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.	)	DOCKET NO. A-050802

Second Comments of Public Counsel

Attorney General of Washington

January 17, 2006

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) December 9, 2005 *Notice of Opportunity to Submit Comments*.

The settlement process issues addressed below are critically important. The issues have been extensively discussed and debated in previous Commission adjudications and rulemaking, at the legislature, at the July 2005 Bench-Bar Seminar, in a petition for rulemaking (A-051427), and in the current rulemaking. The issue of notice and participation was first raised by Public Counsel in the Commission's last "procedural rules" rulemaking in 2003. Public Counsel incorporates by reference in these comments its prior statements and comments in Commission rulemakings, adjudications, and workshops on this issue.

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This rulemaking provides the Commission the opportunity to develop its own reasonable resolution of these issues with stakeholder participation. Some parties have suggested that these concerns can be addressed simply through informal changes in case procedures or practices and that rule changes are not necessary. Public Counsel disagrees. The problems and concerns raised are recurring. However effective informal practice changes may be in the short term, they are vulnerable to personnel changes and the pressures of individual cases and circumstances. Adoption of the proposed rule amendments will provide clear guidance and a consistent framework for settlement that will benefit all parties and the Commission.

II. COMMENTS

1. Please comment whether the commission should consider adopting the amendments to WAC 480-07-730 and WAC 480-07-740 proposed by Public Counsel and others. The rule proposals are posted to the commission's website: http://www.wutc.wa.gov/050802.

The Commission should adopt the amendments to the settlement rules proposed by Public Counsel, Industrial Customers of Northwest Utilities (ICNU), WeBTEC, Citizens Utility Alliance (CUA), Northwest Energy Coalition (NWEC), the Energy Project, and A World Institutes for a Sustainable Humanity (A.W.I.S.H.).

Attached to these comments are statements and memoranda developed in connection with HB 1800 which discuss the reasons for adopting these process improvements in detail. In summary, the rule amendments are designed to ensure that (1) all parties have notice and an opportunity to participate in settlement discussions between Commission Staff and the regulated company; and (2) that, in non-unanimous settlements, that opposing parties have the right to present their case and to receive a decision on the merits of material issues raised.

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2. Please evaluate the settlement process followed in the Avista proceeding (Docket Nos. UT-050482 & UG-050483) and recent Verizon proceedings (Docket Nos. UT-050814 & UT-040788). If you believe flaws existed in the process in those dockets please a) specify what the flaws were and b) whether, why, and what rule amendments are needed to correct them.

Avista General Rate Case – UE-050482/UG-050483. Public Counsel was a party to this case.

1. Notice and Participation. In general, the settlement conference process itself was satisfactory. The pre-hearing order established a date for settlement conferences, which was later reset at the parties' request. All parties were later notified of the time and place for the conferences. Ultimately, a non-unanimous (multiparty) settlement was reached between Staff, Avista and other parties. Public Counsel and ICNU opposed the settlement.

2. Settlement Consideration. The Avista rate case settlement resulted in a dispute about the proper post-settlement procedure. There were both positive and negative aspects to the procedure ultimately adopted. On the positive side of the ledger, opposing parties were permitted to prefile evidence on all material issues, not just the settlement. The pre-existing case schedule up to and through the hearing was not abbreviated. At the hearing, opposing parties were allowed to cross-examine all witnesses who had filed testimony on all issues.

On the negative side of the ledger, the issue at the hearing was expressly limited, over PC and ICNU objections, to whether the settlement should be rejected, accepted, or conditioned.

The limited scope of review was, in Public Counsel's view, the most serious flaw in the Avista process. Whenever a non-unanimous settlement is presented, it is preferable that the Commission considers and resolves all the material issues presented by the case. The non-unanimous settlement should be treated simply as a joint position of parties. The process adopted places the Commission in the position of having to hold two evidentiary hearings if it

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rejects the settlement, a serious inefficiency. The prospect of having to conduct extensive further proceedings places *de facto* pressure on the Commission to accept the settlement, or impose only limited conditions, simply to avoid the burdens of added process. Even if the settlement is rejected, parties must find additional resources to put on their case a second time. This is most burdensome on intervenors with limited resources. This outcome also provides former settling parties, particularly, the regulated company, a "second bite at the apple." The settlement becomes a sort of trial balloon or roll of the dice. They need not fully commit to or submit supporting evidence for the settlement positions because if they are rejected, the company can simply fall back on its original position.

The draft language submitted would help resolve this issue by requiring findings on all material issues. It may also be useful to make an amendment to WAC 480-07-750 to adopt a clear distinction between the procedures used for review of full settlements and those for multiparty settlements. Public Counsel recommends that multiparty settlements be re-designated "non-unanimous" settlements and that when such a settlement is filed, the scope of hearing not be limited to settlement consideration but instead that all material issues in the case remain at issue in the hearing. Proponents of the multiparty settlement will be permitted to put on evidence in support of their joint position, but the joint position will be reviewed in the same way as all other testimony and evidence tendered by other parties to the case.

Verizon/MCI Merger UT-050814. Public Counsel was a party to the case.

1. Settlement Conference. The case resulted in a non-unanimous settlement opposed by Public Counsel and other parties. The settlement conference process was acceptable. All parties were advised that a settlement conference was being convened and had an opportunity to participate.

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2. Settlement Consideration. The settlement consideration process was reasonable and had some practical advantages over the Avista approach. There was no request from the settling parties to narrow the scope of the hearing. The Commission did not expressly order a narrow scope for the hearing (although it cited the provisions of WAC 480-07-750(2) in the final order). All parties were permitted to offer testimony and to cross-examine on all proposed conditions to be imposed on the merger. The Commission's final order effectively rejected the settlement as written, and adopted some of the proposals of settling parties, and some proposed by opponents of the settlement. The settling parties accepted the alternative framework established by the Commission.

Other Commission cases of note

In addition to the above cases, there are at least three relatively recent major cases which have successfully employed the "notice and opportunity" to participate approach contained in the draft rule proposal. PSE's 2001 general rate case, Docket UE-011571 et al., is the pre-eminent example. PSE deserves particular credit for taking the lead in inviting all parties to participate and in spearheading the organization of the process. The settlement process, involving 32 parties, was carefully organized and extended over several weeks. Separate groups were formed to address issues such as revenue requirement, rate design, PCA, low-income, conservation, and other issues. Parties were free to participate in as many sessions as they chose. A full all party settlement was achieved. The Commission acknowledged the efforts of the parties in its final order. *WUTC v. PSE*, Twelfth Supplemental Order; Rejecting Tariff Filing; Approving and Adopting Settlement Stipulation Subject to Modifications, Clarifications, and Conditions; Authorizing and Requiring Compliance Filing, Docket No. UE-011570 and UG-011571 (consolidated), (June 2002).

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PSE followed the same approach in its 2004 rate case, Docket UE-040641 et al. Again, all parties were invited to participate in settlement. After all party talks failed to resolve all issues, an all party settlement of rate design and rate spread was reached, and the remaining issues went to hearing.

A third example of a successful inclusive process was Verizon's contentious general rate case, Docket UT-040788, which had initially sought the largest telephone rate increase in state history. In that case, again, all parties were notified that settlement was to be discussed and there was inclusive participation in the talks. A full all party settlement of the entire case was reached.

3. Based on your actual experience, please compare and contrast Oregon's rules and practice governing voluntary settlements (OAR 860-014-0085) with the commission's rules and practice. Please identify by company, docket number, and date, any individual proceedings in Oregon in which you have been a participant in the settlement process during the past two or three years.

Public Counsel does not have actual experience with the Oregon procedures. Public Counsel believes that the Oregon experience does provide a useful comparison for the Commission in its deliberations, and disproves some of the concerns raised by opponents as to the unworkability of this approach in Washington.

4. Please state whether the amendment to WAC 480-07-730 proposed by Public Counsel and others, if adopted, should apply only to commission staff or to all parties.

By its terms, the draft proposal specifically requires notice of settlement discussions involving the Staff and the company. This is appropriate for several reasons. First, the rule recognizes the practical reality that the Commission Staff has a unique role among parties to any adjudication. It has significant analytic and legal resources, it has an institutional place within the agency which historically gives its voice special influence, and it views its role as acting as the party that seeks to balance the various interests before the Commission. When the

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Commission Staff has reached an agreement with a regulated company to present a joint position on one or more issues, the agreement inevitably carries substantial weight.

Second, although it has an independent function in adjudications, nevertheless, the Staff is a part of the Commission. Since it is part of the Commission's function to craft and conduct a fair and responsive adjudication process it makes sense that its own Staff would follow procedures that facilitate that goal. A third and related point is that, on the other hand, the Commission has limited authority to restrict communications between other parties and the regulated company.

5. Please describe how the nature of the commission's proceedings differs materially from other civil litigation insofar as settlements and the settlement process is concerned, and how any differences should be reflected in the settlement rules or practice.

A chief difference between settlement proceedings in civil litigation and those at the Commission is the special role of the Commission in approving settlement agreements. The Commission cannot delegate its regulatory authority to the parties. It must make an independent decision, based on the record before it, that the result proposed by the settlement is in the public interest and meets all other applicable statutory requirements. By contrast, with some exceptions as in the antitrust and class action field, civil trial courts can not ordinarily reject settlements presented by litigants and require a case to be tried. When the Commission adopts a settlement, it is not simply acting as a disinterested arbiter of private interests, it is exercising its statutory authority to regulate particular economic activities in the public interest. Accordingly, it is particularly important that its settlement procedures are designed to ensure that it has the best record for decision and that all interested stakeholders have had a fair opportunity to be heard.

Another important difference is that in civil litigation, a subset of parties cannot in effect "freeze out" non-settling parties by presenting a non-unanimous settlement as a final resolution

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of the case. Unless all parties agree to the settlement, the case is not resolved and proceeds to trial, where the burden of proof must be met. The fact that a subset of parties agrees on one or more issues does not limit the procedural rights of parties who have not settled.

Finally, as noted above, the role of the Commission Staff is unique. There is no parallel in civil litigation where a party has such a special relationship to the judge. Because of this special role, it is appropriate for the Commission to adopt guidelines to ensure fairness.

6. Would it be improper under the proposed amendment to WAC 480-07-730 for a settlement judge to caucus with one or more, but not all, parties to resolve issues between two or more parties? Should rules restrict parties' ability to caucus with one or more other parties, but not all, during a scheduled settlement conference?

No, neither of these scenarios would be improper. Both of these occur now in Commission settlement proceedings, without objection. Settlement and ADR processes typically contemplate flexibility to participants to design the process in a mutually agreeable fashion. As noted above, the intent of the rule is to codify the successful practice that has been used in a number of Commission cases and is well understood by the parties. Some opponents of the draft rule have suggested a variety of problems and difficulties which, in reality, have rarely if ever arisen in actual Commission practice.

It is important to note that in none of the specific case settlement proceedings discussed above, where notice and opportunity to participate were afforded all parties, did any undue delay or disruption result. Public Counsel is not aware that any disputes about settlement process issues such as inter-party communications, caucusing, scheduling, notice, or other procedural problems occurred. This is the case even though Commission Administrative Law Judges (ALJ) only assisted as mediators in limited situations. The reality is that the Commission ALJs and bar have repeatedly demonstrated their ability to conduct professional, ethical, fair, efficient, and productive settlement proceedings once the ground rules for notice and inclusive participation have been established in a given case. The purpose of the proposed rule is to simply codify this successful practice so that it is clear to all parties that the Commission's policy is to use this

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approach in every case. There is no need to construct a set of rules to cover every variation of party interaction within a settlement.

7. Concerning the proposed amendments to WAC 480-07-740, do the requirements in RCW 34.05.461(3) meet the concerns of the proponents for an order addressing all material issues of fact or law? If not, please discuss why the statute does not address the concerns.

The proposed rule amendments are intended to incorporate by rule the provision of RCW 34.05.461(3), in particular the requirement that:

> Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefore, *on all the material issues of fact, law, or discretion presented on the record*…. (emphasis added).

The purpose of the amendment is to clarify that, in cases where there is a non-unanimous settlement, the opponents of a proposed settlement are entitled to an order which addresses material issues of fact or law which they have raised, even though those issues may have not been addressed in the non-unanimous settlement, so long as those issues are material. The current rule does not address this point.

As discussed above, it is Public Counsel's position that, except in the case of a full settlement, that a non-unanimous settlement should be viewed, as the current rule states, as simply "an agreement of some, but not all, parties on one or more issues [that] may be offered as their position in the proceeding along with the evidence they believe supports it." When "opposing parties present evidence in support of their "preferred result," i.e., an alternative to the settlement, as permitted by WAC 480-07-740(2)(c), the proposed rule amendment clarifies that they are entitled to an order which makes findings on the material issues of fact and law which they have raised. The fact that the issues may not have been encompassed within the provisions of the non-unanimous settlement should have no bearing on whether the Commission addresses them in the final order.

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8. Is discovery under the proposed amendment to WAC 480-07-740 intended to be an absolute right? Would an absolute right allow abuse of the process and irrelevant discovery? Why should parties opposing a settlement have discovery rights greater than those afforded under the discovery rules during other stages of a proceeding (*i.e.*, why should the commission's discretion to control discovery, considering the needs of the case be constrained, when a settlement is filed)?

The right to conduct discovery mentioned in the rule amendment is not an absolute right. The purpose of including this provision is to clarify that non-settling parties retain the right to discovery which they have under existing Commission rules. In other words, there is no presumption that non-settling parties lose their ability to conduct discovery merely because other parties have agreed to a joint position on one or more issues (a "multiparty" non-unanimous settlement). The rights preserved and clarified by the rule are no greater than, but no less than, the discovery rights which otherwise apply. They are subject to the same discretionary authority of the Commission and its presiding officers.

9. Should the commission change the description of the "highly confidential" designation in WAC 480-07-423(1)(b)? If so, please explain how and why.

Public Counsel recommends that the rule be amended by removing the words "for example." The words appear to be superfluous, since the sentence describes a category of information, rather than an example.

10. Please identify circumstances that justify use restrictions for persons given access to documents designated confidential or highly confidential.

In general, use restrictions would apply where the basis for imposing confidential or highly confidential protection have been established under the rules. Public Counsel's position is that use restrictions, rather than employment restrictions, should be applied in all circumstances where access to documents needs to be restricted.

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11. Please identify circumstances that justify employment restrictions for persons given access to documents designated confidential or highly confidential.

Public Counsel does not believe that employment restrictions on outside consultants are a justifiable form of restriction on access. Employment restrictions raise both legal issues and practical problems. Particularly problematic has been the use of highly confidential protective orders which require outside expert witnesses to sign an affidavit indicating they will not engage in certain specified activities for an extended period of time, often several years. Such requirements are often difficult for consultants to agree to, especially where wording is broad and time periods are extended. At least one Public Counsel consultant has declined to sign such an affidavit.

During a case in 2003, Public Counsel conducted an informal poll of its consultants regarding their views of affidavits containing employment restrictions for access to highly confidential information. The consultants raised concerns about the breadth of the restrictions in the affidavit and the vagueness of the terminology. We received thoughtful responses from consultants and firms from Boston, Washington D.C., Florida, California, and elsewhere with public and private clientele and extensive experience in other jurisdictions. The consultants made several points:

- the consultants have not encountered a similar affidavit requirement elsewhere
- the language of an affidavit is often too broad and undefined
- the time period of the restriction is too long (for example, three years)
- consultants are comfortable signing protective agreements that limit use of the sensitive information to the particular docket but the affidavit language in this case is seen as burdensome and would pose a problem.

Our conclusion from these responses, and from other direct dealings with witnesses is that employment restrictions make it more difficult for Public Counsel to retain outside experts. *See*,

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WUTC v. PSE, Docket No. UE-031725 (2003 Power Cost Only Rate Case), Public Counsel Objection to Order No. 03; Petition for Interlocutory Review, p. 4. The Commission has successfully used highly confidential protective orders with use restrictions without problems, including in Docket UT-033044, a case involving multiple telecommunications competitors and much competitively sensitive information. The outside expert is required simply to sign a certification (usually the so-called "Exhibit C") that they agree to protect the information according to the terms of the order.

Public Counsel recommends that the above approach be standardized by rule, and that affidavits with employment restrictions not be employed. This will provide a practical and effective degree of protection, while avoiding the repetitive case-by-case litigation which has occurred over the wording and scope of affidavits and other forms of employment restriction.

12. Please provide proposed language for WAC 480-07-160 and WAC 480-07-423 describing how confidential or highly confidential information should be marked or identified in a document.

Public Counsel believes the current marking and identification requirements are satisfactory. However, Public Counsel believes it would be helpful to have specific approval in the rule to use "BEGIN CONFIDENTIAL **** END CONFIDENTIAL" marking as an additional option for indicating protected material.

13. Please provide proposed language for WAC 480-07-160 and WAC 480-07-423 describing how confidential or highly confidential documents should be filed with the commission.

Public Counsel believes the current filing requirements are satisfactory.

14. Please comment on Public Counsel's August 26, 2005, proposal to amend WAC 480-07-310(b), concerning ex parte communication.

Public Counsel continues to support its August 26 recommendation on this issue. The rule would simply require that, when regulated companies have had pre-adjudication contacts with Commissioners, the company must make a filing in the adjudication docket, disclosing the nature and content of the communications.

15. Please state your observations or concerns about any of the commission's procedural rules, and propose specific language changes to address your concerns.

Public Counsel incorporates by reference its additional recommendations contained in its August 26 comments in this docket. Public Counsel may wish to make other recommendations as the rulemaking proceeds into other issue areas.

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