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October 23, 2014

SENT VIA EMAIL

Steven V. King
Executive Director and Secretary
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

Re: Procedural Rulemaking (Docket TG-130355)

Secretary King:

On behalf of our solid waste collection clients regulated by the Washington Utilities and Transportation Commission (“the Commission”), Summit Law Group submits the following comments on the revised draft of the Commission’s procedural rules governing communications and establishing general transmittal standards (“the Revised Rules”).

The most significant difference presented in the Revised Rules is with regard to electronic submittal of documents, a change in practice that we commend and support. With regard to specific sections, the following are more detailed comments in the order that they appear in the Revised Rules:

WAC 480-07-125: The contact information does not include the bridge line phone number. It’s not easy to find on the website, either. Unless there is a reason for its omission, we recommend it be added to both locations.

WAC 480-07-140: Converting to submittal of documents by electronic means implicates a number of revisions to this rule. While we support the change, overlaying new provisions onto the organizational structure of the original rule is a bit awkward, and there are a couple of points that could be clarified, perhaps in further revisions or perhaps simply in answer to our comments.

As a general matter, the second sentence in Subsection (1) mandates that all documents submitted for formal filing be submitted electronically. Does this mean that delivery of hard copies is not an acceptable means of formally filing documents? Would the

Commission reject documents delivered by messenger, postal express, or U.S. mail as being improperly filed?

Subsection (2) is the only provision in this rule that addresses hard copy communications in writing, apparently. It seems awkward here, maybe because it immediately follows the mandate for electronically submitting formal filings presented in the last sentence of the previous subsection. Perhaps it would help transition more clearly if it directed persons to “send written hard copy communications other than formal filings and other electronic submittals to the commission...” (The Subsection 2 heading may read more clearly if titled “Where to send written hard copy communications.”) Alternatively, consider moving this information to -125 by adding a new section to the chart identifying the proper “addressee” as “the commission secretary”. This provision is from the original rule, but now that seems to be its only salient point.

Indeed, if WAC 480-07-140(2) is the provision intended to address hard copy communications, it lacks details that are specifically stated for electronic filings, such as when the written hard copy communication would be deemed officially received. For parties who affirmatively choose to file the old-fashioned way, the Revised Rules do not provide the same level of specificity. This Subsection (2) could be either embellished or eliminated; and possibly Subsection 5(c) could then be expanded to cover submission by mail or hand delivery, and not be limited to a hard copy filing that includes electronic disks. See also Revised Rule WAC 480-07-145(2)(d) (discussing receipt of paper documents in adjudicative proceedings).

With regard to cover letters, the information required by Subsection (4) is commonly included in the message transmitting electronic documents. The Commission might consider allowing in Subsection (3) for an email message to function as the cover letter that is required when the documents are submitted through the records center. Communicating through the web portal would still require a cover letter, though.

Consider rephrasing Subsection (5) because the syntax of stating that “electronic submission” means “the commission accepts” oddly equates a noun with a verb. One suggestion: “The commission accepts electronic submission of documents for formal filing if properly transmitted in the manner identified in this Subsection (5), and does not require a paper copy of the documents except as provided in WAC 480-07-145 for confirmatory filing of documents in adjudicative proceedings, and except as provided in WAC 480-07-520 for requests for general rate increases.”

For electronic submission of documents, we urge the Commission to adopt the midnight deadline commonly used by federal and state courts. There is no longer the functional need for requiring submittals prior to 5:00 p.m. if they are sent electronically. Both Subsection (5)(a)(ii) and (b)(ii) should be revised to allow for midnight deadlines.

Our clients have experienced capacity limitations with filing general rate requests, particularly when redacted .pdf versions of confidential documents are included. In that case, filings have been submitted electronically in part, followed by a disk being sent to the records center with the redacted materials. When that happens, what is the date the filing has been officially received? If tariff filings are considered adjudications governed by WAC 480-07-145, then this practice is similar to the confirmatory filing provided the following day that essentially ratifies that the deadline was met when the electronic filing was submitted. This is especially true if the electronic filing included the confidential materials, because the Commission then has all the information needed to commence the rate review – the redacted version is for posting and responses to third-party requests. Deeming the electronic submittal as the date of the filing when it is followed by mailing a disk is consistent with this approach. Indeed, where an electronic filing is properly submitted but the rules demand follow-up of either disks or thumb-drives or even the required number of copies under WAC 480-07-160(c)(ii), the electronic submission should be the date for determining whether a deadline has been met.

In Subsection (5)(d), the additional requirements stated in the table for filing solid waste tariffs refer to Chapter 480-70 WAC, but those rules are in some cases inconsistent with the requirements of Chapter 480-07 WAC. We have operated under the assumptions that the most recent rule would govern, without knowing if that is right or not. It would be helpful to have an agency statement clarifying how to reconcile inconsistencies with older rules, at least until the solid waste rules are themselves revised. Note also that Chapter 480-04 WAC does not refer to RCW 81.77.210, the newly adopted Public Records Act amendment related to solid waste companies. It does, however, apply to any “other provision of the law” that might allow for protection of documents, so that omission is not necessarily problematic.

Subsection (6)(a)(i) prohibits spreadsheets that include “locked, password protected, or hidden cells” without prior Commission approval. The phrasing has been controversial recently. Presumably where the cell is merely stating data that has been derived from another entity’s general ledger or some other source document, and that data is used in the formulas contained in excel work papers, the filing would not run afoul of this rule. That cell would not contain a “locked, password protected, or hidden cell.” We understand this prohibition is intended to restrict hidden formulas only, not data downloaded from another source that is subsequently used in the rate analysis. Please clarify this issue, either in rule text or responsiveness summaries. A shared understanding of what the terms actually mean and how they are interpreted by staff seems to be necessary, at least for the solid waste industry.

In discussing acceptable organization, Subsection (6)(c) of the Revised Rules directs “all files required to meet a single deadline to be submitted at the same time and in the same message.” As previously mentioned, the entirety of the redacted work papers may or may not be capable of electronic submittal, requiring a disk to supplement the filing. That practice

seems to be inconsistent with the letter of this Revised Rule provision. If the cover letter explains that, and if the disk with redacted materials is submitted in accordance with WAC 480-07-145, companies should be permitted to file in that manner, even though the two submittals are not presented in the same message or at the same time. Please clarify that point, and also the effect of the requirement to submit six hard copies has on deadlines.

WAC 480-07-141: The Commission is to be commended for recognizing the need for a threshold determination of compliance for filings. The Revised Rule presents a workable framework, and we just have a few suggestions for improvement. For one, Subsection (2) states that the Commission will notify the person about “material areas of compliance” but we suggest that requiring “substantial compliance” might be a standard that is more commonly understood. Either way, we appreciate having some flexibility.

It is not clear, however, what effect receiving a notice of opportunity to correct noncompliance would have on deadlines. The filing party should have a chance to fix deficiencies that will preserve the originally filed deadline. The Revised Rule is silent on this point. By stating that the filing will not be rejected for immaterial deficiencies, the rule infers that the original filing date will be maintained. Consider allowing flexibility on this even if the deficiency is more significant – reasonable minds may differ on what is “material” and both companies and staff may in some cases agree that the deficiency can be corrected without losing the deadline if it’s not a fatal omission.

WAC 480-07-145: We commend the Commission for suggesting the compromise of permitting electronic filings in adjudications to satisfy deadlines so long as a “confirmation” hard copy is received by close of business the next business day. Having taken that step, we recommend considering that confirmation be satisfied by properly placing the hard copy in the mail. In other words, if the party serves the confirmatory filing properly on the day the electronic filing is submitted, then it matters less when the hard copy is received at the Commission’s offices. Even if that is not what the Revised Rules demand in general adjudicative filings, certainly parties in litigation should still be allowed to agree to that method.

This rule presumably applies to tariff filings as acknowledged in Subsection (7), but we suggest the submittal procedures addressed in these Revised Rules could be further enhanced by devoting a specific provision to initial filings for general rate requests. They are formal filings, and they are technically considered “adjudicative” under the Administrative Procedures Act. Yet documents submitted in the filing of rate requests are treated differently from those in other quasi-judicial matters, until the tariff docket is suspended and the hearing procedures commence. Tariff filings are not like the other documents identified as applications for adjudication under WAC 480-07-305. All of the others require an adjudicative hearing to reach resolution but tariff filings are frequently resolved through the

audit process and presented to the Commissioners at an open meeting. A general rate request is not really a “pleading” at all, as that term is commonly understood. They are more vulnerable to filing deficiencies for which an opportunity to make corrections is justified, partly because they are more likely to contain confidential materials.

Furthermore, under current regulations a rate request could not comport with the electronic filing process established by both this section -140 and -145. Hard copies of work papers are required in the regulatory provisions governing what must be provided to initiate a rate request. See WAC 480-07-520(4) (paper copies of work papers must be submitted). See also WAC 480-70-326 (tariff filings for solid waste companies may be submitted only “in person, by mail, or by telefacsimile”). We would certainly support eliminating the need for hard copies of work papers by revising those two rules accordingly – and indeed these days auditors tend to want the electronic work papers anyway. Even so the ability to square a tariff filing with WAC 480-07-140 and -145 is frequently unnecessarily challenging, and this rule presents an opportunity to address that situation. Work papers are not posted on the Commission’s website.

In any event, the provisions of WAC 480-07-145(2) should grant more leeway for tariff filings. For instance, as noted previously: (a) the 5:00 deadline for electronic filings should be eliminated in favor of a midnight deadline; (b) the hard copy as well as the original and six copies should be merely confirmatory of the electronic filing date by reference to having a proper post-mark on the day the electronic filing was made, and (c) for submissions exceeding size limitations, the electronic filing should be the one that determines whether any deadlines have been met, if the disk is placed in the mail that day, instead of requiring the disk to be received on the due-date.

In discussing simultaneous delivery to all parties and the presiding officer in Subsection (2)(c), please consider imposing a deadline of “delivering” the email on the deadline date, since the sender cannot necessarily control the ability for the message to be actually received at the destination. The receiving system may have functional limitations or technical difficulties that the sending party might not know about until after the deadline has passed. Also, how would this rule apply to a party who does not have email? Can the simultaneous delivery be accomplished by properly serving the document?

WAC 480-07-150: Under Subsection (5)(b), we are unclear the circumstances under which the Commission would determine whether to serve documents electronically. We submit that neither the Commission nor any other party should be able to initiate a complaint proceeding by electronic filing. Whether that type of service is governed by this subsection or by Subsection (7), we continue to urge the Commission to use process service to a regulated entity’s registered agent when serving a complaint.

WAC 480-07-160: Our industry is now subject to the same protections as some other utilities for confidential information, under RCW 81.77.210. We do not have a history of compliance with this rule governing submittal of confidential documents, but we understand that the Revised Rules are not intended to change the existing practices, just clarify some points. We have just a few comments.

First, the prior draft rule revision actually included a method for submitting documents that are not within the statutory exemptions created under Titles 80 and 81, but nonetheless arguably within the scope of another exemption in Chapter 42.56 RCW. That provision is gone now, but there still may be occasions to utilize another exemption from production under the Public Records Act itself and so we think it should be re-inserted.

Subsection (4) refers to a filing that is not in compliance with these procedures, but is silent about how long the Commission would have to determine whether the filing was deficient or not. Would WAC 480-07-141 of these Revised Rules also apply to confidential filings? So, after five days, then the sender could safely conclude it was properly filed? Also, this subsection says that failure to comply will result in waiver of any claim for confidentiality – is that only true if the deficiency is material? Can substantial compliance save confidentiality? Can an immaterial deficiency be corrected within a certain time period and preserve confidentiality? Would a filing deficiency prevent asserting confidentiality for the entire filing, or just the specific information that was improperly prepared?

In discussing the process for responding to requests for confidential information, Subsection (5)(b)(i) should allow for the Commission to issue the notice of a request two days after the Commission and the request have failed to agree on a means of responding to the request that avoids disclosure. This gives the Commission time to resolve the request, even though it may have located the documents and determined that they contain information claimed to be confidential, which as currently written is when the two-day clock starts regardless of discussions between the records center and the requester.

WAC 480-07-175: This rule is new, and ignores some practical protections for the companies. The request for review should not be “at any and all times” without limit, and should instead be “following reasonable notice and without unduly disrupting the business operations” or something along those lines. Also, unlimited production of copies should not be permitted if it is unduly burdensome. As we have articulated previously, our clients welcome on-site inspection of documents during the auditing process. We oppose a rule that suggests we have the burden of making copies of any and all documents, regardless of how many and regardless of relevance.

Thank you for considering our comments. They are, admittedly, picayune in some respects. Procedural rules of this nature invite focus on the details. Overall, we commend the Commission for its efforts, and we hope our comments are received in the context of that

Steven V. King
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overarching compliment. It is easier to focus on minutiae when the general, arguably more important, procedures are so clearly laid out.

Sincerely,

SUMMIT LAW GROUP PLLC

A handwritten signature in black ink, appearing to read "Polly L. McNeill". The signature is written in a cursive, flowing style with a prominent initial "P" and a long, sweeping underline.

Polly L. McNeill