

MEMORANDUM

June 30, 2005

TO: File

FROM: Dennis Moss

SUBJECT: Rulemaking—chapter 480-07 WAC-Procedure:
2005 Tune-up Status Report

This memorandum summarizes the suggestions made during 2004 and 2005 for changes to the new procedural rules based on experience over the past 18 months.

Part I: General Provisions

- WAC 480-07-110-Exceptions and modifications
 - Revise subsection (1) so the exemptions provisions of other rule chapters can simply point to this rule. Proposed edits are as follows:

The commission may modify the application of ~~these~~ its rules in individual cases if consistent with the public interest, the purposes underlying regulation, and applicable statutes.

- Add several provisions (based on Teleco WAC 480-120-115):

To request a rule exemption, a person must file with the commission a written request identifying the rule for which an exemption is sought, and provide a full explanation of the reason for requesting the exemption. In addition to any other reason, parties may allege force majeure is the factor leading to the request for waiver.

The commission will assign the request a docket number, if it does not arise in an existing docket, and will schedule the request for consideration at one of its regularly scheduled open meetings or, if appropriate under chapter [34.05](#) RCW, in an adjudication. The commission will notify the person requesting the exemption, and other interested persons, of the date of the hearing or open meeting when the commission will consider the request.

In determining whether to grant the request, the commission may consider whether application of the rule would impose undue hardship on the requesting person, of a degree or a kind different from hardships imposed on other similarly situated persons, and whether the effect of applying the rule would be contrary to the underlying purposes of the rule.

The commission will enter an order granting or denying the request, or setting it for hearing, pursuant to chapter [480-07](#) WAC.

- WAC 480-07-140-Communicating with the Commission
 - Change subsection (4)(a) to provide more flexibility concerning required identifying information in communications with the Commission, as follows.

All persons who communicate with the commission must provide their name and sufficient information to allow the commission to respond. This means the communication must include at least one of the following:

- i. Mailing address;
- ii. E-mail address;
- iii. Telephone number;
- iv. Facsimile number.

Persons who communicate with the commission on behalf of a business, organization, other entity, or other person must provide the name of entity or person on whose behalf the communication is made, in addition to reply contact information as described above.

- Change subsection (5)(b) to address the format needs for handling confidential electronic versions of documents, as follows:

The commission prefers to receive electronic versions of all filings that do not include confidential information in .pdf (Adobe Acrobat) format, supplemented by a separate file in .doc (MS Word) or .wpd (WordPerfect) format. Electronic documents that are redacted versions that mask confidential information should be filed exclusively in “read-only” .pdf format. Parties that cannot create .pdf files directly are requested to provide a .pdf version created via scanner or other available technology.

- *NEW WAC 480-07-141 – Docketing conventions*
 - Coordinate with Records Center and others to develop rule language to standardize procedures for assigning docket numbers
 - One suggestion is that follow-up reporting required in a docket will be filed under the original number, but any new pleading (*e.g.*, a required “subsequent filing,” or a request to change or be relieved from a reporting requirement) will get a new docket number.
 - Discuss in rule the significance (*i.e.*, procedural and/or substantive consequences), if any, of the Records Center assigning a docket number to a filing [*note one suggestion received: “Receipt of a document for filing, and the assignment of a docket number, does not mean that the Commission has “accepted” a document and waived any flaws that would entitle the Commission not to accept it. Docket numbers are assigned, and documents received, for administrative purposes, to facilitate review, and not to denote legal acceptance. A document is not accepted until the Commission takes an action inconsistent with acceptance. Flaws entitling the Commission to reject a document may be addressed, and the document rejected, after its acceptance.”*]
 - Consider adding a rule discussing circumstances and procedures for closing dockets that do not go through an adjudicative process (*e.g.*, a “no action” item can be administratively closed once it has appeared on the open meeting agenda)

- NEW WAC 480-07-142 — *Filing requirements*
 - Include a roadmap to rules for various types of filings [*Note— include references to WAC 480-07-143, 145, 510(2) [tariffs in utility rate filings], 520(1) [tariffs in solid waste rate filings], and 883 [compliance filings]*]. State that all companies are now strongly encouraged to file electronically all tariffs, time schedules, and price lists, using e-mail attachments, supplemented by one paper copy for Record Center’s files.

- WAC 480-07-160—Confidential information.
 - Amend (2)(a) and (2)(b) to specify highlighting colors that work from a practical standpoint. Some documents are being filed with highlighted with colors that cause the confidential version of the document to be "redacted" when copied or scanned.

 - Clarify subsection (3)(b)i)by the following edit:

Paper copies. When the document is in paper format, and there is no protective order in place, the provider must clearly mark each copy with the designation "confidential per WAC 480-07-160." The provider must place this mark on the first page of a multipage document and each specific page where the provider claims there is confidential information.

 - Consider whether this rule should apply in adjudicative (or other?) proceedings where a protective order is in place; in such cases, WAC 480-07-420 and 423 control. [*Note that the current rule expressly applies in adjudicative proceedings where a protective order is in place, effectively giving a second layer of protection. See subsection (2)(b). There is, however, a cross-reference toWAC 480-07 -420 in the prefatory part of the rule.*]

 - Amend to provide that redacted electronic versions of documents containing confidential information should be filed exclusively in “read-only .pdf” format while nonredacted versions are to be filed in a “readable” format (e.g., .doc) to facilitate their use by those privileged to see them (e.g., ALJ’s). *See supra WAC 480-07-140. [Note this could (should) be accomplished by reference to -140].*

- Open this rule to general discussion in connection with the protective orders rules, WAC 480-07-420 and 423
- NEW WAC 480-07-190—Definitions
 - **Person:** any individual human being or any organization, association, political subdivision, or business that has the legal ability to take action.
 - **Party:** any person who exercises its right to participate in an adjudication as a party or to who the Commission has granted permission to participate as a party. Party status creates an obligation on our part to allow the person the reasonable opportunity to participate in an adjudication and the obligation on our part and the part of other parties to provide it with service of certain documents, as provided by law.
 - **Docket Monitor:** A person that does not want to participate in a pending docket as a party, but wants to receive copies of all documents that the Commission serves on parties, simultaneous with service. The Commission may charge for this service.
 - **Interested person:** A person that would like to receive notice of orders that the Commission enters in a docket.

[Note: We might want to switch the last two]

Part II: Rule-Making Proceedings

Conduct a general inquiry into whether we should maintain or modify rulemaking procedures as typically conducted. Should rulemaking procedures be implemented by more detailed rules?

Part III: Adjudicative Proceedings

- WAC 480-07-380(2)(c)
 - Concerning responses to motions for summary determination, revise the rule to read: **“unless the commission establishes by order a different specific date”**; this will allow for schedule changes by notice [note: check other rules that provide for scheduling discretion and make any needed changes to conform to the principle suggested]

- WAC 480-07-395 Pleadings, motions, and briefs—Format requirements: Provide a cross-reference to 480-07-460 for “format requirements for prefiled testimony and exhibits.”
 - Include the “oversize hole” requirement in 480-07-395(1)(a)

 - Edit subsection(1)(c)(iv) as follows:

Body of brief. All briefs must include a table of contents in outline format. The commission may require the parties to organize their briefs according to a common outline. The presiding officer, in consultation with the parties, will establish the elements of the common outline taking into account the issues in the proceeding, the parties' preferences, and the commission's needs.

 - Should we edit subsection (1)(c)(v)(A) to provide for transcript references in the form: **witness surname, TR. [page]:[line(s)]?**

 - Edit subsection(1)(c)(vi)as follows:

Citation to authority. Parties must use the citation formats specified in the current edition of the style sheet of the Washington supreme court reporter of decisions. The presiding officer may require parties to file copies of non-Washington authorities that are cited in parties' briefs and upon which parties place substantial reliance. All briefs must include a table of authorities.

- 480-07-400—Discovery
 - Provide that parties may not seek discovery from Staff until Staff files its response case in a proceeding initiated by complaint or petition. This was formerly included in 480-09-480(5), but was dropped in chapter 480-07 (in favor of it being something parties could request in individual cases, along with other discovery scheduling, as appropriate). Consider broadening this to include Public Counsel and Intervenors. Consider broadening this to provide for a “black-out” period on discovery sought from the utility prior to rebuttal and from all parties prior to and during hearing
 - The reference to "subsection (5)" in WAC 480-07-400 (1)(c)(iii) should probably be to (4)
- 480-07-405—Discovery—Data requests, records requisitions, and bench requests
 - Add new subsection 6(c) to make clear that any party may object to a Bench Request or to a response to a Bench Request (set a time frame for action), and should provide that in the absence of objection or a Commission rejection, the Bench Request response(s) will be received in evidence.
- WAC 480-07-420—Discovery—Protective Orders
 - Clarify that Staff and Public Counsel need only sign one confidentiality form to be privy to both Confidential and Highly Confidential under the Protective Order (or modify the standard form protective order to provide this and leave the rule alone)
 - Make provision for support staff and whether they need to sign a confidentiality form (or modify the standard form protective order to provide this and leave the rule alone)

- WAC 480-07-423—Discovery—Protective Orders—Submission requirements for documents
 - Clarify that parties must file a complete version of the document with confidential material on colored paper and highlighted; it is not acceptable to file a set of confidential sheets for replacement of pages in the redacted version
 - Indicate in the rule that parties will be informed how many confidential sets and redacted sets they need to file to meet the Commission’s internal distribution needs
- WAC 480-07-460—Hearing-Predistribution of exhibits and prefiled testimony

⊖ Modify subsection (1)(b)(iii) to read:

Minor corrections. Minor revisions to prefiled testimony and exhibits may be made to correct typographical errors, printing errors, and nonsubstantive changes (e.g., a change in a witness's address or employment). Counsel should not ask a witness on the stand to correct obvious typographical errors in the prefiled testimony or to make more than three minor substantive corrections. If more than three minor revisions are required, parties must prepare an errata sheet or a revised exhibit for submission at least one business day prior to the hearing to show such corrections to the prefiled evidence. ~~Parties that submit revisions to predistributed or previously admitted testimony or exhibits must prominently label them "REVISED" and indicate the date of the revision. The revised portions must be highlighted, in legislative style or other manner that clearly indicates the change from the original submission. This practice must be followed even with minor changes that involve only one page of an exhibit. Counsel must identify partial revisions by page and date when an exhibit is presented for identification, sponsored, or offered into evidence, as appropriate.~~

(iv) Parties that submit revisions to predistributed or previously admitted testimony or exhibits must prominently label them "REVISED" and indicate the date of the revision. The revised portions must be highlighted, in legislative style or other manner that clearly indicates the change from the original submission. This

practice must be followed even with minor changes that involve only one page of an exhibit. If one or more pages of multiple page testimony or exhibits are revised, the header or footer of the affected pages must be labeled "REVISED" and indicate the date of the revision. Counsel must identify partial revisions by page and date when an exhibit is presented for identification, sponsored, or offered into evidence, as appropriate.

- WAC 480-07-460(2)(b)
 - Revise to require that every page of an exhibit bears the premark (e.g., Exhibit No. ___(JQW-1T)) rather than just the first page
- WAC 480-07-460(2)(d)
 - Include the “oversize hole” requirement
 - Include font requirements
 - Include requirement for tabs separating all prefiled exhibits (i.e., direct and cross)
- WAC 480-07-470(11) [concerning “subject to check” practice in cross-x]
 - Recommend that the deadline for confirmation of subject to checks flow from the date of the receipt of the transcript, not from the date the testimony occurs. You may not get it accurately from memory.
 - Revisit this subsection re obligations it imposes and options that might work better (It is not to promote expedient questioning re something in evidence (or prefiled); in that instance the witness should be referred to the evidence or asked to assume the fact for purposes of the question(s).)
- WAC 480-07-510(2) and WAC 480-07-520(1)) general rate filings—practices apparently are in place for utilities and solid waste companies to file tariffs electronically; acknowledge this change; the rules currently require utilities to file three copies of their revised tariff sheets (WAC 480-07-510(2)), and solid waste companies to file two copies (WAC 480-07-520(1)) [*query—should we go to electronic in lieu of paper or still require one paper copy? { one paper copy should*

be submitted to Records Center for inclusion in a docket file that may later be a contested proceeding file; be consistent with requirements for compliance filings in 480-07-883}

- WAC 480-07-510(3)(b) [*GRC proceedings; what must be filed*]
 - Should this rule provide that any adjustment offered by a party must be accompanied by a full explanation of each of the assumptions and underlying calculations. If these are not set forth in the direct testimony and exhibits, they must be set forth in workpapers. For example, if an adjustment uses a percentage relationship or an allocation factor, the workpaper must contain the detailed support for the development of that percentage or factor, together with an explanation why that factor is appropriate. Also, if the adjustment is connected to any other adjustment, that connection should be stated and explained, and a cross-reference provided.
 - Should the rule require a standard format for presentation of adjustments?
- WAC 480-07-620—Emergency adjudicative proceedings.
 - Add:
If time permits the preparation of a complaint, it shall be served upon the respondent by whatever means may best provide actual notice of the adjudication. If a majority of the Commissioners are not available to authorize a complaint, it may be authorized by one commissioner or, if no commissioner is available, by the Secretary of the Commission or the senior available administrative law judge.
- WAC 480-07-650—Petitions for enforcement of telecommunications company interconnection agreements.

Change subsection (1)(c) by editing the second sentence as follows:

The notice must identify ~~the contract~~ each specific provision of the agreement that the petitioner alleges was violated, . . .

Change subsection (4)(c) by editing the second sentence to read as follows:

The party filing the ~~complaint~~ petition or answer may file with the ~~complaint~~ petition or answer a request for discovery, . . .

- WAC 480-07-730—Settlement
 - Should we do away with the term “multi-party settlement” and use “stipulation” instead? *[Some argue it isn't really a settlement if all do not agree]*. Should we modify procedures for consideration of comprehensive stipulations that are supported by some, but not all parties?
- WAC 480-07-750(2)(a): **"If the commission rejects a proposed settlement, the litigation returns to its status at the time the settlement was offered and the time for completion of the hearing will be extended by the elapsed time for consideration of the settlement."** We may wish to amend this to add the concept that the extension will also take into account other pending business. It may be necessary in some cases to extend a procedural schedule for significantly more time that has "elapsed for consideration of the settlement." We will want to consider this in the context of general rate proceedings and complaint proceedings where the 10 month rule imposes an additional constraint that can be problematic. In such cases, if the Company isn't willing to adjust the schedule to meet needs of the parties and the Commission, then the Commission arguably shouldn't take the time to consider the proposal for settlement.
- WAC 480-07-883—Compliance filings *[Note—compliance filings, including tariff sheets, should require an original on paper for the docket file in Records Center, but otherwise can be submitted electronically]*
- Consider adding rule(s) concerning hearing transcripts (where would these fit best?):
 - One suggestion is to add a rule providing that parties may make motions to correct hearing transcripts, but providing that readily identified typographical errors need not be corrected. *[Note that the Civil Rules don't include anything like this. The idea appears to be that the official transcript is the most accurate record of what was said (and heard) by everyone in the hearing room. Inviting argument to the contrary may not be well-advised. If a party believes an answer, as*

transcribed, fails to reflect what the witness said, or meant to say, one option would be to allow for a motion to reopen the record].

- Consider adding a rule to require parties to submit proposed redacted versions of transcripts that include confidential information rather than maintaining confidential treatment of entire segments of transcripts.