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SENT VIA EMAIL
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Steven V. King
Executive Director and Secretary
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Re: Procedural Rulemaking (Docket A-130355)

Dear Secretary King:

On behalf of our solid waste collection clients regulated by the Washington Utilities and Transportation Commission (“the Commission”), Summit Law Group thanks you for the opportunity to submit the following comments on the revised draft of the Commission’s procedural rules governing adjudicative proceedings (“the Revised Rules”).

One over-arching comment is to suggest that the process for filing general rate requests for solid waste tariffs be set forth in a specific rule explicitly devoted to that particular administrative creature. When our clients file general rate requests, they do not presume that an adjudicative proceeding will ensue. Indeed, even if the filing is suspended at an open meeting, until a notice of prehearing conference is issued, there is no adjudicative proceeding. We understand that other utilities often voluntarily treat a tariff filing as suspended, which is not our industry’s practice. Also, two recent changes have injected additional complexity for which regulatory guidance would be welcome. One is that our industry now has statutory authority to claim that valuable trade information is confidential. The other is that solid waste collection company’s work papers are being posted on the Commission’s website.

Maintaining protections from public record production by properly submitting confidential information is important to our clients. With regard to compliance with submittal requirements for confidential information in the context of a general rate request, the solid waste companies are learning to do it properly – in the initial filing. However, when the filing goes through the audit process, the Commission’s financial analysts pose further questions in the form of informal data requests. The companies typically answer those questions by responsive email. The protections afforded by going straight to adjudication and obtaining a

protective order are not available, and these are not yet formal data requests and answers being provided in discovery. However, they are (or eventually become) public documents. Must those responses also be filed in accordance with the procedures of WAC 480-07-160? Instead of replying to the auditors, are the companies required to file responses to informal data requests through the records center via web portal or email?

The Commission's notification that work papers will be posted on the website raises additional complexities. Will materials provided in response to an informal data request also be posted on the website? Even though they are deliberative materials, presumably everything the auditor relies on in making a recommendation on which the Commission ultimately acts, eventually becomes a public record. We understand the need to have a record on which the Commission acts. But it is not clear to us the significance of work papers being posted on the website versus simply being available in response to a request for public records after the Commission's decision is made.

The draft rules have addressed our industry's peculiarities by inserting specific carve-outs and acknowledgements into some of the procedural regulations governing adjudicative matters that present compliance problems. Instead of this piecemeal approach, we recommend that a specific provision be devoted to the solid waste tariff filing procedures. We suggest that it could set out the requirement for compliance with WAC 480-07-160 in the initial filing but acknowledging that hard copies of work papers are not necessary; explain how to deal with maintaining confidentiality in responding to informal data requests; specify which of these documents will or will not be posted on the website; and elaborate the proper procedures at the initial filing, during the audit process, up to and following an open meeting where rates are approved, and in the interim pendency before an adjudication commences if the rates are suspended.

With regard to specific sections, the following are more detailed comments in the order that they appear in the Revised Rules:

WAC 480-07-300: The enumerated examples of adjudicative proceedings include "suspended tariff filings...". This comports with our understanding that prior to suspension, rate cases are not adjudicative. It underscores confusion about proper procedures during the pendency of litigation.

WAC 480-07-305: In Subsection 3(a), the types of pleadings that request an adjudicative proceedings include formal complaints, but really this is only true for complaints filed by parties other than the Commission itself. Presumably if the Commission issues a complaint, it would not be processed as an "application." Yet note that under Subsection 6(a), adjudication commences in response to a complaint by serving a notice of prehearing conference – yet that does not reflect the commencement of adjudication with third-party

complaints. We understand adjudication commences in that instance when the complaint is served on the regulated defendant. Thus, neither of these two subsections completely address complaints, because third-party and agency-initiated are actually different.

In Subsection 3(b), if a petition for action is presented, then the Commission makes a determination of whether the issues presented should be resolved in adjudication in acting on the request. Its determination cannot be part of the petition itself. It would certainly include arguments about the issue, but not the actual determination. See Subsection (e), for example, where the Commission's determination has been deleted from what is required in a protest.

Subsection (4) and Subsection 6(b) could benefit from minor reorganization. Perhaps the two provisions should be conflated so that the reasons for a determination are set forth following a description of the type of determination made. The nonexclusive circumstances warranting denial in (4) would seem to be better placed following the statement describing a decision not to conduct an adjudicative proceeding in 6(b). Or, the outcomes of determination could be moved to (4), and then in 6(b) simply state that the determination will be made within 90 days.

WAC 480-07-307: We would urge the Commission to consider conducting a threshold review of the merits of third-party complaints, as well as complaints proposed by staff. The Commission should at least verify whether adjudication requested by a third-party is required by law or constitutional right. RCW 34.05.413(2) and .419(s).

WAC 480-07-310: As a point of clarification, Subsection (1) prohibits *ex parte* communications with not only the Commissioners, but also with the administrative law judge assigned to the adjudication, the Commissioners' assistants, advisory staff, legal counsel and advisory consultants. Yet Subsection 2(b) only allows the Commissioners to talk to each other. It begs the question of whether the ALJ, assistants, staff, counsel and advisors are also permitted to talk to each other and to the Commissioners, in which case this provision should include them. Otherwise, this rule leaves the status of the support staff somewhat ambiguous. Subsection 2(c) describes permissible communications with the presiding officer (which may include the Commissioners), but it does not address intra-support staff exchanges.

WAC 480-07-340: In Subsection 3(e) the burden of proof in rate proceedings is mentioned in the classification of "respondent." None of the other party classifications mention burden of proof. Perhaps this rule would be an appropriate place to embellish on burden of proof for all types of parties.

In the same provision, while it's not a particularly troublesome substantive matter, we prefer to stick to the tried-and-true parlance of "protestant" rather than changing to

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“protestor.” The concept of “objector” is recently-created, but “protestant” has been used for decades in the Commission’s published orders.

WAC 480-07-355: Consider requiring petitions to be in writing, unless the party provides reason. Perhaps the standard could be more lenient than the good cause that must be proven for late-filed petitions, but it seems awfully vague to simply say the Commission “strongly prefers” written petitions. The rule could state that a person may petition orally “if they have provided a reasonable explanation for not submitting a written petition.”

In Subsection (2), the party’s written response “to a written and timely filed petition to intervene” is required before the prehearing conference – but obviously if an oral petition is made then this rule cannot be met.

WAC 480-07-370: In Subsection 1(e), the right to file a reply is conditioned on having the Commission’s permission. In general, as a means of limiting administrative resources and promoting efficiencies, this rule makes sense. However, where the party filing the original pleading bears the burden of proof, filing a reply should be authorized. This is particularly true with dispositive motions. A moving party may not know of all the opposing arguments, and should not be required to suggest them. Presumably, if new arguments are made then the burden of obtaining leave to reply would be granted, of course. Nonetheless, the party bearing the burden of proof should be allowed to have the last word.

Also, this draft rule provision contains carve-outs for tariff filings that we alluded to earlier.

WAC 480-07-470: In describing the order of presentation, the provision recognizing that rebuttal by the party bearing the burden of proof goes last has been struck. The rule should retain this statement, even if it is qualified to be “as permitted by the presiding officer.”

Thank you for considering our comments. We look forward to discussing these with Commission personnel and other stakeholders.

Sincerely,

SUMMIT LAW GROUP PLLC



Polly L. McNeill

cc: Clients