BEFORE THE WASHINGTON UTILITIES AND

TRANSPORTATION COMMISSION

A-130355

In the Matter of Rulemaking to Consider Possible Corrections and Changes in Rules in WAC 480-07, Relating to Procedural Rules	)	COMMENTS OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES REGARDING PROPOSED CHANGES TO WAC §§ 480-07-300 – 498

I. INTRODUCTION

1 On June 18, 2015, the Washington Utilities and Transportation Commission (the "Commission") served notice that it would receive comments regarding proposed revisions to Part III, Subpart A of Washington Administrative Code Chapter 480-07. The Industrial Customers of Northwest Utilities ("ICNU") appreciates the opportunity to participate in the ongoing series of workshops and written comment submissions scheduled by the Commission in this docket, and submits these Comments regarding certain of the Commission Staff's proposed revisions.

II. COMMENTS

2 ICNU supports the efforts of the Commission and Commission Staff to streamline the rules of general applicability in adjudicative proceedings before the Commission. Staff's proposed draft rules include a number of positive changes, including the simplification and clarification of wording and terminology usage in key places. More particularly, proposed revisions such as those suggested for continuance and suspension procedure (WAC § 480-07-

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385(2)), captioning (WAC § 480-07-395(1)(c)(i)) and exhibit numbering (WAC § 480-07-460(2)(a)) are just a few examples of the very practical, helpful changes that should benefit all parties in normal practice before the Commission.

3 While ICNU may have further comments, and reserves the right to respond to other parties' comments, it provides the following additional suggested edits to a limited set of Staff's proposed draft rules.

480-07-300(2)(b)

4 As an example of adjudicative proceedings before the Commission, Staff proposes: "Suspended tariff filings seeking a general rate increase." ICNU believes it would be appropriate to remove "general" from this paragraph—i.e., "Suspended tariff filings seeking a rate increase." Such wording would still include a general rate case suspension, but would not exclude any other suspended proceeding involving a rate increase request. Such a change may help ensure that any new or expanded rate case varieties are treated with comparable due process protections as have traditionally been afforded to general rate cases.

480-07-305(3)

5 In enumerating pleadings which constitute applications for adjudicative proceedings, Staff proposes to delete the explicit reference to general rate increase filings from paragraph (d). ICNU is concerned by the potential due process implications flowing from an interpretation that a general rate increase filing, by itself, may no longer constitute an express application for adjudicative proceedings under this subsection. Moreover, the deletion of the explicit reference to general rate increase filings in this subsection seems inconsistent with

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Staff's proposal in WAC § 480-07-300(2)(b), which specifies that a general rate increase filing *is* an adjudicative proceeding.

6 That said, paragraph 305(3)(b) of the draft rules provides that petitions for Commission action *do* constitute adjudicative applications, so long as the relief requested: 1) "requires adjudication"; or 2) the Commission determines that "issues presented should be resolved through adjudication." To allay any due process concerns, and to ensure that sections 300 and 305 are not inconsistent, ICNU suggests the following additional sentence to the end of paragraph (3)(b): "Nonexclusive examples of issues that the commission has determined should be resolved through adjudication include tariff filings seeking rate increase requests."

480-07-305(4)

7 In paragraph (e), Staff proposes that authority be given to deny an adjudicative request based upon a determination that the subject matter "would be better addressed informally." While ICNU supports informal resolutions, such ends are not always possible—hence the need for adjudicative process in the first place. The authority to positively deny an adjudicative request on these grounds could place the requesting party in an untenable position—e.g., a determination that a request is best resolved informally, while other parties refuse to address issues forming the subject matter of the request in good faith. This could require a requesting party to assume the unnecessary expense of an additional administrative review process in order to challenge the denial. ICNU suggests that the "better addressed informally" condition be removed from the draft rules.

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480-07-345(2)

8 Subject to clarification, ICNU supports Staff's revisions to this subsection as providing a welcome simplification to customary practice before the Commission. The draft rules appear to require a separate written notice of appearance filing *only* "if the attorney or authorized representative has not previously appeared through the party's initial pleading."

9 Presently, customary practice for an intervening party involves separate, initial filings of both a petition to intervene and a notice of appearance, thereby requiring the filing of duplicative information. ICNU interprets Staff's proposal as eliminating the need for a separate notice of appearance filing for attorneys appearing via a petition to intervene under WAC § 480-07-370(1). ICNU requests that its interpretation of Staff's revisions to this section be confirmed or clarified.

480-07-355(1)(c)(v)

10 Staff proposes to delete the requirement in this subparagraph that "[a]ttorneys and other party representative must separately file their notice of appearance as required by WAC 480-07-345(2)." ICNU supports this deletion, based upon the understanding that it is intended to complement Staff's proposed revisions to WAC § 480-07-345(2), as discussed above, thereby eliminating the need for a separate, duplicative notice of appearance filing in conjunction with the filing of a petition to intervene.

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480-07-370(1)(c)(i)

11 The draft rules delete the express identification of "petitions to intervene" in this subparagraph as a definitional example of "petitions" constituting "original pleadings." ICNU does not oppose the removal of all specific examples corresponding to "original pleadings" per se; however, ICNU has concerns about the potential interpretive repercussions that such a deletion could have in relation to the proposed terms of WAC § 480-07-345(2) in the draft rules.

12 As noted above, since attorney appearances are already being made through an "initial pleading," ICNU understands that Staff's proposed revisions to WAC § 480-07-345(2) eliminate the need for a separate, duplicative notice of appearance filing in conjunction with a petition to intervene. But, removal of a "petition to intervene" as an explicit example corresponding to "original pleadings" creates an ambiguity that a petition to intervene may not be considered an "initial pleading" under WAC § 480-07-345(2), and therefore, a separate notice of appearance remains necessary for all intervenors in a proceeding. To avoid confusion, ICNU proposes the addition of a clarifying clause as underlined: "… all original pleadings that seek relief<u>, including petitions to intervene,</u> and all pleadings that seek relief from a commission order are petitions."

480-07-400(2)(b)

13 ICNU is uncertain as to why Staff has proposed to delete WAC § 480-07-410 (regarding depositions) as an express method of discovery available to parties in this paragraph. It may be that Staff considers depositions to be a discovery tool that is always available to a party, akin to subpoenas. If that is the case, then the rule should make this explicit by including

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depositions under paragraph (2)(a). If that is not Staff's intention, then ICNU proposes that section 410 be added back to the list of available discovery methods in this paragraph, especially as the draft rules do not delete the 410 depositions section. Depositions are an important tool for discovery and may be the only way to access certain information in some cases.

480-07-410(1)

14 In order to prevent unnecessary constraints on the discovery process, ICNU suggests that the original text of this subsection be retained in current form, which requires only that a presiding officer find "that the person appears to possess information significant to the party's case."

15 Staff's proposal would require a finding that the information is not merely significant, but "necessary"—a standard which seems excessive and inconsistent with the traditionally broad scope of discovery fundamental to agency practice. Moreover, the proposal for another additional constraint, i.e., proving "the probative value of the information outweighs the burden on the person proposed to be deposed," would force requesting parties to conclusively demonstrate the value of "necessary" information before ever hearing it. ICNU strongly believes that this would create an unfair, if not impossible, burden that should not be established in the Commission's rules.

480-07-410(4)

16 In this subsection explaining the permissible use of depositions, the draft rules delete the sentence: "A party may use a deposition to impeach a witness." If Staff has proposed this deletion in the understanding that this explicit illustration is unnecessary, given that use of a

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deposition to impeach a witness is a "lawful purpose" already provided for in the preceding sentence, then ICNU could support the revision as a means to eliminate unnecessarily duplicative text. Otherwise, ICNU suggests that the sentence be retained.

480-07-420(2)(a)

17 ICNU proposes an additional sentence at the end of Staff's newly proposed paragraph (a) concerning the protective order amendment process for highly confidential information: "The party seeking highly confidential designation bears the burden of proof that the commission's standard protective order is insufficient to protect the information." ICNU believes this to be consistent with existing practice, given that the Commission has, in some cases, ruled that parties failed to demonstrate that certain highly confidential designations were warranted, or that the Commission's standard protective order and standard confidential designation provided insufficient protection.[1/] The express assignment of the burden to the requesting party will eliminate any future controversy.

480-07-460(1)

18 Staff proposes a minor change to the last sentence in the opening paragraph of this subsection, according to the following underline: "In general rate increase proceedings … the petitioner must prefile its proposed direct testimony and exhibits at the time it files its rate increase request, in accordance with WAC 480-07-510." To ensure consistency in the event that quasi-general rate increase mechanisms are established in the rules—mechanisms which also necessitate prefiled testimony and exhibits (e.g., expedited rate filings)—ICNU proposes the

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[1/] E.g., Docket UT-023003, 19th Suppl. Order (Dec. 18, 2003).

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following: "In ~~general~~ rate increase proceedings … the petitioner must prefile its proposed direct testimony and exhibits at the time it files its rate increase request, in accordance with commission rules ~~WAC 480-07-510~~."

480-07-460(1)(a)(iv)

19 In the interests of further clarity and specificity regarding the formatting requirements for revised filings, ICNU proposes the addition of an express specification in this subparagraph, stating that only the *individual* revised pages of a filing need to be physically filed and served. For instance, if a witness originally filed a 54-page piece of testimony, and then needed to make a single revision to page 32, it would be unnecessary and wasteful to file and serve multiple reprints of entire testimony versions, especially in a large proceeding in which numerous parties need to be served. While complete versions of revised filings can be easily filed and served electronically, this clarification and specification concerning paper copies will avoid any future controversy.

480-07-460(2)(a)

20 In recent proceedings, parties have been directed by the presiding officer to file revised document pages with the addition of a lowercase "r" included within the Commission's exhibit numbering convention.[2/] ICNU suggests that such a convention be formally added to this rule paragraph, if it will continue to be required or preferred by the Commission or presiding officers. If the new "r" convention is adopted, ICNU also proposes that the illustrative table in subparagraph (a)(iv) be expanded to include an example, e.g., "JQW-5HCTr."

[2/] E.g., Dockets UE-140762 *et al.*, Notice Requiring Refiling of Revised Exhibits (Nov. 14, 2014).

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480-07-460(3)(a)(ii)

21 To avoid confusion (and to expressly permit what is already common practice), ICNU proposes the addition of the following sentence at the end of subparagraph (ii): "The presiding officer may assign cross-examination exhibit numbers to avoid duplicative numbering when multiple parties are filing cross-examination exhibits for the same witness." In a general rate case with numerous parties, for instance, the presiding officer will typically receive exhibit lists and then assign cross-examination exhibit numbers for each proposed exhibit.

480-07-460(4)

22 The addition of a final clause to the last sentence in this subsection would further clarify and complement the proposed revision to subparagraph 460(3)(a)(ii), above. ICNU suggests the following underlined addition: "The presiding officer will establish in a prehearing conference order the deadline for this filing, which may precede the deadline for the filing of cross-examination exhibits so that the presiding officer may assign cross-examination exhibit numbers."

480-07-495(2)(a)

23 In order to effectuate and maintain consistency with Staff's proposed text in the second sentence of WAC § 480-07-490(2), ICNU suggests the addition of a new subparagraph (iv) in this paragraph specifying circumstances under which the Commission may take official notice. Tracking Staff's proposed text verbatim, the new subparagraph (iv) would state: "Records contained in government websites or publications or in nationally recognized reporting service publications that are in general circulation and readily accessible."

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III. CONCLUSION

24 ICNU appreciates the opportunity to submit these Comments regarding the proposed Rules of General Applicability for Part III, Subpart A of WAC § 480-07. ICNU looks forward to further participation in workshops or comment periods addressing these chapter sections.

Dated this 20th day of July, 2015.

Respectfully submitted,

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