

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of a Rulemaking to Consider )  
Possible Corrections and Changes in Rules )  
In Chapter 480-07 WAC, Relating to )  
Procedural Rules. )  
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DOCKET NO. A-050802

**Comments of Public Counsel**  
**Attorney General of Washington**  
**August 26, 2005**

**I. INTRODUCTION**

The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) files these comments in response to the Washington Utilities and Transportation Commission's (Commission) July 20, 2005 *Notice of Opportunity to File Written Comments*. Public Counsel supports the Commission's efforts to continue to improve the rules covering procedural matters and to thereby provide for improved efficiency in the handling of the matters that come before it.

## II. COMMENTS

### WAC 480-07-125 - Physical address; telephone; facsimile; e-mail; internet

This rule appears duplicative of WAC 480-04-035. Perhaps one or the other could be replaced with a cross-reference.

### WAC 480-07-140 to -150 – Communications

Public Counsel supports amending the Commission's procedural rules to recognize the increasingly common practice in adjudicative proceedings of parties filing and exchanging documents electronically with hard copy following by next-day or USPS mail. Allowing the administrative law judge (ALJ) to invoke this as a standard at the prehearing conference would eliminate the additional transactional cost to parties of having to seek leave of the assigned ALJ when a deadline approaches and time is already short. While the ALJs have been uniformly supportive of such requests, Public Counsel believes it would be appropriate for the ALJ (and the parties) to have the option of invoking a default of electronic exchange of documents at the initial prehearing conference when similar procedural matters are most commonly dealt with. This should be equally applicable to the exchange of data request responses pursuant to WAC 480-07-400 and -405.

While Public Counsel is supportive of the Commission's and all parties' use of electronic communications (email) for the purpose of facilitating efficient communication it is important to maintain the opportunity for comments, concerns, or complaints to be filed with the Commission by those who do not have ready access to, or the ability to provide, electronic communications.

### WAC 480-07-200 to -240 - Rulemaking

Public Counsel supports the Commission's existing process for rulemaking. Workshops and multiple rounds of formal comments provide the Commissioners with the opportunity to hear all sides of an issue and make a fully informed decision.

Public Counsel would share one concern regarding the "matrix" which the rulemaking staff provides. Quite often issues raised by commentators are not included in the matrix after a round of comments are provided and thus commentators such as Public Counsel are left not knowing if the comment or suggestion omitted from the matrix was rejected, was considered duplicative of another comment included elsewhere in the matrix, or was simply missed.

WAC 480-07-310 - Ex Parte Communication

Public Counsel believes that the Commission has an exemplary record of dealing with matters of ex parte communications and commends the Commission's sensitivity to matters that might create an impression of impropriety as well as impropriety in fact. However, it has been a matter of increasing concern in recent years that it has become a practice of many regulated companies to meet with Commissioners and discuss issues and policies when the company intends to make a related filing in fairly short order with the Commission. The matter discussed then becomes the subject of an adjudicative proceeding to which the ex parte rule applies, and where the Commissioners sit as the quasi-judicial decision makers.

Public Counsel would recommend amendment of the rule to address this issue through disclosure as follows:

WAC 480-07-310(b) – ADD:

When a regulated company has communicated directly with one or more commissioners regarding an issue which was later set for adjudication by the Commission, the nature and

content of the communication shall be disclosed by the company in a filing in the docket established by the commission.

WAC 480-07-423 – “Highly Confidential” documents

There has been a trend over the last decade towards the increasing use of “highly confidential” amendments to Commission protective orders pursuant to WAC 480-07-423.<sup>1</sup> The terms of these amendments have been a source of ever increasing dispute and litigation amongst parties appearing before the Commission. Public Counsel believes it is appropriate for the Commission to set forth a generally applicable standard governing party or consultant/expert witness access to documents designated as “highly confidential.”

Public Counsel recognizes that part of the problem in this area is that different companies in different industries have differing degrees of sensitivity regarding individual documents. Administrative efficiency is not well served, however, by relitigating this issue in every case. Public Counsel’s concern is that the terms of the protections sought by several companies (but by no means all) would unreasonably restrict the future employment of those with access to highly confidential documents, rather than simply restricting the proper use to which a given person could put the knowledge gained from a document designated by a company as highly confidential.

An additional problem posed by access restrictions in highly confidential protective orders relates to challenges to the confidential designation by a party pursuant to WAC 480-07-160(4). As a practical matter, it is impossible for any party to challenge a highly confidential

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<sup>1</sup> Public Counsel’s comments are equally applicable to WAC 480-07-160 and should be considered there as well.

designation if it does not have access to a document so designated. While counsel may have access, the assistance of an expert consultant is frequently essential to determine if a designation should be challenged.

Further, to the extent consulting experts are unwilling to execute a highly confidential protective order agreement in order to access documents, a party's ability to provide a meaningful analysis or testimony is severely impaired. If only two parties were able to present expert testimony and analysis to the Commissioners, the regulated utility, and its advocacy staff; the regulatory process would not be functioning well.

This is a complex issue. However, workable provisions have been adopted in several cases that offer a template for a generally applicable approach. Public Counsel looks forward to further, detailed discussion with the Commissioners, the Commission Staff and all interested parties regarding this question.

WAC 480-07-730 – Settlement

Multiparty, non-unanimous settlements have become an increasing area of concern for Public Counsel and others, and have resulted in procedural litigation entirely unrelated to the merits of the matters brought before the Commission.

Public Counsel requests that the Commission initiate a separate rulemaking docket to address this rule specifically and in an expedited fashion given the significance of the issues that have arisen regarding this rule. We believe this issue is one which would otherwise dominate the time available for a broader workshop, and impair the full consideration of other rules and issues, as it did during the recent Bench-Bar conference.

Public Counsel recommends the Commission adopt the following language to resolve the on-going problems surrounding multi-party settlements:

(5) Notice of Settlement Negotiations Required:

(a) Prior to engaging in settlement negotiations with a regulated company in an adjudicative proceeding, commission Staff must provide notification to other parties. Five calendar days before a settlement negotiation with a regulated company, the commission staff shall notify in writing, and by electronic mail, all parties on the master service list of the time and location of the proposed settlement negotiation. If a prehearing conference has not yet been held in the case, notice shall be sent to all persons who regularly appear before the commission in similar adjudicative proceedings. Staff shall maintain a copy of the notice and a record that it was provided.

(b) Any party given notice under this section may attend settlement negotiations. Additional notice of continuing settlement negotiations involving the same issue need only be provided to parties attending the initial settlement negotiation, or who have requested continuing notice.

(c) For purposes of this section 5, “settlement negotiations” means any discussion or other communication, in person or otherwise, between Commission Staff and a company regulated by the Commission whose purpose is to pursue resolution of one or more issues in an adjudicative proceeding. Settlement negotiations do not include requests for information or clarification in aid of discovery.

Adopting the foregoing language would resolve Public Counsel’s concerns and eliminate an area of litigation which continues to be a costly distraction to the Commission and the parties that appear before it.

WAC 480-07-740 – Settlement Consideration Procedure

Public Counsel recommends the Commission amend subsection (c) “Rights of opponents of a proposed settlement” to clarify that parties opposing a settlement retain the following rights:

to conduct discovery, present evidence, have a hearing, cross-examine witnesses, and present arguments on all disputed material issues of fact and law. And that the commission's final order shall be based upon substantial evidence in the record and shall include findings and conclusions on all disputed issues of fact, law, or discretion presented on the record.

It is almost axiomatic that proposed multiparty settlements commonly do not address issues considered critical by non-settling parties. Fundamental fairness requires that non-settling parties have a meaningful opportunity to be heard on not just the facts proposed multiparty settlement, but on all disputed material issues of fact and law. This provides a superior record for Commission decision. Doing so prevents the risk that a subset of parties will attempt to dictate the scope of the Commission's review of facts and issues. And as a practical matter, the Commission's final order will be far less subject to appeal. It is Public Counsel's belief that the transactional costs to the Commission of providing the extra day or two of hearing, or considering a brief that may be somewhat longer, and of issuing a final order that encompasses the proposed settlement as well as any additional disputed material issues of fact or law is far less than the transactional costs to the Commission and interested parties of being involved in subsequent judicial review.

WAC 480-07-XXX – Electronic Interested Person Lists

Public Counsel would recommend that the Commission initiate an email-only interested person list for significant case types that would allow interested persons to receive only electronic copies of Commission issued notices, orders, etc. While this is not an issue for Public Counsel, we have heard from third parties who occasionally intervene in Commission proceedings that they were surprised to hear of a case through informal discussions. Some form of additional out-reach along these lines would further facilitate the Commission's communications with the public and all persons interested in the matters that come before the Commission.

For example, common intervenors could request notice of all electric and natural gas general rate cases which are suspended and the Administrative Law Department's staff could add them as a matter of course to an interested persons "external mail group" as is now commonly used to send email notices of prehearing conferences to parties.

#### **IV. CONCLUSION**

Public Counsel looks forward to working with the Commissioners, the Commission Staff, and other interested parties in further refining and improving the Commission's procedural rules. Public Counsel looks forward to participating in procedural rule workshops and providing additional comments in the future.