

Agenda Date: September 24, 2003
Item Number: C1

Docket: A-010648

RE: **Rulemaking: chapter 480-04 WAC—Public Access to Information and Documents, and chapter 480-09 WAC-- Procedure**

Staff: Dennis J. Moss, Review Judge (Lead; Administrative Law Division)
Glenn Blackmon, Assistant Director Telecommunications (Regulatory Services Division)
Karen Caillé, Administrative Law Judge (Administrative Law Division)
Paul Curl, Deputy Director (Regulatory Services Division)
Vicki Elliott, Assistant Director (Consumer Affairs)
Graciela Etchart, Utility Rate Research Specialist (Regulatory Services Division)
Nicolas Garcia, Policy Specialist (Policy Research Office)
Kathy Hunter, Records Center Manager (Records Center)
Jeffrey Showman, Knowledge Manager (Policy Research Office)
Tim Sweeney, Public Outreach Coordinator (Public Affairs)
Mary Tennyson, Senior Assistant Attorney General (Office of the Attorney General)

Recommendations:

Direct the Staff to prepare a Rule Adoption Order for Commissioner's review to adopt revisions to chapter 480-04 WAC, the Commission's rules governing public access to information and records, and to repeal and replace the Commission's procedural rules (chapter 480-09 WAC) with new chapter 480-07 WAC, all to be effective on January 1, 2004.

Direct the Secretary to file a Supplemental Notice of Proposed Rulemaking (Supplemental CR-102) with the office of the Code Reviser in Docket No. A-010648 proposing revisions to chapters 480-14, 480-15, 480-30, 480-31, 480-51, 480-60, 480-62, 480-66, 480-70, 480-75, 480-80, 480-90, 480-92, 480-100, 480-110, 480-120, 480-121, and 480-140 WAC that will update cross references to revised chapter 480-04 WAC, and to the Commission's procedural rules in new chapter 480-07 WAC.

Discussion:

On August 20, 2003, the Washington Utilities and Transportation Commission (Commission) filed with the Code Reviser a Notice of Proposed Rulemaking (CR-102) to reorganize, revise, repeal, and adopt rules governing the conduct of business before the Commission, including rules governing formal proceedings. The Notice was published on September 3, 2003, at WSR #03-17-100.

The proposed rules are the product of Commission Staff's comprehensive review of the Commission's rules governing public access to information and documents, and the agency's procedural rules (*i.e.*, chapters 480-04 and 480-07 WAC), focusing on three areas:

- Rules Organization (logical grouping/order; use of subheadings)
- Clear language (consistent style and grammar)
- Substantive changes (new rules, substantive changes to existing rules)

Staff for this project included representatives from the Administrative Law Division, Policy Research Office, Regulatory Services Division, Public Affairs Division, Records Center, Consumer Affairs Division, and Office of the Attorney General. This structure ensured that a variety of perspectives from within the Commission were represented in the rulemaking process. Staff from throughout the Commission were regularly consulted as the rulemaking process moved forward.

During the CR-101 phase, the Commission received several rounds of written comments from persons who regularly conduct business with the Commission. In addition, the Commission held several public workshops to discuss various draft revisions to the existing rules. Both the written and oral comments received were extremely useful to Staff in revising chapter 480-04 WAC and in drafting a new chapter 480-07 WAC to replace existing chapter 480-09 WAC.

A further opportunity to file written comments was provided upon publication of the CR-102 Notice. Commission Staff undertook additional review of the proposed rules and considered all comments, as discussed below.

Comments

The Commission received written comments concerning the rules proposed via the CR-102 from Puget Sound Energy ("PSE"), Qwest, AT&T Communications of the Pacific

Northwest, Inc. (“AT&T”), and Public Counsel. The comments generally express support for the revisions embodied in the proposed rules, which are attached as Appendices A and B to this memorandum.

Both PSE and Qwest comment favorably on the rules as published in the CR-102 Notice. Qwest, for example comments favorably on the Commission’s “collaboration with various stakeholders.” PSE comments that “the new rules balance the interests of the various stakeholders in Commission processes.” Neither PSE nor Qwest propose any further changes at this time.

AT&T proposes an additional change to WAC 480-04-090(5)(a) that would require a person requesting public records to disclose the identity of their “employer and any business or commercial affiliations,” in addition to the existing requirements in WAC 480-04-090, that requesters give their name, address, and telephone number.” AT&T comments that this change would “assist the Commission and companies in assessing whether confidential, proprietary or trade secret information are being sought by an individual or entity that might misuse such information.”

Staff recommends that the Commission not adopt this proposed change. RCW 42.17.270 provides that "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspections and copying would violate *RCW 42.17.260(5)." The footnote to the preceding quote updates the statutory reference to RCW 42.17.260(9), which is the section that says agencies do not have authority to "provide access to lists of individuals requested for commercial purposes--we cover this in WAC 480-04-090(5)(g). In addition, the class of information that concerns AT&T—“confidential, proprietary, or trade secret information”—is governed by separate statutes and rules (*e.g.*, RCW 80.04.095 and the exemption provisions in chapter 42.17 RCW). These statutes and rules provide processes to protect persons from having their confidential, proprietary, or trade secret information disclosed to any other person, again regardless of the requesting party’s identity or business affiliations.

Public Counsel comments that it has a continuing concern “about the level of confidentiality asserted by companies subject to Commission jurisdiction and the increased use of highly confidential protective order amendments” in adjudicative proceedings. Public Counsel states that it is generally satisfied with the proposed rule language (*i.e.*, WAC 480-07-420 and 423), but requests that an additional sentence be added at the end of the introductory paragraph of section 423 as follows:

WAC 480-07-423 Discovery—Protective orders—Submission requirements for documents. Protective orders entered in individual proceedings may allow for parties to designate portions of documents exchanged during discovery or submitted during a proceeding (e.g., by filing, or by offering as an exhibit) as “confidential” or “highly confidential.” In general, parties must strictly limit the amount of information they designate as confidential or highly confidential. Designation of documents as highly confidential is not permitted under the commission’s standard form of protective order, and may only occur if the commission so orders. In entering such a protective order the commission shall not restrict the access of the attorney general to such records or portions of records.

According to Public Counsel, this would capture in rule language Public Counsel’s “[general satisfaction] in proceedings where Commission Staff and Public Counsel receive similar treatment, as has been the case in many recent highly confidential protective order amendments.”

Staff recommends that the Commission not adopt this proposed change. It is appropriate in many proceedings to treat Commission Staff and Public Counsel similarly, or identically, with respect to restrictions on access to highly confidential information. However, in some adjudicative proceedings, for example, where Public Counsel elects to co-sponsor one or more witnesses with another party (e.g., an organization whose members include competitors or customers of a regulated company), or otherwise proceed in concert with such a party, the Commission should retain its discretion to impose appropriate protections for confidential information that may be shared during discovery or in another phase of a proceeding.

Public Counsel proposes the following changes to proposed WAC 480-07-505 – General rate cases—Definition:

(4) ~~Commission discretion~~ Other filings. The commission ~~may~~ shall require that any filing or proposal by a regulated company to increase rates for any customer class by 3% or more, or to restructure rates, is subject to the procedures and protections of subpart B of these rules.

Public Counsel comments that proposed subsection 4, which explicitly sets forth that the Commission may require a complete set of general rate case supporting papers when any filing or proposal is made to increase rates for any customer class, is an improvement in the procedural rules. Public Counsel, however, “believes that this should be required in every case where a party to a proceeding before the Commission would seek to raise rates for any customer class by 3% or more.”

Public Counsel presented this same comment during the CR-101 phase of this rulemaking process. The Commission 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. The Commission incorporated ICNU’s proposal, with slight modification, as WAC 480-07-505(4) to address both recommendations.

Staff recommends here that the Commission not adopt Public Counsel’s more prescriptive language. Public Counsel will be able to ask the Commission to use its discretion in any case where Public Counsel believes a regulated company seeks to raise rates for any customer class by 3 percent or more, and the Commission can exercise its discretion in appropriate cases to require a complete set of general rate case supporting papers.

Staff proposed change from the rule language included in the CR-102

- 1 After further internal review of the proposed rule text noticed at WSR #03-17-100, Staff recommends one change:

WAC 480-04-090—Copying and service charges.

- 2 Subsection (2), as included in the CR-102, is deleted in its entirety and replaced by the following language:

The commission's schedule of charges for copies, except as provided in WAC 480-07-145 (3) (b), is published in Administrative Policy 1.60 c, which is available from the commission's website or by contacting the commission's records center. Out of state customers and governmental agencies are not charged sales tax.

This change is essentially editorial. It provides the same information by reference as previously incorporated into the rule language, but has the advantage that the rule will not need to be revised each time an item in the price list published in Administrative Policy 1.60c changes.

Effective Date

Staff recommends an effective date of January 1, 2004, for two principal reasons. This will allow time for the supplemental CR-102 process, if authorized, to be completed. Staff believes this is a necessary step so that there will be no hiatus in the implementation of these complementary rule changes. In addition, this will allow time for the Commission to conduct one or more workshops with company representatives, counsel, and support personnel, to promote a smooth transition to the new rules.

Conclusion

Staff recommends that the Commission direct the Staff to prepare a Rule Adoption Order for Commissioner's review to revise chapter 480-04 WAC, the Commission's rules governing public access to information and records, and to repeal and replace the Commission's procedural rules (chapter 480-09 WAC) with new chapter 480-07 WAC. Staff also recommends that the Commission direct the Secretary to file a Supplemental Notice of Proposed Rulemaking (CR-102) with the office of the Code Reviser in Docket No. A-010648 proposing revisions to chapters 480-14, 480-15, 480-30, 480-31, 480-51, 480-60, 480-62, 480-66, 480-70, 480-75, 480-80, 480-90, 480-92, 480-100, 480-110, 480-120, 480-121, and 480-140 WAC that will update cross references to revised chapter 480-04 WAC, and to the Commission's procedural rules in new chapter 480-07 WAC.

Attachments: Appendices A, B

APPENDIX A
REVISED CHAPTER 48-04 WAC

APPENDIX B
PROPOSED CHAPTER 480-07 WAC