Bench-Bar Notes
(Rulemaking and Settlement Processes)
July 22, 2005[1]

RULEMAKINGS:

Robert Cromwell – Summary: Not all of the comments get into the Staff's summary table. Does staff team win now in light of its power to lobby the Commissioners? Concern: Level of review. If Commissioners rely on the edited table, without viewing the comments, it is a concern.

Mark Reynolds – Industry can find the lobbying process to be difficult. When Staff summarizes the comments without a response, commenters don't know why comments are adopted or rejected. It is helpful as going through process to know the rationale used for recommendations or decisions at each point. Open forums (workshops) may or may not provide rationales. If the Commission followed the E.U. process – respond to each issue – stakeholders would be more at ease. Robert Cromwell suggested that Staff add to table why we are doing what we do.

Michel Singer-Nelson – We know that we can get answers from Staff if we ask for them. There is also a legislative history in the order of adoption. It is useful to track reasoning.

Simon ffitch – The comment matrices are extremely valuable. There are inconsistencies in approaches from rulemaking to rulemaking – wants consistency.

Letty Friesen – Want to know why comments are rejected. What is the Staff recommendation? The Staff comment?

PSE – Difficult when we are in the midst of a long rulemaking and something comes out asking for a 2-week turnaround. It's hard to get clients organized. Need more time on comments in that situation. Timing of rulemaking – a long time isn't necessarily a problem apart from the need to get back up to speed and educate replacements for prior staff. The Commission should consider starting a new rulemaking in some situations.

[1] 8/15 edits included

Judy Endejan – Not enough emphasis on the question, "Do we need a rule at all?" Ask that question at the outset.

Simon ffitch – Agrees that the Commission should ask, Do we need to modify or repeal a rule? If there are long delays it would be helpful to learn from the Commission that it has been put on hold and perhaps the reason. Hiatus causes problems because issues get stale – after a long break, start slowly please. Volume of comments will be reduced if reasons for staff or Commission decisions are stated. Recommendation: Use standard redlining for draft rules.

Mark Reynolds – Ask for comments before a scheduled workshop. That would prevent a lack of focus. There could be benefit from more comments or analysis.

Robert Cromwell – The first workshop should be a policy workshop. Address policies at issue and the need for a rule. Not technical at this point. This would have implications for a) timing of the rulemaking and b) preparation of cost-benefit information.

Simon ffitch – Open Meeting issues: Should we show up and comment? Uncertainty for the CR-101 decision. Maybe the Commission could just announce it has filed a CR-101, and not put it on the agenda. CR-102/Adoption – These should both be on an open meeting agenda. CR-102 – seems like Commission has decided and opportunity to stop train is limited. What's function of final adoption hearing? Because it's merely at the time of adoption? Without the CR-102 presentation, the adoption hearing is usually the only meeting in front of Commission. When is the Commission making the decisions? How can we have our arguments considered?

Letty Friesen (SBEIS) – Every rulemaking should consider costs and benefits. We have felt that costs are not considered as seriously as they should be. We really want Staff to look at costs and benefits more seriously. We don't need technical cost studies because of the cost to us of preparation, but we need some kind of interest in the costs of regulation. Confidentiality is also an issue for any detailed information that we provide.

Greg Kopta – Would like to see a cost-benefit analysis. What's really needed for this metric? The Commission recently required a client to meet a 60-second response time for inquiries. Why 60 sec. as opposed to 75 or 90? There are real cost differences, and we did not think we got a clear explanation of why it was

necessary to impose those costs. If costs are imposed —the agency needs to consider costs of whatever is needed to comply with the requirement.

SETTLEMENTS:

Art Butler – A provision on settlements is needed to provide confidence in integrity of regulatory process. Without a rule, it is too easy for intervenors to be cut out of the process. Good examples of how inclusive process may work exist – for example, the Verizon General Rate Case. That process worked well. It is an issue of confidence and integrity. When we can't participate? We lose a view of the entire process.

Robert Cromwell – Fairness Issue. Global settlements are a part of the process. When Staff agrees in principle prior to informing others, other parties' real opportunities are very limited. In the hearing process, when there is a non-unanimous settlement, other parties are also limited in their opportunities. The same thing has happened – parties felt unable to obtain a fair hearing. The goals should be transparency, fairness, and perception of fairness. Costs? Proposed sections 5 and 6 would impose few costs – cost is a few phone calls or letters. The proposal would constrain the freedom of Staff, but it is incumbent on public servants to act in the public interest when they perform audits. Staff has resources that others don't. We have fewer resources. Weight of the Staff in decisions: Staff is often credible because unlike every other party, it has no axe to grind, that is, no financial interest in the outcome.

Greg Kopta – We need to have a Verizon kind of process. When all parties can't agree, the situation is problematic in several ways. Procedural protections – often a proceeding is Commission v. Utility, and the Intervenors are just that. When the complainant settles with the respondent, it raises the issue of intervenor rights. At that point, to achieve their goals the intervenors almost need to file own complaint. They shouldn't have to file a complaint and bear the burden of prosecution. This involves lots of complications. If an issue is legitimately raised, it should continue to be raised and resolved.

Robert Cromwell – There is a net cost saving for Commission to fully answer settlement issues on the merits. The costs of transparency and an open process is less than cost of appeals.

Michael Early – Staff plays a unique role. We don't want to walk into a noticed meeting and learn that the critical parties have reached a final agreement. When that happens, we have no practical opportunity at that point to accommodate our concerns. The proposal makes it more likely that a comprehensive settlement can be reached among all parties to have all issues resolved. Staff needs guidance.

Phil (NWEC) – In favor of rule. Members of his organization advocated in the legislature that an open process works very well. Secret deals inspire a lack of confidence in the fairness of the regulatory process.

Would Idaho or Oregon Rules satisfy parties' concerns?

Greg Kopta – Provisions of the existing rule seem to be honored in breach. That leads to litigation.

James Van Nostrand – Supports settlement conferences regularly in process. Everyone invited? That kind of rule is elegant and affords rights. Formalization of the settlement process could be beneficial. Process notice – settlement on eve of hearing? With the requirement of 5 or 10 days' notice, the settlement couldn't happen.

Judy Endejan – If proposed rule were adopted, it would be very difficult to achieve settlements because of the need to talk individually in order to iron out differences. If it's not broken – don't fix it. Don't prohibit initial discussions with Staff on whether some issues are open. You can't put gag rule in place to prevent discussions. This would result in no incentive to settle but would provide incentives to blackmail parties into settlement of minor issues. The proposal offends procedural due process – utility has burdens in working toward settlement that others would not. In principle, settlement process works as it is now structured.

Chuck Eberdt – Oregon and Idaho rule work in those jurisdictions. There is no ability to conduct discussion prior to a settlement meeting to which all parties are invited, and the process is impartial.

Kirstin Dodge – There is a huge difference between a gag order and process assurances. Side discussions go on constantly in any effective negotiation. Candid discussions can't operate if others are always present. Common sense

says that the Commission Staff's mandate includes more than intervenor issues. Wouldn't the proposal prevent questions on audits? What's really at issue?

Irion Sanger (Davison Van Cleve) – The Oregon rule doesn't bar basic questions in preliminary discussions. In addition, parties can waive rule. Issues? Once the requirement for notice is met, no one comes unless they are interested.

Lisa Anderl – A rule allowing one or more intervenors to hold up a settlement process will have chilling effect on settlements.

David Valdez – Verizon settlement – Verizon operates in Oregon and there is not full agreement among stakeholders on the meaning of every part of the Oregon rule. In a competitive environment, issues are at play in settlement that are very sensitive. Staff is a voice of reason. A part of negotiation to watch dynamics. All the parties in the room in every negotiation need to do sidebars to get agreement. Positions at the start and positions at end are very different. Intervenors jump on all the issues, not just those of concern. Staff's view is reasonable and this rule would limit the effect of staff's influence in settlement negotiations. In the recent Verizon case, in which all parties joined in a settlement, some would have walked away if rule had been in effect.

Todd Glass –Sidebars very effective. They are needed to preserve balance of issues.

Dave Wiley – Rule is impractical from standpoint of settlements, e.g. – complaints before they are issued – would restrict settlements. Work to address issues and we need to work individually with heavy hitters. Saves time and effort/expense – have staff work with heavier parties.

Integra – Verizon Intervenor – Not destroyer – Verizon case process worked well. Recently in Oregon – the deal was done before the docket was opened. Washington openness is now better than Oregon's. The Commission can't prohibit pre-filing discussions.

Sally Johnston – Critical to allow staff and utility to engage in bilateral settlement discussions - current rule adequate. HB 1800: 10 days. Oregon – reasonable notice – Idaho – after negotiations begin. APA expressly allows agencies to restrict rights of intervenors. The poster child case – Verizon – included many bilateral discussions. Commission Staff and the Company are the only parties that address all issues.

Simon ffitch – 2001 PSE, Verizon, PSE 2004 settlement process – the latter resulted in only a partial settlement. He is disappointed by parties' recharacterization of the settlement process that has been used in some proceedings. Public Counsel's intent is to allow the kind of process that was actually used in those poster child cases. Many process concerns can be addressed. No intent to create overly-bureaucratic process, but to allow PSE/Verizon processes and not to create a parade of horribles. All know how to do a good process. They also know impact on process if Staff and Co. secretly negotiate and reach a settlement among themselves.

David Valdez – Irony - Poster child Verizon case couldn't have happened if the draft rule were in effect. Wait and see. Look at the issue for twelve months, then re-evaluate in light of cases in the meantime.

Mark Sidran – Glenn, then how is this different from other litigation?

Glenn – In other processes than general rate cases, e.g. enforcement role. Unfiled agreements case – settled with individual companies. Could not have done that with the approach proposed in the rule. There was frustration with comments that the poster proceedings would be okay under draft rule. If those are okay, let's craft a specific rule to allow them.

Glenn – Staff is pulled in different ways and wants all parties involved in discussions. We want all to be involved, but we don't want to let a single party hold the process hostage. Statute? Rule? Constitutional amendment? Why not try a pilot process in a case? Parties haven't done that.

Simon ffitch – Unlike civil litigation a) Staff has a central role, b) there are public interest issues – parties can't decide by themselves and must present a proposed settlement for approval. There can be a reasonableness hearing in civil litigation, as well.

Art Butler – Two parties cannot settle out others' positions.

Michael Early – Rate case litigation is different from civil litigation. Settlement with Staff means more because of the weight that Staff carries.

Polly McNeill – Situations are different between utility and transportation cases. Consider whether a settlement rule is necessary, especially for transportation.

Chris Swanson – People seem to be critical. Settlements require flexibility, and tactics can vary greatly in different cases. Most of the issues boil down to the personalities of persons working on the case.