BEFORE THE WASHINGTON UTILITIES AND

TRANSPORTATION COMMISSION

A-130355

In the Matter of Rulemaking to Consider Possible Corrections and Changes in Rules in WAC 480-07, Relating to Procedural Rules	)	COMMENTS OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES REGARDING PROPOSED CHANGES TO WAC CHAPTER 480-07

I. INTRODUCTION

1 On June 1, 2016, the Washington Utilities and Transportation Commission ("WUTC" or the "Commission") issued notice that it would receive comments regarding proposed revisions to Part I and Part III, Subpart A of Washington Administrative Code Chapter 480-07. The Industrial Customers of Northwest Utilities ("ICNU") appreciates the invitation to participate in this rulemaking docket and submits these comments regarding the Commission Staff's revised draft rule proposals.

II. COMMENTS

2 ICNU supports the efforts of the Commission and Commission Staff to streamline general rule provisions and the rules of general applicability in adjudicative proceedings before the Commission. On the whole, Staff's revised draft rule proposals would clarify, simplify, and improve many of the Commission's procedural rules. That said, ICNU believes there are several key issues that should receive serious consideration and which may justify further refinement to the existing rules. These issues form the primary basis of the comments below.

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A. Part I, General Provisions

3 Staff has proposed significant changes, both in the format and substance to the General Provisions contained in Part I. For instance, several sections relating to communicating, filing, and submitting documents with the Commission appear have been modified and reorganized within WAC § 480-07-140. While ICNU generally supports these revisions, a few specific concerns and suggested modifications are noted. Moreover, as Staff proposes to move adjudicative proceeding service rules into Part III, Subpart A, comments on those revisions have been reserved for that section.

4 Also, Staff is proposing a considerable shift in how challenges to confidentiality designations would be resolved. As ICNU understands, the rules would no longer provide for a Commission ruling on such a challenge, which presumably would require designating parties to obtain court relief in order to prevent the Commission from removing protection after ten days.[1/] To the extent that this proposed rule change would create an incentive for utilities to avoid improper and overly expansive confidentiality designations, as such practice might result in costly court action, ICNU would support Staff's modifications.

480-07-110(1)

5 The revised draft rules reinsert a provision that had originally been deleted from Staff's initial draft rules, issued on November 14, 2013.[2/] More specifically, ICNU supported Staff's initial deletion of the last sentence in this subsection, as a means to provide greater

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1/ WAC § 480-07-160(4). Unless otherwise indicated, all citations to WAC § 480-07 refer to Staff's Revised Draft Proposed Rules, dated June 1, 2016.

2/ Staff's 2nd draft rules proposal, issued September 22, 2014, also retained the original deletion proposal.

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certainty and clarity for adjudicatory parties. In the newly revised proposal, however, Staff proposes to retain and modify the last subsection sentence as follows: "The commission may modify the application of procedural rules in this chapter during a particular adjudication or other docket~~consistent with other adjudicative decisions,~~ without following the process identified in subsection (2) of this section."

6 ICNU believes that the Commission should delete this sentence entirely, as recommended by Staff in the first two iterations of the proposed draft rules. Although ICNU recognizes that unique circumstances could warrant a modified application of standard procedural rules, the process for obtaining an exemption or modification of the rules is not prohibitively onerous or inconvenient. Conversely, summary modification of standard rule applications could significantly impair the rights and interests of adjudicating parties without any due process. Further still, the newly proposed modification to the existing rule sentence promotes even less predictability, consistency and due process protections, in that future modifications would no longer require any consistency with precedent.

7 In order to accommodate the Commission's interest in adapting to varied circumstances, ICNU suggests a related modification to subsection (2). Terms could be added to clarify that exemption or modification process might originate through the Commission's own initiative, rather than simply through a party request or petition.

480-07-110(2)(d)

8 ICNU continues to recommend that the Commission retain paragraph (d) within this subsection, which, in regard to the final disposition of process initiated to exempt or modify

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a rule, states: "The commission will enter an order granting or denying the petition, or setting it for hearing." Staff's proposal to delete this paragraph entirely threatens to deprive parties of an important due process protection—namely, the opportunity for a hearing or at least the explicit supporting rationale for a decision that could materially affect the rights of parties.

9 Since an exemption or modification of procedural rules could impact the rights of parties as much as a determination on a motion or petition, ICNU believes that the Commission's rules should retain the requirement for a hearing or order following a rule's disposition. Moreover, deleting paragraph (4) would create an inconsistency with Commission rules elsewhere, which Staff proposes to retain in the revised draft: "The commission will provide written notice and allow for appropriate process when it acts in the absence of a party's petition."[3/] That is, if the Commission will provide written notice and allow for process even when a party has not made a petition, then there is no apparent justification for dispensing with written order and hearing requirements when a rule exemption or modification petition has actually been made.

10 Notwithstanding, some degree of reasonable flexibility could be incorporated into the rule to address process appropriate to minor exemptions or modifications. For example, circumstances may warrant oral disposition at a hearing or prehearing conference, to be later memorialized in the record by written order. A rule provision allowing for this scenario could balance the desire for expediency without fully sacrificing due process considerations.

[3/] WAC § 480-07-370(1)(c)(i).

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480-07-140(1)(b)

11 Reference is still made to "WAC 480-07-143," although Staff's revised rules draft no longer includes a Section 143. ICNU believes the intended reference, under Staff's revised formatting, may be to WAC § 480-07-140(5)(c).

480-07-160(4)

12 ICNU suggests the following strike-though correction to the first sentence of Staff's proposed revisions in this subsection: "The commission or a party to an adjudicative proceeding in which a provider submits a document with information designated as confidential~~ity~~ may challenge that designation."

B. Part III, Subpart A, Rules of General Applicability in Adjudicative Proceedings

13 The revised draft rule proposals in Part III, Subpart A contain many changes directly responsive to issues raised in prior comments. ICNU acknowledges and appreciates Staff's diligence in reexamining, refining, and seeking to improve rules of general applicability in adjudicative proceedings. Accordingly, ICNU has also carefully reviewed the newly proposed rules and offers the following comments to further contribute to Staff's thorough efforts.

480-07-305(5)(b)(v)

14 As noted in prior comments, ICNU is concerned about the implications of adding rule text which explicitly provides that the Commission might choose not to conduct an adjudicative proceeding if a matter "would be better addressed informally." In particular, customers requesting adjudicative relief do so because informal resolutions are not always possible, and intervention from the Commission is the only recourse to leverage against the

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monopoly power of utilities. Indeed, rather than limiting access to adjudicative process, customers should be further assured of the certainty and constancy of its availability in light of recent events. For instance, the Commission recently issued a strongly worded order finding that a major utility "did not show good judgment or good faith" in a still pending rate case, including the identification of behavior which "tests the bounds of reason" and was found contrary to "common sense" and what the company had been "legally obligated" to do.[4/]

15 ICNU points out these stark findings not to take aim at any particular party, but to emphasize the danger of a proposed rule provision which expressly sanctions the rejection of adjudicative process requests and directs aggrieved persons to attempt "informal" resolutions of controversial matters with entities of considerably unequal power. Any party could potentially be found to act without good faith. But, if a regulated utility can be found to exhibit a troubling lack of good faith in formal proceedings, in spite of direct Commission oversight, then the potential for similar or worse behavior should be readily apparent in an informal context, without immediate Commission oversight. This would be a concern regardless of the identities of the entities in dispute, yet the nature of Commission proceedings is such that many controversies will involve a monopoly utility pitted against a customer of significantly less power, in which an equitable resolution on an "informal" basis is unrealistic.

16 Staff proposes the recourse of "administrative review of a decision not to conduct an adjudicative proceeding" in paragraph (c) of this rule section. This will likely provide customers with little comfort, however, given the potential for unnecessary and additional

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[4/] WUTC v. Pacific Power & Light Co., Docket UE-152253, Order 08 at ¶¶ 13-14 (Apr. 29, 2016).

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expense that may be required just to secure the right of adjudicative process. Ultimately, this proposed regime favors utilities, who have superior resources to litigate initial administrative review processes and then fund actual adjudicative process on any underlying controversy.

17 While ICNU understands the potential for unfounded or frivolous attempts to use adjudicative process, Commission rules already provide for efficient disposition of such actions. For example, WAC § 480-07-380 specifically allows for motions to dismiss and motions for summary judgment. Accordingly, ICNU recommends that the Commission *not* adopt Staff's proposed rule text, as both unnecessary and likely harmful to customers.

480-07-340(3)(e)

18 ICNU is uncertain as to why the revised draft rules propose to delete the second sentence of this paragraph, which defines the "Respondents" classification of parties. The existing rule paragraph states: "In general rate proceedings that are set for hearing on the commission's motion or complaint, the party seeking to increase rates is a 'respondent,' but bears the burden of proof in the proceeding pursuant to RCW 80.04.130 or 81.04.130." While ICNU would support deletion of the word "general," thereby eliminating future controversy in circumstances involving an "expedited rate filing" or a similar "non-general" rate proceeding, ICNU does not believe the rules would be improved by the deletion of this entire sentence.

19 Foremost, ICNU finds value in the explicit articulation that a utility "bears the burden of proof" as the respondent in a rate proceeding. While this may be self-evident to certain individuals and entities regularly practicing before the Commission, this specification is

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important for the sake of the public, because a complainant is often presumed to bear the burden of proof.

20 Moreover, this paragraph (e) sentence provides a natural bookend to the second sentence in paragraph (b) of this subsection, defining "Complainants." Under Staff's proposed draft, the second sentence in paragraph (b) would state: "When the commission commences an adjudicative proceeding on its own complaint, the commission is the complainant." Thus, the second sentence in paragraph (e) is helpful in completing the picture of a proceeding in which the Commission is the complainant—i.e., in "rate proceedings that are set for hearing on the commission's motion or complaint, the party seeking to increase rates is a 'respondent.'"

480-07-345(2)

21 Staff proposes modifications to a number of rule sections which should greatly streamline notice and appearance process for parties such as ICNU, who routinely appear as intervenors in Commission proceedings. Nonetheless, ICNU has encountered disparate requirements and rule interpretations from presiding officers in the context of party representative and service designations, an issue which is somewhat interrelated with appearance rules. This subsection provides the first opportunity to offer recommendations intended to clarify rule requirements and terminology.

22 Here in subsection (2), the draft proposal adds language to require that a party's initial pleading or written petition to intervene "must designate the party's representative <u>and the person to accept service for the party itself</u>." ICNU proposes that this text be slightly revised to

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state that the initial pleading or petition "must designate the party's representative and one additional person authorized to accept service for the party."

23 The intended emphasis in ICNU's proposal is two-fold. First, ICNU's text plainly conveys that *both* an attorney (or other authorized representative) and a second person are designated to receive official service. This seems consistent with Staff's proposal in WAC § 480-07-360(2)(b), which provides:

> When one or more attorneys or other authorized representatives have appeared for a party in a proceeding before the commission, the party must name at least one of those representatives to receive service of documents. Service on the representative is valid service upon the party, except as provided by law.

This rule paragraph requires service on a party "representative," which will often be an attorney. That appears inconsistent with Staff's proposed text in WAC § 480-07-345(2), however, which seemingly creates a significant distinction between: 1) an attorney or other designated "representative"; and 2) a "person to accept service for the party itself." In other words, the distinction of a separate "person to accept service" implies that the party's representative is *not* similarly authorized to accept service. The alternative ICNU phrasing is designed to avoid such interpretive controversy.

24 Second, ICNU's proposed text is designed to convey that a party ought to be able to voluntarily designate persons authorized to accept service for the party. For example, ICNU often uses one lead attorney and one lead consultant in major rate proceedings. By designating that these two individuals are authorized to receive service on behalf of ICNU in a petition to intervene, ICNU is best able to effectively and efficiently participate in Commission proceedings.

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25 Presiding officers usually allow ICNU to designate service in this manner within a petition to intervene, but this has not always been the case. For instance, ICNU has been involuntarily required to name its executive director for one of two official service designations, which seems to needlessly create inefficiencies in the service process without furthering any inviolate rule requirement.[5/] In fact, both Staff's proposed rules and existing rules specifically allow for service flexibility, in that the Commission has complete freedom to "order different arrangements for service in individual proceedings."[6/]

26 ICNU's proposed text should avoid future controversy and inflexible service designation interpretations. Staff's proposal that a party must designate a second "person to accept service for the party itself" *should* allow the party to voluntarily choose who that person will be, but ICNU is concerned that it may be misinterpreted as a mandate to designate only one individual occupying a certain position at the top of the "party itself." ICNU's alternative proposal, for the broader designation of "one additional person authorized to accept service for the party," should prevent such an outcome.

27 Finally, as matter of clarity and to improve organization, ICNU suggests that subsection (2) might benefit through division into three paragraphs. Specifically, ICNU proposes that one paragraph be reserved for notice of appearance requirements, a second paragraph treat withdrawal requirements, while a third would address filings to change persons

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[5/] By way of analogy, mandating service on ICNU's executive director instead of ICNU's lead consultant might be comparable to service being made on the Governor of Washington *in lieu of* the Commission, on the very matters which the Governor has specifically authorized and instructed the Commission to attend.

[6/] WAC § 480-07-360(2)(c); see also currently effective WAC § 480-07-150(2)(c).

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designated within initial pleadings or petitions to intervene. Moreover, consistent with ICNU's proposed alternative text discussed above, ICNU recommends the following modification to the last sentence in Staff's revised subsection (2): "A party must also file and serve a written notice to subsequently change the designation of an additional person authorized to accept service for the party~~representative~~."

480-07-355(1)(c)

28 ICNU noticed what appears to be a couple of typos in this paragraph specifying the required contents of a petition to intervene. The references in subparagraphs (i) and (v) to "WAC 480-07-360(c)" seem intended to reference subsection 360(3).

29 Substantively, ICNU recommends a few modifications to this paragraph in keeping with prior concerns regarding the efficient use of official service designations. First, ICNU recommends that subparagraph (i) should be modified to simply read: "The petitioner's name and contact information." This would allow a party like ICNU to provide official organizational contact information for the record, without impeding ICNU's ability to freely designate and authorize persons to receive official service during proceedings—e.g., a lead attorney and lead consultant, acting on behalf of the organization.

30 Consistent with this modification, ICNU proposes that subsection (v) read as follows:

> (v) The name and contact information, as specified in WAC 480-07-360(3), of:
>
> (A) petitioner's attorney or other authorized representative, if any; and
>
> (B) one additional person authorized to accept service for petitioner, as required by WAC 480-07-345(2).

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480-07-355(2)

31 ICNU proposes the following modifications to the last sentence of Staff's proposed text in this subsection:

> A party's written response to a timely filed written petition to intervene must be filed and served within 20 days or at least two business days before the prehearing conference or hearing at which the commission will consider the petition, whichever time is less, ~~or at such other time as~~unless the commission ~~may~~ establishes a different time by notice.

Since a maximum response period of 20 days, barring a specially established exception, is consistent with general petition response rules in WAC § 480-07-370(1)(d)(ii), ICNU does not believe that any parties would be adversely affected by this proposed rule modification.

480-07-355(3)

32 Staff is proposing a seemingly minor change which could have considerably harmful impacts. Regarding dispositions on petitions to intervene, the second sentence of this subsection would be revised as follows under the draft rules:

> The presiding officer may grant a petition to intervene if the petitioner has~~If the petition discloses~~ a substantial interest in the subject matter of the hearing and~~or if~~ the petitioner's participation is in the public interest~~, the presiding officer may orally grant the petition at a hearing or prehearing conference, or in writing at any time~~.

33 ICNU is concerned with the implications of conditioning future interventions on a two-fold requirement that a petitioner be found to have *both* a substantial subject matter interest *and* that participation would be in the public interest. The existing rules require only that a petitioner *either* disclose a substantial interest *or* that participation would be in the public

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interest. ICNU believes that the current standard invites more public participation in Commission proceedings and ultimately furthers the public interest.

34 ICNU concedes that circumstances could exist in which a petitioner has a substantial interest in the subject matter of a proceeding, yet participation is not in the public interest. For instance, an out-of-state entity could be materially impacted by the Commission's determination in a proceeding, but that entity's interest may not concern the public interest of Washington. ICNU suggests, however, that the proposed two-fold intervention requirement is unnecessary in order to enable a presiding officer to deny a petition for intervention under these circumstances, since both existing and proposed rules stipulate that a presiding officer "may" grant a petition when stipulated conditions exist. In short, grants of intervention are always subject to Commission discretion even when qualifying conditions are present.

35 An important difference between the conjunctive, two-fold requirement proposed by Staff, and the existing, disjunctive standard within existing rules, is the procedural burden placed upon the Commission, parties, and petitioners alike. Currently, a petitioner need only disclose substantial personal interest or that participation would be in the public interest before a decision is made. Under the proposed rules, however, a petitioner's burden would be increased because a finding would need to be made that both forms of interest are satisfied.

36 Further, the current rule allows a presiding officer to grant an intervention if a petitioner's participation is in the public interest, regardless of the personal interest circumstances of the petitioner. Conversely, a presiding officer could not grant an intervention under the proposed two-fold standard if a petitioner was not found to have a substantial personal

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interest, *even if participation would be in the public interest*. Needless to say, ICNU does not believe it would be in the Commission's or the public's interest to adopt a new intervention standard that proscribes an intervention that would serve the public interest.

37 Accordingly, ICNU recommends that the Commission not approve all of Staff's proposed modifications in this second sentence of subsection (3). Instead, ICNU proposes that Staff's revised text be modified as follows: "The presiding officer may grant a petition to intervene if the petitioner discloses~~has~~ a substantial interest in the subject matter of the hearing or~~and~~ the petitioner's participation is in the public interest."

480-07-360(2)

38 In paragraph (a) of this subsection regarding the "Designation of person to receive service," the proposed rule provides that each party "must designate at least one person to receive service of documents relating to the adjudication." Standing alone, this provision could be interpreted to allow the designation of several individuals to receive service on behalf of a party. ICNU would welcome such an interpretation, as it would obviate all concerns over inefficient service constraints and involuntary service designations. Moreover, the allowance for multiple service designations is not impractical, given that electronic service would become the default mechanism under Staff's proposed rules.[7/] To avoid conflicting interpretations, however, ICNU recommends that the rules explicitly address the issue of whether there are any limits to the number of persons who may be designated to receive official service.

7/ WAC § 480-07-360(6).

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39 Paragraph (a) also states that "[a]n individual appearing on his or her own behalf must be the person to receive service." The corollary of this statement is that a party that is *not* an individual appearing on his or her own behalf should *not* be required to designate itself to receive service—e.g., ICNU, as an organization, should be permitted to at least designate an attorney and consultant, as persons authorized to receive service on its behalf.

40 Consideration of the text of paragraph (b) also merits an overall examination of the consistency and alignment of service requirements. For instance, paragraph (b) states that, if multiple attorneys or other authorized representatives appear on behalf of a party, that "party must name *at least one* of those representatives to receive service." (Emphasis added). While this implies that multiple authorized representatives could be designated to receive service, something ICNU supports, the expansive allowance here would be in conflict with a constrained interpretation of WAC § 480-07-345(2), which could be viewed as limiting service to only one "representative," in addition to a single "person to accept service for the party itself."

41 Since ICNU has previously been required to follow a strict two-person service limitation similar to the constrained interpretation of WAC § 480-07-345(2), the potential inconsistencies between various rule provisions is a relevant concern.[8/] ICNU recommends that all proposed rule provisions associated with appearance and service designations be carefully examined to ensure that Commission and party resources are not expended in an attempt to clarify and reconcile various provisions in the future.

[8/] See also WAC § 480-07-360(3) (stating parties must designate "individuals," plural, to receive service); WAC § 480-07-360(6) (providing that the Commission will only provide service to "designated representative(s)," also implicating the potential for several individual designations).

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480-07-360(5)

42 Given that Staff is proposing that all future service may normally be accomplished electronically, both in terms of party and Commission service,[9/] ICNU believes that the master service list should not remain an artifact of the paper-only service past. In particular, the revised rule draft proposal seems to unnecessarily constrain the contents of the official master service list to a two-person-per-party limitation. This may have been practical under a paper-only service regime, but retaining the constraint would appear unjustified in the context of a new, electronic paradigm.

43 ICNU recognizes that subsection (5) provides for what is commonly referred to as a "courtesy" service list, by way of allowing for a master service list that incorporates "the name and email address of additional persons a party requests to receive service." Notwithstanding, the proposed rule distinguishes between a singular "designated representative for service" and the "additional persons" on the unofficial or courtesy email list, giving rise to the potential that only a single person may actually receive official service. This is important relative to previous concerns expressed in regard to ICNU's lead consultant being unnecessarily omitted from the official service list, and the inefficiencies in process created as a result.

44 ICNU understands the apparent goal of the proposed rule subsection to limit "the persons who must be served paper copies in addition to electronic service," in presumably narrow circumstances in which "the commission requires both paper and electronic service." But, to address concerns over needless official constraints in the future of predominantly electric-

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9/ WAC § 480-07-360(6).

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only service, ICNU recommends that the Commission consider the adoption of two potential alternatives.

45 First, tracking the form of language already proposed by Staff within this subsection, a provision could be added to explicitly allow parties to "identify the persons who must be served electronic copies only." A reasonable limitation could be added, as in "identify up to five~~the~~ persons who must be served electronic copies only." But, even this limitation would still address ICNU's concern about constraining official service to just a single party representative who is actively involved in a proceeding.

46 Alternatively, ICNU would propose the following modifications to Staff's proposed subsection:

> The master service list will contain the contact information for each party's authorized representative and additionally designated person authorized to ~~the proceeding and each party's designated representative for~~accept service, as well as the name and email address of additional persons a party requests to receive service. If the commission requires both paper and electronic service, the master service list will identify the persons who must be served paper copies in addition to electronic service.

480-07-360(6)(a)

47 ICNU appreciates that Staff supports a new paragraph, within the prehearing conferences rule section, which expressly anticipates that parties may raise "[o]bjections to commission service of orders and notices solely in electronic form."[10/] ICNU believes this provision may address concerns raised in prior comments over the potential infeasibility of electronic-only service.

[10/] WAC § 480-07-430(1)(l).

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48 As a complement to Staff's proposal, ICNU recommends the following modification to the last sentence in paragraph (a):

> A party need not deliver a paper copy of the documents to any other party to perfect service, unless paper service is specifically required by a presiding officer or statute, but may serve a paper copy of any documents in addition to the electronic copies on a party that requests a paper copy. The Commission encourages parties to cooperatively arrange for paper service upon party request.

480-07-395(1)(b)

49 Based on ICNU's understanding of Commission precedent, the following additions to the first sentence within the paragraph would seem appropriate: "Pleadings, motions, and briefs must not exceed sixty pages exclusive of exhibits, appended authorities, supporting affidavits or declarations, tables of contents and authorities, signature blocks, and other documents."

480-07-400(2)(b)

50 The newly revised draft rules address a prior concern raised by ICNU, in that Staff's last proposal had perhaps inadvertently omitted WAC § 480-07-410, regarding depositions, as an express method of discovery available to parties. However, the revised paragraph (b) now excludes WAC § 480-07-415, concerning discovery conferences, as an available discovery method.

51 Since Staff is not proposing to delete WAC § 480-07-415, ICNU assumes this exclusion was also inadvertent. Accordingly, ICNU recommends that the final clause in Staff's proposed paragraph be modified as follows: "the methods of discovery set forth in WAC 480-07-405 ~~and~~through 480-07-41~~0~~5 will be available to parties."

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480-07-405(7)(b)

52 Staff proposes to condition the timing for a data request response based either upon when "the request is served or made." ICNU would propose that the "or made" condition be deleted, as it would seem to invite potential confusion and contention, without adding any apparent benefit. In fact, Staff's proposed rules require that "[d]ata requests must be served electronically," without separate allowance for a request to be simply "made," apart from the service requirement.[11/]

480-07-410

53 ICNU maintains a concern regarding Staff draft rules which would significantly change deposition rule requirements. First, Staff continues to propose a heightened, three-fold requirement in paragraph (1) that a party must satisfy before receiving permission to depose a potential witness. As ICNU has previously commented, Staff's proposal seems not only excessive and inconsistent with the traditionally broad scope of Commission discovery, but parties would effectively be faced with meeting the impossible standard of showing that a potential witness possesses "necessary" information, prior to being able to actually depose the individual to determine what information is possessed.

54 Staff also continues to propose that paragraph (4) should no longer state: "A party may use a deposition to impeach a witness." Subject to the understanding that this sentence is superfluous, since subsection (4) already provides that depositions may be used "for any lawful purpose," Staff's proposed deletion may not pose an issue. If there is any uncertainty or debate

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11/ WAC § 480-07-405(2).

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about the use of depositions for impeachment purposes, however, ICNU recommends retaining this sentence.

55 The term "potential witness" is used throughout this rule section. ICNU recommends that rule section -410 be revised in several places to indicate that parties may depose both witnesses and potential witnesses. For instance, the first sentence of subsection (1) might be revised to state: "A party may depose a witness or any person identified by another party as a potential witness." As witnesses routinely submit pre-filed written testimony and exhibits to the Commission, an express allowance for depositions of persons already established as witnesses would be appropriate.[12/] Further, the relevancy of the previously mentioned sentence in paragraph (4), allowing for the use of "a deposition to impeach a witness," is manifest when considering existing witnesses.

480-07-460(3)(a)(iii)

56 Staff's proposals to streamline, clarify and simplify testimony and exhibit designations and numbering are greatly appreciated. In keeping with Staff's newly proposed text in subparagraph (ii), ICNU proposes the following modification to the beginning of subparagraph (iii): "Place the capital letter "C" immediately after the number or underscored blank space if the exhibit …."

12/ The rules contain many references to a "witness" in the context of a person submitting written testimony and exhibits. See, e.g., WAC § 480-07-395(1)(c)(v)(B); WAC § 480-07-460(1)(a)(i)-(ii), (2)(a)-(b), (4).

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C. General Protective Order

57 ICNU raises an issue separately here, due to uncertainty as to whether the matter is best addressed in revision of Commission rules or in separate process. Specifically, ICNU believes it would be helpful to obtain official guidance from the Commission on access to confidential information and how that access is obtained, given that some parties have disagreed over a protective order interpretive issue that arises frequently and has resulted in varied practice among parties who regularly appear before the Commission.

58 Paragraph 8 of the Commission's standard protective order concerns "Persons Permitted Access" to confidential information. The first sentence of that paragraph provides: "No Confidential Information will be made available to anyone other than Commissioners, Commission Staff, the presiding officer(s), and counsel for the parties for this proceeding, *including* counsel for Commission Staff, and *attorneys' administrative staff such as paralegals.*" (Emphasis added). In paragraph 9 of the standard order, the Commission states: "Before being allowed access to any Confidential Information designated for this docket, *each counsel or expert* must agree to comply with and be bound by this Order on the form of Exhibit A (*counsel and administrative staff*) or B (expert) attached to this Order." (Emphasis added).

59 Taking these provisions together, ICNU has always understood that administrative staff working for an attorney are permitted access to confidential information, provided the attorney has signed standard protective order Exhibit A. Moreover, Exhibit A to the standard order is titled "Exhibit A (*Attorney Agreement*)," and reads: "I, _____, as *attorney* in this proceeding …." (Emphasis added). The fact that Exhibit A contains no text providing for

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express agreement by administrative staff seems to confirm ICNU's understanding of paragraphs 8 and 9. In sum, access by counsel to confidential information includes "attorneys' administrative staff," obtained when counsel agrees to comply with the protective order by signing Exhibit A, as this covers both "counsel and administrative staff."

60 Based on recent experience, ICNU understands that some parties agree with ICNU's interpretation while others do not, and that there may even be disagreement between individuals within certain parties. To avoid controversy, ICNU has agreed in recent proceedings to amend Exhibit A by hand and file separate pages for each and every individual serving within an administrative staff capacity, who may need access to confidential information in order to assist counsel. This seems inefficient and unnecessary to ICNU, however, and has prompted the present request for Commission guidance, possibly through the current rule review.

61 Thus, to efficiently address the current disagreement among parties, ICNU proposes the creation of a new paragraph (c) to WAC § 480-07-420(2), to read:

> (c) Persons Permitted Access. Unless amended, disclosure of confidential information under the standard protective order will be conditioned on the signing and filing of the exhibits attached to the standard protective order, for attorneys and experts, respectively. Attorneys' administrative staff, including paralegals, are permitted access to confidential information, so long as the attorney they are supporting has signed standard protective order Exhibit A.

III. CONCLUSION

62 ICNU appreciates the opportunity to submit these comments regarding proposed revisions to Part I and Part III, Subpart A of WAC Chapter 480-07. ICNU looks forward to further participation in workshops or comment periods addressing these chapter rule sections. Also, as an aid to interested stakeholders in understanding the rationale behind Staff's newly

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proposed revisions, ICNU recommends that Staff include commentary to explain changes in further drafts. This could take the form of comment boxes in redlined rule proposals or a separate comments document, but some manner of explanation could be of significant benefit in clarifying Staff's intent.

Dated this 30th day of June, 2016.

Respectfully submitted,

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