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July 20, 2015

SENT VIA WUTC WEB PORTAL
Mr. Steven V. King
Executive Director and Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Pk. Dr. S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Re: *Rulemaking to Consider Corrections and Changes in Rules in WAC 480-07, Relating to Procedural Rules,* Docket A-130355

Dear Mr. King:

Enclosed please find, for electronic filing in the above-referenced docket, Public Counsel's Fourth Comments in response to the Commission's Notice of Opportunity to File Written Comments, dated June 18, 2015.

Sincerely,

Lisa Gafken
Assistant Attorney General
Public Counsel Unit
(206) 464-6595

LWG:cjb
Enclosures

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

Rulemaking to Consider Possible Corrections and Changes in Rules in WAC 480-07, Relating to Procedural Rules.	DOCKET A-130355

FOURTH COMMENTS OF PUBLIC COUNSEL

July 20, 2015

I. INTRODUCTION

1. Pursuant to the Commission's Notice of Opportunity to File Written Comments, dated June 18, 2015, Public Counsel submits the following comments regarding the draft procedural rules found in WAC 480-07-300 through -498 (Part III, Subpart A). The comments below are presented in the order that the rule provisions appear in Part III, Subpart A of WAC 480-07.

II. WAC 480-07-305(4)(e) – REVIEW OF REQUESTS TO COMMENCE AN ADJUDICATION

2. WAC 480-07-305(4) addresses the Commission's review of requests for adjudication and identifies when an adjudication will not be commenced. The draft language in WAC 480-07-305(4)(e) states that the Commission will not commence an adjudication when the subject matter is not required to be resolved in an adjudication "or would be better addressed informally or in a different proceeding." Public Counsel believes the flexibility allowed by the proposed language is reasonable, particularly in light of the fact that any flexibility granted in rule is limited by the Commission's authority, as granted by the Legislature. The Washington Administrative Procedures Act provides that adjudication will occur when one is required by law or

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constitutional right. RCW 34.05.413. Hearings are required before the Commission can take certain action, including but not limited to prescribing rates that the Commission determines are fair, just, reasonable, and sufficient (RCW 80.04.130, RCW 80.28.020), assessing penalties via complaint (RCW 80.04.380, RCW 80.04.110), and allowing an alternative form of regulation for telecommunication companies (RCW 80.36.135). Adjudication plays an essential and necessary role in the Commission process. While there may be issues that could be better addressed through informal or different proceeding, Public Counsel believes that the Commission should apply this discretion narrowly and with care.

3. In determining whether to commence an adjudication or some other procedure, Public Counsel urges the Commission to weigh expediency, procedural protections, quality of evidence, and due process concerns.

4. Additionally, depending on how the Commission implements the proposed language, matters could be held on the Open Meeting agenda. As discussed in Public Counsel's comments filed in this Docket on May 17, 2013, uncertainty regarding what is in the agency record, questions about what standards apply, and disadvantage to matters subject to statutory deadlines could occur under those circumstances.[1]

III. WAC 480-07-360 (MASTER SERVICE LIST)

5. The proposed rule provides that the Commission will maintain the master service list in an adjudication, which will be available upon request from the records center and online. When both paper and electronic service will be used, the master service list will be comprised of each party and each party's designated representative for service. The proposed rule also provides

[1] Public Counsel Comments filed May 17, 2013 at ¶¶ 9-11.

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that, when both paper and electronic service will be used, the Commission may compile a separate list of the parties, their designated representatives, and additional persons the parties wish to receive courtesy copies of documents. WAC 480-07-360(2). When electronic-only service will be used, the additional persons parties wish to receive courtesy copies will be included in the master service list, along with the party and the party's representative. WAC 480-07-360(3).

6. Public Counsel recommends that the proposed rule be revised to state that the master service list contain the parties, their representatives, and the additional persons parties wish to receive courtesy copies The purpose for this suggestion is to avoid having two different processes depending on what type of service is used. The courtesy electronic distribution list is a material convenience for the parties, and because the courtesy copies are electronic, the burden is low. Parties often have multiple people within their organizations as well as outside consultants who need copies of documents. To the extent that the intent is to limit the number of paper copies served, WAC 480-07-360(2) can provide that only the party and the party's representative will receive paper copies when such copies are served. Courtesy copies will be provided electronically under WAC 480-07-360(2) (which aligns with current practices in most instances), while including all individuals on the master service list.

7. Additionally, WAC 480-07-360 only addresses Commission service of documents. The rule should also state that parties are required to use the master service list when serving documents, and this requirement should extend to the individuals parties wish to receive courtesy electronic copies. Doing so will ensure consistent adherence to the practice of providing copies to the parties, their representatives, and the persons parties wish to receive courtesy copies.

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Parties seem amenable to providing courtesy copies and generally observe to the practice, but a statement in rule will eliminate party discretion when considering whether to follow the practice.

IV. WAC 480-07-395 (PLEADINGS, MOTIONS AND BRIEFS)

8. The proposed modifications to WAC 480-07-395 align well with current practices, and present minor differences that will be easy to adopt. Public Counsel believes that the revisions provide a useful update to the rule. One such useful update is eliminating the need for a table of contents when a brief is less than 10 pages.

V. WAC 480-07-400 (DISCOVERY)

9. WAC 480-07-400(1)(c)(iii) defines "data request," and the proposed language limits the requests to existing documents. The proposed language states that the Commission will not require parties to create new data, documents, or cost studies without a compelling reason to do so. With respect to cost studies, if a party relies on cost studies, it must be willing to rerun the study using different inputs and assumptions, subject to subsection (5). It is unclear what subsection (5) is as there is no subsection (5) to WAC 480-07-400.

10. The proposed language in WAC 480-07-400(1)(c)(iii) may be acceptable, but Public Counsel has some concerns that require further discussion and consideration. One situation that may cause issues is when a utility presents a new methodology for calculating something in their rate request, for example weather normalization or jurisdictional allocation factors. Parties may request that the calculation be done using the former methodology or a method approved by the Commission for another utility. This type of request should be allowed.

11. Another concern is whether the proposed language limiting discovery to "existing" documents, but specifying an allowance for "cost studies" to be re-run using different

assumptions or inputs may unintentionally exclude the possibility to request re-runs of calculations produced by models used by utilities. The term "cost study" is not defined in the rule. Parties do not always have access to the various models used by utilities, the software components that make the models work, or the expertise to run the models. It is appropriate to ask the utility to run its model using other assumptions or inputs to test the utility's presentation.

VI. WAC 480-07-405 (DISCOVERY – DATA REQUESTS AND BENCH REQUESTS)

12. The proposed language in WAC 480-07-405 requires parties to serve data requests in both the native format and in .pdf. The requirement to serve data requests in .pdf format seems unnecessary. The Commission requires parties to use .pdf format when filing various documents with the Commission, often to preserve the format and eliminate formatting problems associated with opening native format documents on different computers. These issues do not exist with data requests.

13. Parties responding to data requests place the request at the top of their response. To do this, the native format (Word) is useful to allow for cut and paste. It may be possible to cut and paste from a .pdf, but it is preferable to do this from the native format.

14. Parties generally do not send a .pdf version of the data requests. On occasion, parties might include a .pdf version or may only send a .pdf version. When Public Counsel receives .pdf versions of discovery directed to our witnesses, we do not use the .pdf version. Rather, we either use the native format, or if no native format was sent, we request that the party propounding the discovery send the native format.

15. Public Counsel recommends that the language in WAC 480-07-405(2) be modified to remove the requirement that parties serve .pdf versions of data requests.

16. Additionally, the draft language states that parties must not file data requests "propounded to other parties" with the Commission. WAC 480-07-405(2). While Public Counsel does not believe the intent is to limit what evidence parties may use in their presentation – either in pre-filed testimony or in cross examination exhibits – clarity with respect to whether parties may use discovery that they did not send or receive would be appreciated. Without the ability to use discovery that was propounded or received by another party, the amount of discovery may increase as parties ensure that they have access to the information needed to present their cases. This seems to be an unintended consequence given that parties are encouraged to avoid duplication of discovery efforts.

VII. WAC 480-07-420 (DISCOVERY – PROTECTIVE ORDERS)

17. The draft language in WAC 480-07-420(2) regarding highly confidential protective orders is consistent with Washington's strong open government policies. Parties seeking a highly confidential protective order, under the proposed language, will be required to file a motion and show the specific factual and legal basis for the request. Public Counsel believes this is appropriate and views the proposed language favorably.

VIII. WAC 480-07-460 (HEARING – EXHIBITS, CROSS EXHIBITS, EXHIBIT LISTS)

18. Public Counsel appreciates the Commission's efforts to create reasonable standards and encourage uniform practice with respect to exhibits used in adjudication proceedings. The proposed rule, in large part, accomplishes this. There are a few areas in the draft rule that could benefit from further consideration or guidance.

19. With respect to pre-filed testimony and exhibits, as well as cross exhibits, the proposed rule does not specify the number of copies to be filed with the Commission, stating that the

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administrative law judge will prescribe the number of copies to be filed by prehearing conference order. Discussions earlier in this rulemaking supported significantly reducing the number of copies filed with the Commission, recognizing the administrative and environmental burden such copies have. Public Counsel notes that the number of copies required in recent cases have decreased significantly from the Commission's prior practice and views this trend positively. Public Counsel encourages the Commission to explore achieving further reductions in paper copies.

20. WAC 480-07-460(2) provides that witnesses must include a summary of testimony that is greater than five pages in length. It would also be useful if witnesses were required to include a table of contents and a list of exhibits in their testimony. Often, witnesses address multiple topics or multiple topics within a larger topic. A table of contents is useful in identifying the general organization of the witness's testimony as well as in locating a specific section within the testimony. A list of exhibits is a useful summary of the evidentiary support the witness offers in support of the discussion presented in the testimony. The table of contents could be required for testimony greater than five pages in length, but the list of exhibits should be included in all testimony, regardless of length.

21. With respect to cross examination exhibits, the proposed language in WAC 480-07-460(3) provides that parties should number the exhibits beginning with the next sequential number after the last pre-filed exhibit submitted by the witness to be cross examined. While this is one suggestion regarding how to mark cross exhibits, this proposal will likely cause avoidable problems. If two parties wish to cross examine the same witness, they will both begin numbering their cross exhibits with the same number. For example, if the last pre-filed exhibit

for the witness was number 20, both parties wishing to cross the witness will begin their numbering with 21, causing at least two exhibits to be pre-marked with the same number. One way to prevent this is to leave the number blank, while still using the naming convention proposed, for example ABC-___. Once all cross exhibits are identified, they can be numbered in the order that parties will present their cross examination at hearing, and the exhibits can be numbered sequentially accordingly.

22. In a recent case, *In re: Petition of Puget Sound Energy for an Accounting Order Approving Allocation of Proceeds of the Sale of Assets to Jefferson County PUD*, Docket UE-132027, Public Counsel did precisely what is proposed in the draft rule. Public Counsel numbered its cross examination exhibits beginning with the next sequential number after the last number of the pre-filed exhibits for each witness. The exhibits were subsequently assigned different numbers, which caused confusion because copies the Commissioners, parties, and witnesses had copies with different and multiple numbers.

23. Contrast the experience in Docket UE-132027 with the experience in another recent case, PacifiCorp 2014 GRC, Docket UE-140762. In Docket UE-140762, the parties did not assign numbers to their cross exhibits. The administrative law judge circulated a master exhibit list into which the parties listed their proposed cross exhibits. Once the cross exhibits were identified, they were placed in the order that parties were going to present their cross examination at hearing, and the exhibits were assigned sequential numbers. The administrative law judge then circulated the completed exhibit list prior to hearing. While there was some back and forth between the parties of that case and the administrative law judge, the process was efficient and provided for accurate exhibit numbering before the hearing.

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24. Additionally, it is not uncommon for multiple parties to identify the same exhibit to be used during cross examination. Following the process used in the Docket UE-140762 allows for unnecessary duplication of cross exhibits to be eliminated.

25. One issue that could benefit from guidance in the rule, or further discussion between the stakeholders and the Commission, is the effect of a cross examination exhibit not being used or entered into the record. Since the cross examination exhibits will be filed, they will be part of the administrative record. However, if they are not entered into the record at hearing, they are not truly part of the record. Clarity regarding how this situation will be handled is needed.

26. The proposed language in WAC 480-07-460(6) creates a new filing required of parties. The proposed language requires each party to file an errata sheet listing all corrections to pre-filed testimony and exhibits. Public Counsel recognizes that an errata sheet listing all of the corrections or revisions to pre-filed testimony and exhibits would be useful. The errata sheet would be a single source to identify each party's corrections and revisions. The administrative law judge will, under the proposed language, set the deadline for this filing. Public Counsel notes that the errata sheet should be filed late enough in the proceeding to capture the corrections and revisions.

IX. WAC 480-07-470 (HEARING GUIDELINES)

27. The proposed draft deletes WAC 480-07-470(4), which provides that Public Counsel may have the opportunity to describe the major contested issues and Public Counsel's position on those issues during a public comment hearing.

28. During recent public comment hearings in general rate proceedings, the Commission has shown the public a short video describing regulation and the ratemaking process. The video was

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followed by a Commissioner providing a brief summary of the particular proceeding for which the public comment hearing was being held. During this statement, the parties present are introduced. Typically, the parties present are the company, counsel for Commission Staff, and Public Counsel. Public Counsel prepares a handout summarizing issues, and if the hearing occurs after testimony is filed, we include information regarding our positions. This handout has been favorably received as being useful and informative by the public and the Commission.

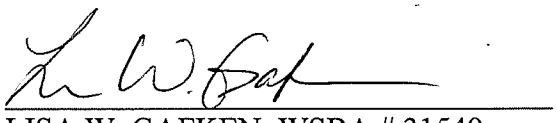
29. Public Counsel believes the current practice of showing the Commission's video followed by a Commissioner's description of the case and introduction of parties is sufficient. Public Counsel will continue to attend and participate in public comment hearings. Public Counsel will also continue to prepare and distribute a written handout.

X. CONCLUSION

30. Public Counsel appreciates the opportunity to submit these comments. While no workshop to discuss the proposed revisions to Part III, Subpart A of WAC 480-07 is currently scheduled, we look forward to further dialogue among stakeholders in this docket. Should a workshop be scheduled, we will attend and will be prepared to discuss the proposed language with the Commission and stakeholders.

31. Dated this 20th day of July, 2015.

ROBERT W. FERGUSON
Attorney General



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