

## UTC RULEMAKING WORKSHOP REMINDER

# DELEGATION RULES

SHB 2426, 2006 SESSION

**MAY 11, 2006, 9:30 A.M.**

**WORKSHOP TOPIC:** Development of rules to implement Substitute House Bill 2426 of the 2006 session, granting the commission authority to delegate certain decisions. We will discuss

- Delegation of some decisions to the Executive Secretary,
- Delegation of probable cause decisions to administrative law judges, and
- Process involved in allowing ALJ decisions to become final.

### **ENCLOSED MATERIALS:**

- Comment matrix, showing a summary of comments submitted, and
- Discussion draft rules – to bring out discussion on significant topics

### **QUESTIONS / TOPICS FOR DISCUSSION:**

- How should the delegation of routine, simple, and usually-unopposed matters be handled for best and fastest results? What matters fall within that category? Should review be *de novo*? Will the consent agenda still be needed? Is web publication needed?
- Should the commission go beyond routine and uncontested matters to delegate decisions that are sometimes contested? If so, what process would be best?
- Must the commission provide adjudicative notice of delegated matters? Must the commission establish a delegation open meeting at which the executive secretary makes decisions on delegated matters? Are there other procedural barriers?
- What steps are needed to implement order finality for best efficiency and least confusion?
- Is a rule appropriate regarding probable cause determinations?

**COMPANION PROGRAM:** Please also plan to attend the May 11 afternoon Bench-Bar conference, starting at 1:30 p.m. In addition to topics relating to Commission processes, Appellate Court Judge Robin Hunt and recently-retired Thurston County Superior Court Judge Dan Berschauer (invited) will discuss how agencies and lawyers can best present arcane regulatory topics in the judicial system. Please join us for both events!

### **Delegation Rule Workshop, May 11, 2006, Room 206**

1300 S. Evergreen Park Drive SW, Olympia Washington 98504

For information call Bob Wallis, 360-664-1142 or Kippi Walker, 360-664-1139

## Draft delegation rules, A-060357

### Stakeholder comment matrix – CR-101

Issue	Pacific	Public Counsel	Avista	Staff response
1. Definition of noncontroversial matters for delegation		Define very narrowly. Include no matters where property interest is implicated.	Routine, ministerial actions, generally not contested, ergo not likely to be in dispute	Focus should be on routine, noncontroversial matters.
2. Which categories of decisions may be delegated	80.08.040, issuance of stocks, bonds, notes, debt; extensions of time to file reports;	Only uncontested matters may be delegated.	Routine items. Allow executive secretary, exec. director, dirs, ADs to make preliminary determination, subject to safeguards, that filing will be uncontested. Utility tax items, ICAs, compliance filings.	Define categories for action and review.
3. Rule or order?	Order preferable at first.	Delegate by rule – more clear	Generally, by rule.	Principally rule, orders later as needed.
4. Should rule provide that matters contested by parties not be delegated?		Argues that contested matter is by definition an adjudication.	Allow filing party to ask Commission decision. “Contest” is a party’s stated position that there are contested facts or matters of policy that should go to Cs for decision.	If needed, consider excluding from some delegation any matters on which staff and applicant disagree.

Issue	Pacific	Public Counsel	Avista	Staff response
5. How may matters be put to parties on question of delegation?	Parties should have notice prior to decision.	Incorporate delegation into current process. Weekly filing report should include projected open meeting date and give 20 days' notice of delegation. Matter could be heard on second or third open meeting after notice is issued.	There should be a notice of intent to proceed with delegation. Notice should go to applicant and be posted on web site.	Process should allow speedy resolution of minor matters. Applicants and affected persons should have timely notice and opportunity to obtain commission decision
6. How should opportunity for review be noticed?	Review should be <i>de novo</i> .		Once a decision is made, the parties should be notified and given a reas. time to review.	A decision on review of a delegated decision should be <i>de novo</i> .
		A. Use existing processes to extent possible.		Agreed.
		B. Make annual reports on items decided.		Should be considered.
		C. Must provide 20 days' notice of opportunity for adjudication; Delegation of uncontested matter must respect ex parte requirements;		Adjudications may not be delegated under the statute.

Issue	Pacific	Public Counsel	Avista	Staff response
		D. Any individual who is delegated authority under OPMA is subject to OPMA.		No prior case has single delegatee, with right to de novo decision by delegating body. Will rule and process cure? <b>Delegation docket?</b>
7. Probable Cause determinations: is a rule needed?	Rule should specify that judge making probable cause determination may not hear the merits. Otherwise, no rule is needed.	No rule is needed. Parties should have opportunity to supplement record if needed.	No rule is needed. Notice of intent should be published and opportunity for affected parties to respond. Determination should show why finding made despite opposing comments.	Rule appropriate to set out basics. No need to publish notice of intent. Assignment of same judge would be avoided, but should not be proscribed.
8. Record of review		Open meeting style memo is usually sufficient.	Record of review should show reasoned basis for decision. No probable cause determination should prejudice outcome.	No record is needed. Matters reviewed should be clear.
9. Should process differ between complaints and penalty assessments?	No.	No.	No.	No.

## NEW SECTION

### **WAC 480-07-903 Delegation of authority to the executive secretary. (1)** **General provisions.**

(a) The working title of the secretary position authorized in RCW 80.01.030 is “executive secretary.”

(b) The commission delegates authority to the executive secretary as set out in this rule, pursuant to RCW 80.01.030 and subject to oversight and direction by a majority of the commissioners.

(c) The commission may delegate other functions to the executive secretary by order.

(d) **Subdelegation.** When the executive secretary is absent or otherwise unavailable to perform authorized duties, the commission authorizes the executive secretary’s designee to perform the duties on behalf of the executive secretary.

(2) **General delegation of authority.** The commission authorizes the executive secretary to supervise the general administrative functions of the agency, including without limitation the following specific tasks.

(a) **Filings and correspondence.** The executive secretary will sign commission documents to be filed with the code reviser, courts, or other agencies or governmental entities. The executive secretary will sign other official commission correspondence and filings that the commissioners do not sign.

(b) **Appointing authority.** The executive secretary is the “appointing authority” for the commission and has authority over appointment, separation, and discipline of commission employees. This authority includes, but is not limited to, appointments, terminations, reductions in force, dismissals, suspensions, and demotions pursuant to WAC 356-30-007 and WAC 356-34-011

(c) **Grievance Procedure.** The commission authorizes the executive secretary to hear bargaining unit employee grievances and enter a final agency decision. The commission reserves the right to hear individual grievances or to select another designee to hear grievances on a case-by-case basis.

(d) The executive secretary shall sign orders or letters rejecting tariffs, contracts, applications, or other filings that do not to comply with statutory requirements or commission rules regarding effective dates, required supporting documents, or other standards for a complete filing.

(3) **Authority to resolve delegated matters.** Matters delegated to the executive secretary by rule are specified in this rule and in WAC 480-07-904 and 480-07-905. The executive secretary may in his or her discretion defer any delegated matter to an open meeting for decision without exercising delegated authority.

### **(4) Authority to sign discretionary orders implementing commission decisions.**

(a) **Commissioner direction.** A majority of the commissioners may direct the executive secretary to sign an order or decision implementing a decision made by a majority of the commissioners.

(b) **Commissioner unavailability.** When a majority of the commissioners are unavailable to sign and enter decisions and orders of the commission, the executive

secretary is authorized to do so without express direction only when: i) a majority of the commissioners has previously reached a decision on the merits of the particular matter, and ii) entry of the order cannot be deferred pending commissioner availability.

## NEW SECTION

**WAC 480-07-904 Delegation of authority to the executive secretary to decide certain matters.** The commission delegates the following matters for decision. The decision shall take effect immediately on entry of an order, without prior notice, but the commission will review the matter upon request under subsection 1(d) of this rule at a commission open meeting. Commission review of delegated decisions under this provision will be *de novo*.

**(a) Matters delegated for decision.**

(i) Applications for funding highway-railroad grade crossing improvements under the grade crossing protection fund for applications under WAC 480-62-405(1)(a).

(ii) Petitions for approval of changes to existing highway-railroad grade crossings, including installation or modification of signals; reconstruction of the crossing; or implementation of changes in design or construction.

(iii) Applications by water companies for removal from regulation or for the commission to exercise regulation under RCW 80.04.010.

(iv) Applications for approval of a) fully negotiated telecommunications interconnection agreements and b) adoptions of existing agreements.

(v) Applications for less than statutory notice approval of transportation company fuel surcharges and requests for rate increases limited to passing through costs that are authorized for pass-through, such as tipping fees.

(vi) Requests for approval of solid waste company management plans.

(vii) Applications for less than statutory notice approval of tariff revisions that are not opposed by commission staff.

(viii) Securities filings.

(ix) Petitions for telephone number resource allocation.

(x) Petitions for mitigation of penalties when the petitioner does not request a hearing, or when commission staff supports the request for mitigation.

(xi) Requests for approval of service area agreements.

(xii) Requests for extensions of time to make filings under deadlines set by rule or order, not including deadlines related to any pending adjudication.

(xiii) Contracts for service at terms other than those established by rule or tariff.

(xiv) Petitions for accounting orders.

**(b) Notice.** The commission will post on its internet web site for at least 14 days a listing of all matters decided pursuant to subsection 1(a), above, showing the docket number, date of entry of decision, and company name. The commission will publish notice of listings weekly via electronic mail to persons requesting such notice.

**(c) Opportunity for review.** Any affected person may request a commission decision reviewing any matter under subsection (1)(a) of this section by asking for commission consideration no later than the fourteenth day after the date of the posting. The commission will provide a form for this purpose on the commission's web site. The

commission will schedule the matter promptly for consideration and will promptly notify the person requesting review of the time and place of the open meeting at which review will be taken.

## NEW SECTION

**WAC 480-07-905 Delegation of authority to executive secretary to enter *ex parte* orders.** The commission authorizes the executive secretary to enter the following *ex parte* orders and other documents in the name of the commission in non-adjudicative matters. Notice of the order will be published, and responses must follow the procedure outlined, in WAC 480-07-904(1)(b) and (c).

(a) **Motor Freight Carriers (excluding Household Goods Carriers).**

(i) Orders and permits authorizing intrastate transportation of general commodities, materials transported by armored car, or hazardous materials if the applicant satisfies the requirements of WAC 480-14.

(ii) Orders and permits authorizing or reflecting change of carrier name and business structure if the carrier satisfies the requirements of WAC 480-14.

(iii) Orders and permits reinstating previously-held authority if the carrier meets the requirements of WAC 480-14.

(iv) Orders suspending and/or cancelling a permit if the carrier fails to show that it has the required level of insurance in effect for its operations. *WAC 480-14*.<sup>1</sup> The order will tell the carrier (a) that the permit may be reinstated prior to cancellation if the carrier corrects conditions leading to suspension and (b) that the carrier may contest the suspension and/or cancellation by requesting an adjudication or brief adjudication. *WAC 480-14*.

(v) Orders canceling previously-suspended permit authority if the carrier fails to correct conditions leading to suspension, and fails to request an adjudication or brief adjudication during the suspension period. *WAC 480-14*.

(vi) Orders canceling permit authority or dismissing an application by request of carrier or applicant. *WAC 480-14*.

(vii) Orders dismissing an application after notice to the applicant of failure to meet the requirements of WAC 480-14.

(b) **Household Goods Carriers.**

(1) Permit authority granted by a commission order authorizing permanent, provisional or temporary intrastate transportation of household goods. *WAC 480-15*.

(2) Orders and permits authorizing permanent intrastate transportation of household goods if the applicant satisfies the requirements of WAC 480-15.

(3) Orders and permits authorizing or reflecting change of a carrier's permit name, corporate name, trade name, or addition of a trade name. *WAC 480-15*.

(4) Orders authorizing voluntary suspension of permit authority if the carrier satisfies the requirements of chapter 480-15 WAC.

(5) Orders reinstating voluntarily suspended permit authority if the carrier satisfies the requirements of chapter 480-15 WAC.

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<sup>1</sup> NOTE: Italicized citations will be removed before filing with the code reviser.

(6) Orders canceling permit authority or dismissing application by request of carrier or applicant. *WAC 480-15*.

(7) Orders suspending and/or cancelling a permit if the carrier fails to maintain evidence of required cargo and/or liability insurance coverage. *WAC 480-15-430(a)*. Such orders will inform the carrier that a permit may be reinstated if the carrier corrects conditions leading to suspension and that the carrier may contest the suspension and/or cancellation by requesting an adjudicative or brief adjudicative proceeding. *WAC 480-15*.

(8) Orders vacating suspension of permit if the commission receives the insurance filing during the suspension period and orders of abeyance if the carrier requests a hearing or brief adjudicative proceeding. *WAC 480-15*.

(9) Orders canceling previously suspended permit authority if the carrier fails to correct conditions leading to suspension, and fails to request a hearing or brief adjudicative proceeding, during the suspension period. *WAC 480-15*.

(10) Orders reinstating previously canceled permit authority if the carrier satisfies the requirements of *WAC 480-15*.

(11) Orders rejecting applications for temporary authority if *WAC 480-15-285* applies.

**(c) Solid Waste Collection Companies – Specialized.**

(1) Orders and permits authorizing intrastate solid waste collection services involving unprotested applications in territory not served by any existing carrier. *RCW 81.77.040 and WAC 480-70*.

(2) Orders and permits authorizing change of carrier's corporate name, trade name, or addition of a trade name. *WAC 480-70*.

(3) Orders and permits approving unprotested applications to transfer or lease certificate. *WAC 480-70*.

(4) Orders suspending a permit if the carrier fails to maintain evidence of the required liability insurance coverage. *WAC 480-70*. The order must tell the carrier that the permit may be reinstated if the carrier corrects the conditions leading to suspension and that the carrier may contest the suspension by requesting an adjudication or brief adjudicative proceeding. *WAC 480-70*.

(5) Orders vacating suspension of permit if the commission receives the carrier's insurance filing during the suspension period and orders of abeyance if the carrier requests an adjudication or brief adjudicative proceeding. *WAC 480-70*.

(6) Orders canceling previously suspended permit authority if the carrier fails to correct conditions leading to suspension, and fails to request a hearing or brief adjudicative proceeding, during the suspension period. *Chapter 480-70 WAC*.

(7) Orders reinstating a permit canceled for cause if the conditions for reinstatement in *WAC 480-70* and in the order of cancellation are met.

(8) Orders dismissing application or canceling permit authority by request of applicant or carrier. *WAC 480-70*.

**(d) Solid Waste Collection Companies – Traditional.**

(1) Orders and permits authorizing intrastate solid waste collection services involving unprotested applications in territory not served by an existing carrier. *RCW 81.77.040 and WAC 480-70*.



(2) Orders and permits authorizing change of carrier's name, trade name or addition of a trade name. *WAC 480-70.*

**(e) Private, Nonprofit Transportation Providers.**

(1) Orders and permits authorizing intrastate transportation of persons with special needs. *WAC 480-31.*

(2) Orders and permits authorizing sale, assignment, lease, acquisition or transfer. *WAC 480-31.*

(3) Orders suspending permit if the carrier fails to maintain evidence on file that it has the required level of insurance in effect for its operations. *WAC 480-31.* The order must inform the carrier that the permit may be reinstated if the carrier corrects the conditions leading to suspension and that the carrier may contest the suspension by requesting a hearing or brief adjudicative proceeding. *RCW 34.05.422(1)(c).*

(4) Orders vacating suspension of a permit if the commission receives an insurance filing during the suspension period and orders of abeyance if the carrier requests a hearing or brief adjudicative proceeding. *WAC 480-31.*

**(f) Charter and Excursion Busses.**

(1) Orders permits authorizing intrastate transportation of passengers by charter or excursion. *WAC 480-40.*

(2) Orders suspending permit if the carrier fails to show that it has the required level of insurance in effect for its operations. *WAC 480-40.* The order must inform the carrier that the permit may be reinstated if the carrier corrects the conditions leading to suspension and that the carrier may contest the suspension by requesting a hearing or brief adjudicative proceeding. *RCW 34.05.422(1)(c).*

(3) Orders vacating suspension of permit if the commission receives an insurance filing during the suspension period or orders of abeyance if the carrier requests a hearing or brief adjudicative proceeding. *WAC 480-40.*

(4) Orders canceling previously suspended permit authority if the carrier fails to correct conditions leading to suspension and fails to request a hearing or brief adjudicative proceeding during the suspension period. *WAC 480-40.*

(5) Orders canceling permit authority or dismissing an application by request of the carrier or applicant. *RCW 81.70.300.*

(6) Orders dismissing application after due notice to applicant for failure to meet the requirements of *WAC 480-40.*

(7) Order authorizing lease, assignment, or transfer of permit authority. *WAC 480-40.*

**(g) Auto Transportation Companies.**

(1) Orders and permits authorizing intrastate, intercity transportation of passengers involving unopposed applications to serve routes not served by any existing carrier and that do not fall within the boundaries of a transit district. *RCW 81.68.040.*

(2) Orders and permits involving name changes, including trade names. *RCW 81.68.030.*

**(h) Commercial Ferries.**

(1) Orders suspending a certificate if the carrier fails to maintain the required insurance coverage. *WAC 480-51.* The order must inform the carrier that the certificate may be reinstated if the carrier corrects the conditions leading to suspension and that the

carrier may contest suspension by requesting a brief adjudication or an adjudication. WAC 480-51.

(2) Orders vacating suspension of a certificate if the carrier corrects conditions leading to suspension and orders of abeyance if the respondent requests a brief adjudication or an adjudication. WAC 480-51.

(3) Orders canceling previously suspended certificate if the carrier fails to correct conditions leading to suspension and fails to timely request an adjudication or brief adjudication. WAC 480-51.

(i) **Temporary transportation authority.** The commission delegates to the executive secretary decisions in applications for temporary motor carrier or solid waste authority. The decision shall take effect immediately on entry of an order without prior notice of delegation. An applicant whose application is denied, in whole or in part, may obtain review by requesting an adjudication within 20 days following entry of the order. Commission review of delegated decisions under this provision will be *de novo*.

#### NEW SECTION

**WAC 480-07-307 Probable cause determinations.** An administrative law judge will review the information or evidence supporting a proposed complaint or penalty assessment and determine whether probable cause exists to issue the complaint or assess penalties. If the judge determines that the information, if proved at hearing and if not rebutted or explained, would support the proposed penalties or sustain the complaint, the judge will sign the complaint or penalty assessment on behalf of the commission. The existence of a finding of probable cause may not in any later stage of the proceeding be considered as support for the proposed penalties or the complaint.

#### AMENDATORY SECTION

**WAC 480-07-825 Initial orders – Petitions for administrative review. \* \* \***

**(7) Initial order finality.**

(a) The initial order of an administrative law judge will become a final order of the commission unless, within the time for filing petitions for administrative review, i) a party petitions for administrative review, or ii) the commission serves a notice to the parties of its intention to review the initial order.

(b) Parties who seek finality of an initial order before the end of the petition period may waive the right to seek administrative review. If all parties waive review, the order will become final on the day the commission declines to exercise administrative review or when the time for exercising review ends. If the commission exercises administrative review, all parties may state objections and responses as permitted in subsection (8) of this rule.

(8) Designation for review. The commission may designate an initial order for administrative review by serving on the parties a notice of its intention to review the order. The notice will identify the docket number and the title of the proceeding, a time period within which the parties may state objections to the initial order, and a time to respond to others. The commission may in the notice ask the parties to address specific issues relating to the initial order.

~~(7)~~**(9) Final order.** The commission may by final order adopt, modify, or reject an initial order after ~~reviewing~~ considering the initial order and any petitions for review, answers, replies, briefs, responses to a notice that the commission will review the order, ~~and~~ oral arguments, and ~~the~~ record. Alternatively, the commission may remand the matter for further proceedings with instructions to the presiding officer. The statutory time for filing a petition for judicial review commences when the commission serves its final order. However, if a party timely files a petition for reconsideration of the final order, and complies with the commission's procedural rules governing reconsideration, the time for filing a petition for judicial review does not commence until the date on which the agency serves an order disposing of the petition for reconsideration, or the date on which the petition is deemed denied as a matter of law, as provided in RCW 34.05.470.

**(10) Judicial review.** The statutory time for filing a petition for judicial review begins when the commission serves its final order or the time when an initial order becomes final under RCW 80.01.060(3) and subsection 8 of this rule. However, if a party timely files a petition for reconsideration of the final order, and complies with the commission's procedural rules governing reconsideration, the time for filing a petition for judicial review does not begin until the date a) the agency serves an order disposing of the petition for reconsideration, or b) the petition is deemed denied as a matter of law, as provided in RCW [34.05.470](#).