject to challenge.
480-07-160	(9)(a) – Designation or redesignation of confidential information in adjudications	Public Counsel believes this section needs further clarification regarding conclusiveness of designations and which party has responsibility for designation	Staff agrees that some clarification is needed and adopts, in most part, Public Counsel’s proposed edits.
480-07-300	Scope of Part III	Public Counsel recommends using the term ‘general rate case’ rather than ‘general rate proceeding.’ Public Counsel says ‘the former term has been in common use for decades and is understood by industry and stakeholders. It is unclear why the change is necessary and it may add confusion rather than clarity.’	Staff does not accept Public Counsel’s proposed edit. Staff is largely indifferent on this point, but points out that the current rules (e.g., 480-09-310) refer to “proceedings” in this context, not “cases.” Although both terms are used in the current procedural rules, Staff notes that the APA, Chapter 34.05 RCW, also uses “proceedings” extensively. Staff does not believe the use of “proceedings” in the draft rules represents “a change” and does not believe use of this term will cause confusion.

480-07-310	Ex Parte Communication	<p>Public Counsel ‘strongly recommends retaining the existing title to this rule.’ Deletion of the phrase ‘is not allowed’ sends an unintended but unfortunate symbolic message that ex parte limitations are to be weakened.</p> <p>Public Counsel suggests that the definition of <i>ex parte</i> communication be expanded to include communications occurring before commencement of an adjudication.</p> <p>Public Counsel suggests clarifying the provision to include existence of an <i>ex parte</i> "firewall" between the Commission and advocacy, investigative, or prosecutorial staff.</p> <p>Public Counsel suggests clarifying the distinction between</p>	<p>Staff does not accept Public Counsel’s proposed edit to the section title. The existing rule, WAC 480-09-140, is titled “Ex parte communications.” Staff takes Public Counsel’s meaning to be that it favors the original draft title, which was “Ex parte communication is not allowed.” Staff concluded that the current, broader title should be retained.</p> <p>Staff does not accept this suggestion because it could create significant confusion and burdens vis-à-vis open meeting discussions and other proper communications about a potential adjudication or about unrelated matters. In any event, the matter of pre-adjudication ex parte contacts is addressed by subsection (3) of the draft rule.</p> <p>Staff accepts this comment and edits subsection (1) of the draft rule to include language clarifying that the Commission’s advocacy, investigative, and prosecutorial staff are within the class of “persons” who are barred from making ex parte communications.</p> <p>Staff accepts this suggestion. The edit proposed in response to the preceding comment should</p>
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		<p>advisory and advocacy legal counsel.</p> <p>Public Counsel suggests adding the term "Commissioner" to the provision requiring disclosure, as the Commissioners sit as presiding officers on review of cases heard by ALJs.</p> <p>Public Counsel suggests adding recusal as a sanction for <i>ex parte</i> communication.</p>	<p>adequately clarify the distinction between advisory and advocacy legal counsel.</p> <p>Staff does not accept the proposed revision. It is unnecessary because while an adjudication is pending, the Commissioners, by virtue of their statutory responsibilities, are the ultimate presiding officers whether or not they choose to sit at the hearings.</p> <p>Ex parte communications can be cured by disclosure and the opportunity for response. The occurrence of an ex parte contact is not itself grounds for recusal. However, if the ex parte contact is such as to give rise to actual bias or prejudice, recusal might be appropriate and could follow.</p>
480-07-340	Parties— General	Public Counsel offers a correction to its designation as a party : 'public counsel section of the attorney general's office.'	Staff agrees that the existing draft is incorrect and edits the designation to read: "public counsel section of the office of the Washington attorney general."
480-07-355	Parties— Intervention	ICNU recommends adding language to subsection (2) that would require 'A party who opposes the petition to intervene	Staff agrees with the concept, but edits the draft rule to provide for any written response to be filed at least two days before the next prehearing or hearing session, at which time the petition

		shall file any written response within five days after the petition is served.'	can be heard.
480-07-370 and 480-07-375	Petitions Motions	Public Counsel suggests that these rules be clarified to provide that when the Commission takes action on its own petition or motion, it will provide notice 'and an opportunity to comment by the affected party or parties.'	Staff agrees that the draft rule should be edited to state that the commission will provide notice and allow for appropriate process when it acts in the absence of a party's petition. Comment by select parties may not be the appropriate process in all instances. Broader language accordingly is proposed.
480-07-380	Motions that are dispositive	ICNU proposes to modify subsection (2)(b) to provide that motions for summary determination may be filed at least ten days before the next applicable hearing session, rather than thirty calendar days prior as required in the draft.	Staff does not accept ICNU's suggested timing because this is too late for such a motion to be reviewed, responded to, heard, and decided prior to the hearing session. Typically, parties are able to inform the presiding officer and other parties well in advance that a motion for summary determination is planned and the presiding officer can establish a workable time frame for the process by notice. This 30-day timing provision establishes a default if no time frame for a summary determination process is established by the presiding officer.
480-07-390	Briefs; Oral argument;	Public Counsel recommends elimination of the option of	Staff does not accept this proposal. The draft rule provides this option for post-hearing filings

	findings and conclusions	requiring parties to file proposed findings and conclusions. Public Counsel’s concern is that ‘simple adoption’ of findings prepared by parties’ undercuts the goals of demonstrating the Commission’s reasons for decisions, including policy and factual analyses.	because it has proved useful from time to time in particular cases. The rule does not contemplate “simple adoption” of parties submissions. Expressly requiring findings and conclusions may prove valuable to the Commission in understanding parties’ views of what outcomes the record and applicable law supports. Post-hearing process is determined on a case-by-case basis, following consultation with the parties.
480-07-395	Pleadings, motions, and briefs—Format requirements	Public Counsel recommends against a blanket requirement that copies of non-Washington authorities cited in briefs be furnished to the Commission when briefs are filed.	Staff agrees to eliminate this as a blanket requirement, but amends the draft rule so as to retain the presiding officer’s flexibility to require it in some cases.
480-07-400(1)(c)	Discovery- General Definitions	Qwest recommends edits to harmonize response time-frames for record requisitions and bench requests.	Staff’s review of this rule, and the related rule at 480-07-405, based on these comments, has resulted in several edits that include harmonizing the time-frames for responses as recommended.
480-07-400(2)	Discovery When discovery available	ICNU proposes to add a new subsection (2)((b)(iv) providing that discovery, in addition to discovery via subpoena, will be available in ‘any complaint	Staff accepts the proposal, in concept, but implements the change by editing subsection (2)(b)(iii). Staff sees no need to identify violation of a specific organic statute.

		proceeding regarding allegations of unjust or unreasonable rates or other illegal practices, including any alleged violation of RCW 80.28.'	
480-07-405(6)	Discovery— Data Requests, record requisitions, and bench requests Objections	ICNU recommends that objections to providing a full response to a data request be filed five days before any response is due, as provided in an earlier draft of this rule.	The prior draft produced a strong negative reaction from a number of interested persons who urged that requiring objections separately from and earlier than responses would cause confusion and unnecessary work. Considering these earlier comments, Staff remains persuaded that the approach in the current draft, which reflects the current rule and practice, is preferable.
480-07-423	Discovery- Protective Orders- Submission Requirements	Public Counsel expresses concern about the 'increased use of highly confidential protective orders' and suggests specific edits to raise the standard for obtaining the right to make such designations. Qwest comments on the difficulty of adequately defining the type of information that might require highly confidential treatment.	Staff agrees with these comments that the standards for, and use of, the "highly confidential" designation need to be clarified. Staff has edited the draft rule consistent with the comments received. Under the revised draft, parties that seek highly confidential status for information will have an opportunity, and an obligation, to explain the need for such heightened protection from disclosure.

480-07-460(2)	Prefiled testimony	Public Counsel recommends adding a subsection to impose procedural requirements when one witness proposes to adopt the testimony of another. Specifically, Public Counsel suggests notice, opportunity for objection, and leave from the Presiding Officer for good cause shown.	Staff does not accept this recommendation. When illness, emergency, accident, the passage of time and changes in employment, or other factors prevent the original scheduled witness from appearing, it is necessary to accept a stand-in or bar the testimony from the proceeding. Existing procedural options (i.e., a motion to strike) provide adequate procedural protections if a proposed adoption of testimony is perceived to cause prejudice.
480-07-470(4)	Summary of Public Counsel	Public Counsel recommends editing this subsection to provide that Public Counsel may state its position on the issues.	Staff concludes that this subsection should be clarified to provide both that statements by Public Counsel and other parties are optional in the Commission's discretion, and that if statements are allowed, they may include statements of position.
480-07-470(12)	Redirect examination	PacifiCorp recommends that this subsection be clarified by stating more plainly that redirect examination is limited to issues raised during cross-examination.	Staff agrees to the proposed clarification.
480-07-505	General rate proceedings	Public Counsel again proposes addition of another subsection to	Staff remains of the view that the Commission should not preclude consideration of proposals

		<p>preclude consideration of any proposal that would qualify as a general rate case filing if it were filed under RCW 80.04.130, unless it is so filed.</p> <p>Public Counsel also recommends that a new criterion be added to include within the definition of “general rate increase” any request that “would increase basic residential or business flat-rated local rates by 3 percent or more.” Public Counsel argues that this is a clarification to the rule, the need for which became apparent due to a dispute that arose in a recent case.</p> <p>ICNU suggests adding a new subsection to express the Commission’s discretionary power to “require that any filing by a regulated company for an increase in rates be subject to the procedures and protections of a general rate case.”</p>	<p>that arise in non-traditional settings, such as settlement discussions, so long as equivalent notice and opportunity to participate is given to the affected public and all potential parties.</p> <p>Staff considered this recommendation in conjunction with ICNU’s suggestion to add a new subsection regarding Commission discretion to require general rate proceeding filing and process requirements in connection with any proposal to increase rates. Staff incorporates ICNU’s proposal, with slight modification, to address both recommendations.</p>
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480-07-510(1)	General rate proceedings- testimony and exhibits	Public Counsel recommends adding language to require service of testimony and exhibits on Public Counsel at the same time these are filed with the Commission.	Staff accepts this recommendation.
480-07-510(3)	General rate proceedings- workpapers	<p>PacifiCorp recommends that the requirement to file information concerning affiliated transactions be limited to correspond to the periodic reports that will be required under the rules being developed in the Docket No. A-021178 rulemaking, with the additional requirement that such information be supplemented through the end of the test period.</p> <p>Puget Sound Energy expresses a similar concern and comments that the current draft includes vague language requiring information about “every transaction . . . that directly or indirectly affects the proposed rates.” PSE recommends</p>	Staff accepts these comments in principle, but also remains concerned that the potential importance of affiliated transactions in general rate case proceedings should be addressed in the filing requirements. Staff believes that adopting PacifiCorp’s proposed language, modified to cover all industries, and to require that affiliated transactions that <u>materially</u> affect proposed rates be identified, addresses both the companies’ concerns and Staff’s need for this information at the outset of a general rate proceeding.

		deleting subsection (3)(f) from the draft rules.	
480-07-700 and 480-07-710	ADR Mediation	Public Counsel recommends that the rules should clarify that settlement judges will not later adjudicate in a proceeding. Public Counsel recommends that the rules should include language to the effect that partial settlements are disfavored.	Staff accepts Public Counsel's recommendation to clarify that settlement judges will not later serve as adjudicators, absent express waiver by all parties. This is the same as for mediators and facilitators. A provision is added to 480-07-700(4)-ADR Guidelines, to make this clear. Staff does not accept this recommendation. Partial settlements are allowed and the procedural rules should not limit the potential usefulness of this process by suggesting it is disfavored.
480-07-875	Amendment, rescission, or correction of order	ICNU recommends that the notice requirement in this rule be expanded to include Public Counsel and intervenors.	Staff accepts the concept of broader notice and edits the draft rule to provide for notice to all parties in the underlying proceeding.
480-07-900	Open public meetings	Northwest Energy Coalition and Public Counsel recommend that the agenda rule expressly provide that the agenda will be distributed by mail or email to any party who requests such service.	Staff accepts this recommendation to the extent it reflects current practice and technical feasibility. Currently, anyone may request to be included on a mail service list. Persons who request the agenda by email are directed to the Commission's web page where the agenda is posted. This is the favored means for persons to obtain the agenda, consistent with the general

			trend toward a more paperless office environment. In the future, the agenda will be available as part of an electronic subscription process that will use email delivery. However, that project is still in the development phase.
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