

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RULEMAKING TO CONSIDER RULES
IMPLEMENTING SHB 2426, 2006
SESSION, RELATING TO DELEGATION
OF CERTAIN COMMISSION DECISIONS

DISCUSSION DRAFT (CR 101)

DOCKET NO. A-060357

COMMENTS OF PUBLIC COUNSEL (SECOND)

May 31, 2006

I. INTRODUCTION

The Public Counsel Section of the Washington Attorney General's Office respectfully submits this second set of comments in response to the Commission's May 2, 2006, Notice of Opportunity to File Written Comments and Discussion Draft of the Proposed Rules (CR-101) in the above captioned matter.

These comments reflect many of those made by Public Counsel at the May 11, 2006, workshop and attempt to incorporate our understanding of certain discussion points into the language of the rules. Additionally, we offer more specific and expanded comments to those offered by Public Counsel on April 24 and May 11 and provide suggested rule language reflecting those comments.

II. GENERAL COMMENTS

In Public Counsel's initial comments, dated April 24, 2006, we identified the practical challenge of accomplishing quicker Commission action while providing sufficient public notice.

We believe that the rules as proposed, along with the additional changes discussed at the May 11 workshop, successfully resolve many of these concerns.

As the Commission recognized in the draft rules, sufficient public notice requires, among other things, that it is clear as to what matters may be delegated. Therefore, we continue to urge the Commission to resist efforts to create a “catch-all” category in WAC 480-07-904(1)(a) because it would greatly reduce the clarity of the delegation rules. As noted in the workshop, and perhaps even more importantly, delegation under such a “catch-all” rule would likely violate the statutory requirement that the Commission delegate specific decisions “by rule or order.” RCW 80.01.030.

Moreover, while we initially urged the Commission to utilize existing processes as much as possible, we believe that those new processes proposed, along with the additional changes discussed at the May 11 workshop, successfully dovetail existing practices. In our initial written comments, Public Counsel urged the Commission to issue yearly reports detailing the decisions it delegated, to whom the decision was delegated, the process and the outcome. We note that such a reporting requirement is not reflected in the rules. We continue to urge a reporting mechanism to preserve transparency in the process and allow for evaluation of the delegation program in the future, including the new processes created by the rules. We understand that the Commission may choose to include such a requirement by order instead of by rule and urge that, regardless of the vehicle the Commission chooses, such reporting and evaluation should occur.

Similarly, our comments regarding adequate training for those who have not regularly been on the decision-making side of the ex parte “wall” are not reflected in the rules. We

understand the Commission may choose to pursue this suggestion as purely an administrative matter. We raise it here only to note it again as a concern.

III. PUBLIC COUNSEL'S COMMENTS TO THE MAY 11, 2006, DRAFT RULE REGARDING DELEGATION OF AUTHORITY TO THE EXECUTIVE SECRETARY TO DECIDE CERTAIN MATTERS, DRAFT WAC 480-07-904

In the first unnumbered paragraph, the draft rules require that the delegated decision take effect immediately upon entry of the Secretary's order. We understand the concerns expressed by a number of the companies regarding the potential for being whipsawed if the Secretary's decision takes immediate effect and is then later reversed by the Commission. Therefore, we would support a change to this provision allowing a company either to seek immediate effect of the Secretary's order or to have the Secretary's order take effect after the opportunity for review has been exhausted.

A. Matters delegated for decision:

In general, Public Counsel is comfortable with draft WAC 480-07-904 (a)(i) through (a)(vi), (a)(ix) and (a)(xii). We note some concerns about Subsections (a)(vii), (a)(viii), (a)(x), (a)(xiii) and (a)(xiv) and discuss these concerns below.

1. Subsection (a)(xiv), Petitions for accounting orders.

We express very strong concerns about the broad nature of subsection (a)(xiv) pertaining to petitions for accounting orders and ultimately have decided to oppose including accounting orders in those matters subject to delegation.

Accounting orders, depending on the circumstances, may be either routine ministerial matters or matters requiring great discretion with very significant policy implications.

Indisputably, many recent petitions for deferred accounting have fallen into the latter category.

For example, companies have often sought power cost adjustments through accounting orders. *In re: Petition of PacifiCorp*, Sixth Supplemental Order, Docket No. UE-020417 (July 15, 2003). Indeed, PacifiCorp's application for deferred accounting for power costs in Docket No. UE-020417, while initially rejected, ultimately resulted in amending the Commission's prior five-year rate plan order adopted in Docket No. UE-991832. Docket No. UE-020417, at ¶ 57.

Furthermore, significant compliance filings have also been processed as accounting petitions. These have included the distribution of rate credits resulting from merger conditions, as well as the treatment of proceeds from the sale of a telephone company's directory business. *In re: MidAmerican Energy Holdings Company and Pacificorp, D/B/A Pacific Power & Light Company*, Order No. 7, Docket No. UE-051090, ¶ 4 (February 22, 2006); *In re: Request of Sprint Nextel Corporation*, Order No. 6, Docket No. UT-051291 (March 4, 2006).

Finally, a gas decoupling mechanism has also been sought through a petition for an accounting order. *See, In re: Avista Corporation, d/b/a Avista Utilities*, Docket No. UG-060518. This is also an extremely important policy issue for the Commission.

During the workshop, Chairman Sidran requested that interested parties proposing that certain matters be excluded from delegation identify why such matters should be excluded. Specifically, the Chairman asked interested parties to identify, in terms of time and other resources, why the benefit of delegation would be outweighed by any concerns about such delegation.

After careful consideration, Public Counsel was unable to identify a workable demarcation between truly routine accounting matters and those that involve significant policy questions. Given the many major policy questions often raised by accounting orders, including

matters of first impression, we must oppose including such orders among those matters that may be delegated. Nonetheless, we welcome proposed narrowing of this language by other stakeholders and remain open to evaluating any new language during this rulemaking process.

2. Subsection (a)(vii) – tariff revisions with less than statutory notice.

Public Counsel also has very strong concerns with the proposed language in subsection (a)(vii) regarding tariff revisions with less than statutory notice (“LSN”).¹ We are particularly concerned that this subsection remains too broad and may encompass filings inappropriate for delegation.

We appreciate that opposition from Commission Staff ensures significant protection against the rule being abused. Indeed, this condition goes a long way toward assuaging our concerns. However, we would feel more comfortable if the rule added a second condition.² The second condition would prohibit delegation of any LSN tariff revision that directly or indirectly increases any rate or charge unless it was the result of a new municipal tax rate.³ We offer the following language modifying the proposed rule in legislative format:

WAC 480-07-904 (a)(vii), Applications for less than statutory notice
approval of tariff revisions that are not opposed by commission staff- or those

¹ Less than statutory notice is also governed by WAC 480-07-500(5). Under that rule, the commission may grant requests to alter tariffs on less than statutory notice for good cause shown, in accordance with RCW 80.28.060 and 81.28.050, and a company petitioning for less than statutory notice of tariff changes must include a complete explanation of the reasons that support such treatment with its filing.

² This concern does not extend to less than statutory notice under (a)(v) since the Commission has apparently been operating under an existing order in much the same way and no concerns have been raised about the current process.

³ See, RCW 80.28.060 (“the effect of which is to increase any rate or charge”).

that do not directly or indirectly increase or change any rate or charge unless directly caused by a change in any municipal tax rate.

We acknowledge that the exception proposed by Public Counsel may result in negating much of the rule. If this language is not acceptable and should a workable narrowing of this language not be possible, Public Counsel would likely oppose the delegation of these matters.

3. Subsection (a)(x), Petitions for mitigation of penalties.

Again, we note that petitions for the mitigation of penalties (even when the petitioner does not request a hearing, and even when Commission Staff supports the request for mitigation) may nonetheless have significant policy implications. For example, under this language it would be possible for Staff and a company to arrive at a settlement in which penalty mitigation is exchanged for the company's waiver of its right to a hearing. Such a settlement could then be approved by the Secretary as a delegated matter. Commission review in such situations would likely be the norm rather than the exception in significant cases since the exclusion of other stakeholders from the settlement process will likely cause requests for review. In such cases, any benefits from delegating the decision would be lost.

In order to limit the broad sweep of this language, we note that most controversial penalties are assessed in the areas of telecommunications and energy regulation. Thus, the bulk of the controversies surrounding the mitigation of penalties can be avoided by removing these areas of regulation from delegation.⁴ Others may suggest that, instead, monetary penalties below a certain amount should be subject to delegation, however, the decision setting the penalty

⁴ Indeed, penalties against telecommunications and energy companies appear to be imposed less frequently and so, removing these from the delegation rule would not significantly add to the Commission's workload.

amount may also be controversial. Therefore, Public Counsel proposes the following language in legislative format:

WAC 480-07-904(a)(x), Petitions for mitigation of penalties issued against motor carriers; household goods carriers; auto transportation companies; private, nonprofit transportation providers; passenger charter carriers; commercial ferries; railroad companies; solid waste and/or refuse collection companies; and water companies in instances when the petitioner does not request a hearing, ~~or~~ and when commission staff supports the request for mitigation.

4. Subsections (a)(xiii) and (a)(xiii), Securities and contracts for service.

Additionally, we note some concern about subsection (a)(viii). We acknowledge the Commission's limited authority in this area but urge that any order requested by a company and issued by the Executive Secretary contain the same or a similar language already inserted in current securities orders adopted by the Commission. *See e.g.*, Order No. 1, Docket No. UE-060822 (May 31, 2006), ¶ 11 ("This Order shall in no way affect the authority of this Commission over rates, services, accounts, valuations, estimates, or determination of costs, or any matters whatsoever that may come before it, nor shall anything herein be construed as acquiescence in any estimate or determination of costs, or any valuation of property claimed or asserted.")

We also note some concern regarding subsection (a)(xiii), which delegates the approval of contracts for service for terms other than those established by rule or order. The need for further delineation in this area was recognized at the workshop. Further narrowing should ideally include, at the very least, identifying those contracts governed by WAC 480-80-141, -142

and -143 subject to delegation. Additionally, we urge that any order adopted by the Secretary also include the same or similar language identified in the prior paragraph.

B. Notice of delegated decisions, WAC 480-07-904(b).

Public Counsel is generally comfortable with the notice process outlined in the proposed rules. We offer these comments to further define the rule and reflect our understanding of the feedback we received at the workshop.

At the workshop we pointed out that if notice was limited to a weekly list of filings and if a filing came in at the end of the week, interested parties would have only seven days in which to request review and not the fourteen days identified in WAC 480-07-904(c). It was clarified that the weekly list of filings would be provided in addition to and not in place of a daily notice of filings on the Commission's web site. Consistent with this understanding, Public Counsel recommends the following changes to the proposed rule in legislative format:

WAC 480-07-904(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, each matter decided pursuant to subsection (a), above, on its internet web site on the day the matter is decided. Each matter shall be posted for at least 14 days. The posting will show the docket number, the decision, the date of entry of the decision, the company name and the deadline for seeking review under subsection (c), below. The commission will also publish notice of weekly listings weekly of delegated decisions via electronic mail and first-class mail to persons~~

requesting such notice. The weekly listings will consist of a compilation of the information contained in the commission's daily web site postings.

C. Opportunity for review, WAC 480-07-904(c).

Public Counsel is generally comfortable with the opportunity for review outlined in the proposed rules. We offer these comments to reflect our understanding of the feedback we received at the workshop, to further define the rule, and to make it more consistent with our proposed revisions to WAC 480-07-904(b).

We offer the following language modifying the proposed rule in legislative format:

WAC 480-07-904(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 first day the matter is posted on the commission's web site. ~~The commission will provide a~~ In addition to the commission's customary methods of allowing interested parties to communicate with the commission, an electronic form for this purpose seeking review under this subsection will be provided on the commission's web site. The commission will schedule the matter promptly for consideration at an open meeting and will promptly notify the person requesting review of the time and place of the open meeting at which review will be taken.

IV. CONCLUSION

Public Counsel appreciates the opportunity to submit these comments and we hope they offer assistance to the Commission in its deliberations. We look forward to reviewing future drafts and fully participating in any discussions during the next stage of the rulemaking process.