[Service date: 1/17/06]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Procedural Rules Rulemaking – Chapter 480-07 WAC	Docket No. A-050802 **COMMENTS OF WeBTEC**

I. INTRODUCTION

1. The Washington Electronic Business and Telecommunications Coalition ("WeBTEC") hereby submits the following comments in response to the Washington Utilities and Transportation Commission's ("Commission") December 9, 2005 *Notice of Opportunity to Submit Comments* about procedural rules in chapter 480-07 WAC, including certain issues raised in the November 10, 2005 workshop held in this rulemaking proceeding. In its Notice, the Commission raised 15 specific questions, which are addressed below.

2. The first eight questions relate to the Commission's treatment of non-unanimous settlements and the amendments to WAC 480-07-730 and WAC 480-07-740 proposed by Public Counsel and others, including WeBTEC (collectively "Petitioners").

II. COMMENTS

A. Please comment on 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.

3. The Petitioners propose amendments to the existing administrative rules regarding settlements because they will promote confidence in the regulatory process, protect due process, and improve efficiency by ensuring that differing points of view that are best advanced by

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individual parties are fairly considered. The proposed addition to WAC § 480-07-730 will ensure that all parties are notified of settlement negotiations, thereby allowing all interested parties to participate in negotiations. The proposed new section of the rule will prevent Commission Staff from holding closed settlement negotiations with regulated companies in which other parties are excluded from participating, as is permitted under the current rule. This will improve the regulatory process by giving all parties to a proceeding fair notice and equal opportunity to participate in the resolution of all issues in a contested proceeding.

4. The proposed amendment to WAC § 480-07-740 provides that when a non-unanimous settlement has been reached, the Non-Settling Parties will have the opportunity to fully litigate all disputed issues of law and fact, and the Commission will issue a ruling on all disputed issues. This will ensure that intervenors receive a full hearing on all disputed issues, including issues that have been settled by some parties. This will give Non-Settling Parties the procedural right to fully litigate the issues that led to their participation in the proceeding.

5. As the Petitioners stated in their petition for rulemaking, fundamental fairness requires that Non-Settling Parties have a meaningful opportunity to be heard on both the proposed non-unanimous, multiparty settlement, and all disputed material issues of fact and law. Review of all disputed issues will provide the Commission with a superior record and prevent a subset of parties dictating the scope of the Commission's review. As a practical matter, the Commission's final order will also be far less subject to appeal and related transactional costs.

6. Moreover, the proposed rule changes will ensure that the due process rights of all parties to an adjudicatory proceeding (or contested case) are protected. Those rights are set forth in the Washington Administrative Procedures Act, Chapter 34.05 RCW, and in the Commission's rules.

7. RCW 34.05.449 specifically provides that "to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit

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rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order."

8. RCW 34.05.461(3) provides that "initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on ***all the material issues of fact, law or discretion presented on the record, including the remedy or sanction*** ..." (Emphasis added.)

9. While the Administrative Procedures Act provides that the Commission may dispose of a contested case by agreed settlement of the parties, it specifically preserves the rights of a party not to join:

> [I]nformal settlement of matters that would make unnecessary more elaborate proceedings under this chapter is strongly encouraged. Agencies may establish by rule specific procedures for attempting and executing informal settlement of matters. ***This section does not require any 1 or other person to settle a matter.*** (Emphasis added.)

RCW 34.05.060. The key point here is that an agreement between some, but not all, of the parties to a case is not a true settlement—not all parties agree and not all competing interests are accommodated. Instead, it is simply an agreement of some parties to take a common position as to issues in the case. *See* WAC 480-07-730(3). It does not have the affect of terminating other parties' rights in the case, as the foregoing statute underlines. Nor does it have the affect of subjecting Non-Settling Parties to an unfair process or deprive them of access to relevant evidence or the right to rely upon it in presenting their case or deprive them of their right to a decision on the merits on all material issues in dispute.

10. In the absence of an unanimous settlement, evidentiary hearings can only be dispensed with by a regulatory commission when there are no disputed questions of fact.[1] In *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, a decision of the Illinois Commerce Commission ("ICC") approving a non-unanimous settlement of

[1] *Dee-Dee Cab, Inc. v. Penn. Public Utility Comm'n*, 817 A.2d 593, 598 (2003).

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an electric utility rate case was challenged by several intervenors on the grounds that it constituted an illegal settlement or rate bargain between the utility and the ICC.[2] The settlement was presented after extensive hearings had been conducted, and was approved over the objections of intervenors. The Illinois Supreme Court ruled that the ICC was required to base its decision exclusively on the record, as required by state law, and not on the settlement. The settlement was not a decision on the merits.[3] The court held that "[i]n order for the commission to dispose of a case by settlement, however, all of the parties and intervenors must agree to the settlement."[4] The court went on to clarify that the ICC could ***consider*** a settlement proposal not agreed to by all of the parties and the intervenors as a decision on the merits, as long as the provisions of such a proposal are within the commission's power to impose, the provisions do not violate the laws under which the commission operates, and the provisions are independently supported by substantial evidence in the whole record. Such was not the situation in the case before the court.[5]

11. Several other state courts have held state commission orders approving non-unanimous settlements to be unlawful where the commission failed to hold a full hearing on the issues and, therefore, was unable to make findings and conclusions based on substantial evidence, as required by the commission's own regulations.

12. In *Fischer v. Public Service Commission of Missouri*, 645 SW 2d 39 (Mo. Ct. App. 1983), for example, the Missouri Court of Appeals rejected the Missouri Public Service Commission's ("MPSC") approval of a non-unanimous settlement of a rate design case as unlawful. There, all parties but public counsel reached a compromise on the rate design issues in the docket, and a stipulation and agreement was filed with the MPSC setting forth the agreement. Thereafter, the MPSC informed public counsel that it had adopted a "limited hearing procedure"

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[2] *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 555 N.E. 2d 693 (1989).

[3] *Id.*, at 704.

[4] *Id.*, at 700-701.

[5] *Id.*, at 704.

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for the docket providing that after any non-signing party had been accorded a right to a hearing as provided by law, the commission would enter an order approving or disapproving the settlement agreement. Following this limited hearing of evidence presented by public counsel in opposition to the settlement, the MPSC approved the settlement, citing only the fact that "it resulted from extensive negotiations between groups with varying interests and economic positions." The court rejected the MPSC's order as unlawful on three separate bases. First, the MPSC's own regulations set forth minimal requirements for commission hearings and provide that all parties have the right to be heard and introduce evidence," and the MPSC's limited hearing procedure violated this provision. 645 SW 2d at 42. Second, MPSC regulations require the MPSC's orders to state the findings of fact that form the basis for the order, and the court held that:

> The findings in this case ... are completely conclusory, and provide no insights into if and how controlling issues were resolved. There are many factual issues which the Commission would necessarily have considered before entering an order adopting a rate design ... but which are absent from the findings of fact.

645 SW 2d at 42-43. Third, the court ruled that "the hearing procedure employed by the MPSC violated due process of law by denying public counsel a fair and meaningful opportunity to be heard." 645 SW 2d at 44.

13. The Missouri Supreme Court reached a similar conclusion in *Monsanto Co. v. Public Service Commission of Missouri*, 716 SW 2d 791 (1986). There, the court again struck down an order issued by the MPSC adopting a rate design proposed in a non-unanimous settlement because it lacked the requisite findings of fact. In so holding, the court reasoned that "nowhere in the Report and Order does the commission make any findings of fact as to why this method would be the appropriate method for allocating the increase." 716 SW 2d at 796. Despite the fact that the MPSC had held a hearing on the matter, the court found that "the lack of findings renders the report and order violative of the statute and unlawful." *Id.*

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14. The Supreme Court of Kentucky has also reached a similar conclusion in *Kentucky American Water Company v. Kentucky Public Service Commission*, 847 SW 2d 737 (S.Ct.Ky. 1993). There, two intervenors opposed the Kentucky Public Service Commission's ("KPSC") order adopting a settlement agreement reached only between the KPSC staff and the utility. On appeal, the Supreme Court of Kentucky held that: (1) the contested settlement did not constitute an evidentiary basis for the KPSC's final order; (2) the KPSC should have held a full scale rate hearing, instead of one merely to consider reasonableness of the settlement; and (3) failure to allow KPSC staff to be subjected to discovery and cross-examination violated the intervenor's due process rights.

15. As noted, a non-unanimous settlement itself cannot be the basis for a Commission decision concerning any issue about which there is a material factual dispute. Because the settlement is not unanimous, the Commission must make findings of fact on all material issues of fact and law and base its decision on substantial evidence submitted in the record of the case. A non-unanimous settlement can only be considered as a decision on the merits if it is supported by substantial evidence in the record as a whole, and then only if it resolves all material issues in dispute.

16. Further, a full evidentiary hearing and a decision on the merits on all disputed issues is also required by the appearance of fairness doctrine. The appearance of fairness doctrine "requires that hearings and decisions appear to be fair as well as being fair in fact."[6] Giving some special priority right to consideration of a non-unanimous settlement without also considering all of the other evidence that would be submitted in the case would violate this doctrine. The Washington Supreme Court in applying the appearance of fairness doctrine has opined that the basic test of fairness is whether a fair-minded person could say that everyone had been heard who should have been heard and that the decision making body gave reasonable consideration to all

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[6] *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 Wash. L. Rev. 533 at 534 (1986).

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matters presented.[7] To be consistent with this requirement, the Commission must conduct a full evidentiary hearing and decide all material issues of fact and law on the merits whenever all material issues have not been resolved by an unanimous settlement.

B. 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.

17. Avista General Rate Case – UE-050482/UG-050483. WeBTEC was not a party to this case. However, based on a review of the publicly available documents in the case and a discussion with Public Counsel, WeBTEC believes that, 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 Commission Staff, Avista and other parties. With regard to the hearing, the Non-Settling Parties were permitted to file 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, the Non-Settling Parties were allowed to cross-examine all witnesses who had filed testimony on all issues. In other words, the Non-Settling Parties were not limited to examination of the settlement. On the other hand, the Commission announced that the issue at the hearing was expressly limited to whether the settlement should be rejected, accepted, or conditioned. And, the final order failed to specifically discuss or make findings on a number of issues raised by the Non-Settling Parties. In other words, it appears that the Commission failed to properly consider and resolve all the material issues presented by the case, thereby violating the requirements of RCW 34.05.461. The non-unanimous settlement should have been treated simply as a joint position of the Settling Parties.

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[7] *Smith v. Skagit* County, 75 Wn. 2d 715, 453, P. 2d 832 (1969).

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18. Also, had the Commission rejected the proposed settlement, it would have had to hold a second evidentiary hearing, a serious inefficiency. As Public Counsel has noted, 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.

19. Verizon/MCI Merger: UT-050814. Again, WeBTEC was not a party to the case and bases the following comments on its review of the publicly available documents in the case, as well as on discussion with parties to the case.

20. The *Verizon/MCI merger* case also resulted in a non-unanimous settlement. However, the case followed the settlement and hearing process that would be called for if the rule changes proposed by Public Counsel, WeBTEC and others. All parties were advised that a settlement conference was being convened and had an opportunity to participate. And, the hearing combined the consideration of the proposed settlement with a full hearing on the merits. All parties were given an opportunity to address all material issues in dispute, to put on evidence, cross-exam witnesses of other parties, and brief all issues. The only puzzling aspect of the case was language in the Commission's order which suggested that if the Settling Parties rejected certain changes that the Commission felt were necessary for the settlement to be in the public interest, additional hearings would be required. It is not clear what additional hearings the Commission was referring to because the hearing conducted was a full hearing on the merits. Putting aside that puzzling language, WeBTEC believes that the *Verizon/MCI Merger* case is an appropriate model for the Commission to follow when there is a non-unanimous settlement.

21. In addition, WeBTEC submits that the Commission can look to the procedure followed in Docket No. UT-021120, which dealt with the application of Qwest Corporation for approval of the sale and transfer of its directory publishing affiliate, Qwest Dex, to Dex Holdings,

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LLC. In that case, a partial proposed settlement between Qwest, Dex Holdings, Public Counsel, AARP, DoD/FEA and WeBTEC was offered but was also opposed by Commission Staff. The key point is that the Commission held full evidentiary hearings on all disputed issues. The proposed settlement was considered as a proposed resolution on the merits in the case, as was Commission Staff's position. While a non-unanimous settlement can be considered as the Settling Parties' proposal for resolution of the issues in the case, it should not be given any superior status.

C. 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.

22. While WeBTEC does not have direct experience with the Oregon rule, its sister organization, Oregon TRACER, does. The Oregon TRACER members report that there is nothing at all "unworkable" about the rule. Settlement conferences are set up for particular dates at the beginning of a case, and additional conferences can be set up on the agreement of the parties or with reasonable notice to everyone. And, if the parties wish, they can continue to exchange drafts of documents or discuss settlement via e-mail as long as everyone is copied.

D. 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.

23. By its terms, the draft proposal specifically requires notice of settlement discussions involving the Commission Staff and the company. WeBTEC believes that this is appropriate because of the special role that the Commission Staff has among parties to any adjudication. It has resources that other so not have, and it has a place within the agency which historically gives its voice special influence. It also views its role as being the party that seeks to balance the various interests before the Commission.

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24. Although, in formal proceedings, the Commission's regulatory Staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding,[8] there is simply no room to dispute the fact that when the Commission Staff has reached a settlement with a company, that the agreement carries substantial weight. Further, WeBTEC is aware of no case involving a non-unanimous settlement which the Commission Staff has opposed where there has been anything other than a full hearing on the merits.

25. Not surprisingly, the utilities strongly oppose the proposal to prohibit secret negotiations between them and the Commission Staff because it would require a process where all interests have a fair chance of being represented. Obviously, it is always easier to get one's way if it can cut out other parties. Now, the utilities need only get the Commission Staff to agree to a compromise, and other parties, and the interests they represent, are out of luck. By following the Oregon model that requires that all parties have a chance of participating in settlement negotiations, the Commission could increase the chance that all differing points of view are fairly considered.

E. 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.

26. A chief difference between settlement proceedings in civil litigation and those at the Commission is the special role of the Commission in adjudicatory proceedings. It performs both an adjudicative and a legislative function. It also has a special role in approving settlement agreements. As Public Counsel points out in its comments, 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.

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[8] RCW 34.05.455. See 10th Supplemental Order, Docket No. UT-021120 at 2, n. 2.

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27. Further, in civil litigation a subset of parties cannot settle a case out from underneath others. There is no such thing as a non-unanimous settlement that functions as a final resolution 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 some of the parties agree on one or more issues does not limit the procedural rights of parties who have not settled.

28. Finally, as noted above, the role of the Commission Staff is unique. There is no parallel in civil litigation for a party which has a special relationship to the adjudicative body.

F. 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?

29. WeBTEC concurs with Public Counsel that neither of these scenarios would be improper. The intent of the proposed rule changes is to codify the successful practice that has been used in a number of Commission cases and is well understood by the parties. Examples include the *Avista* and *Verizon/MCI Merger* cases discussed above. Also, successful all-party negotiations were conducted in the recent *Verizon Northwest General Rate Case*, Docket No. UT-040788, and the *Dex* case, also discussed above. While some resulted in unanimous settlements and others in non-unanimous settlements, all parties shared the conviction that the settlement negotiation process was fair. 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.

30. It is important to note that in none of these settlement proceedings, including *Avista*, *Verizon/MCI Merger*, *Verizon Northwest General Rate Case*, and the *Dex* case, where notice and opportunity to participate were afforded all parties, did any of the parade of horribles raised by the proposal's opponents arise. There was no undue delay or disruption. There were no disputes about settlement process. 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.

G. 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.

31. The proposed rule amendments are intended to incorporate by rule the provisions 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).

32. The purpose of the amendment is to clarify that, in cases where there is a non-unanimous settlement, the Non-Settling Parties are entitled to an order which addresses all disputed material issues of fact or law, even though those issues may have not been addressed in the non-unanimous settlement. The current rule, as interpreted and implemented by the Commission, does not comply with the statute's requirements.

H. 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)?

33. The proposed rule is intended to implement the requirements of RCW 34.05.449, which requires that "to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence..." 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

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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).

I. 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.

34. WeBTEC concurs with Public Counsel's recommendation that the rule be amended by removing the words "for example" because those words are superfluous in that the sentence describes a category of information, rather than an example.

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

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

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

36. In the past, some protective orders issued by the Commission have imposed employment restrictions on both counsel and outside experts. WeBTEC does not believe that employment restrictions on outside counsel are ever justifiable and such restrictions on in-house counsel and outside experts rarely are and should only be approved in extraordinary circumstances and be narrowly restricted as to geography, subject matter, and time. 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, and sometimes counsel, to sign an affidavit indicating they will not engage in certain specified activities for period of time, often several years. Such requirements are often difficult for attorneys and consultants to agree to, especially where wording is broad and time periods are extended. Some attorneys and consultants have declined to sign.

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37. Some highly confidential protective orders issued in the past required an affidavit that the affiants would not for a period of three years "involve themselves in competitive decision making" by any company or business organization that "competes, *or potentially competes*, with the company or business organization from whom they seek disclosure of highly confidential information." This affidavit is much too vague and therefore is overly broad and restrictive. At a minimum any employment restriction should be restricted to those circumstances where disclosure or use of the trade secrets is "impossible" not to result. Further, the provision of legal services by outside counsel or consulting and testimonial services by outside experts should be exempted from the employment restriction.

38. While the Commission has often stated that it has "broad discretion" to create protective orders to facilitate the production of information vital to its decision-making process, any such discretion does not justify disregard of the settled rules of law concerning restraints on trade and the rights of individuals to pursue their livelihoods. WeBTEC submits that the affidavit described above violates acceptable limits on competitive restraints found in the law of covenants not to compete and trade secret misappropriation.

39. Covenants not to compete have been closely scrutinized because they limit the ability of employees to move from job to job, exercise their skills, and pursue their livelihoods. *Winston Research Corp. v. Minnesota Mining and Manufacturing*, 350 F.2d 134, 137-138 (9th Cir. 1965). Washington courts have noted that "public policy requires us to carefully examine covenants not to compete, even when protection of a legitimate business interest is demonstrated, because of equally competing concerns of freedom of employment and free access of the public to professional services." *Knights, Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 371, 680 P.2d 448, 452(1984). A covenant not to compete will only be enforced if it is "reasonable," a determination that is made after considering the following factors: 1) whether the restraint is necessary to protect the business or goodwill of the employer; 2) whether it is narrowly tailored to

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impose no greater restraint on the employee than necessary; and 3) whether the degree of injury to the public caused by the restraint justifies non-enforcement of the covenant. *Id.* at 452.

40. The employment restraint imposed in these past highly confidential protective orders would fail all of these tests. It has no geographic limit and the restraint is not narrowly tailored to only that which is necessary to protect the businesses of the parties producing the classified information. The organizations that attorneys may not serve are broadly defined, and require subjective interpretation about which entities with whom the protected parties may "potentially compete." There is no time limitation on when the "potential competition" may be expected to materialize and the prohibited competition is not limited to activities where the protected information would be of use. The restraint on all involvement with competitive decision making could prevent attorneys and experts from assisting clients in almost any aspect of their business activities in the market.

41. As pointed out by WeBTEC in previous advocacy on this point, the phrase "potentially competes" is also too vague. It is impossible to know what that would encompass. It would require some sort of clairvoyance or speculation about the future plans of companies that is totally unrealistic. This is particularly troublesome because no time limit is included about the "potential competition."

42. This protective order makes no effort to balance the injury to the public of imposing such a restraint on the possible harm to the parties producing the classified information. It does not provide any rationale for limiting the rights of the attorneys or experts involved to matters that may occur in remote geographic locations, to vaguely defined parties, to issues only tangentially related to the matters at hand in the case (if related at all).

43. Although the WUTC has imposed such protective orders in the past to protect highly confidential trade secrets, no justification is offered to explain why it is necessary to go

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beyond the protections offered by the Uniform Trade Secrets Act (UTSA), RCW 19.108 *et seq.*[9] The UTSA, which has been adopted in Washington, provides a cause of action for misappropriation of trade secrets against a signatory who improperly uses or discloses trade secrets obtained under the terms of the protective order. *See* RCW 19.108.010 *et seq.* To establish a claim for misappropriation, a party must establish the existence of a trade secret and its wrongful acquisition or use by the defendant. RCW 19.108.010(2). The UTSA entitles a party to recover damages for the actual loss caused by misappropriation, unjust enrichment that is not taken into account in computing damages for actual loss and, in cases of willful and malicious misappropriation, exemplary (up to double) damages and attorneys fees. RCW 19.108.030.

44. While the UTSA allows for an injunction to prevent actual or threatened misappropriation of trade secrets, courts have been reluctant to use such power to prevent individuals from obtaining employment. In *Pepsico, Inc. v. Redmond*, 54 F.3d 1262, 1268 (7th Cir. 1995), the leading case on the doctrine of "inevitable disclosure," the court notes that trade secret law "should not prevent workers from pursuing their livelihoods." The *Pepsico* court would only restrict the defendant from employment where his new job would "inevitably lead him to rely on the plaintiff's trade secrets." *Id.* at 1269. By imposing a prior restraint on the activities of the affected attorneys and experts without any showing that the restricted activities would inevitably result in the disclosure of protected information, the highly confidential protective order far exceeds these reasonable limits.

45. Certainly where an engagement is merely one of providing outside legal or expert consulting and testimonial services, it should be sufficient to require that the affiant commit to not disclose the information except as provided in the protective order and agree to use the

[9] Lawyers are also subject to professional ethical obligations, which would deter any violations of protective order non-disclosure requirements. For example, Washington Rule of Professional Conduct 1.2(d) provides: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ." And , RPC 8.4 provides: "It is professional misconduct for a lawyer to: (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or to do so through the acts of another; ... (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation..." Lawyers, ethically required to protect client confidences, are also used to protecting secret information.

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information only for purposes of this proceeding. The only circumstance that could arguably justify an employment restraint would be direct employment with a competitor in the marketing or pricing of services that compete with the services about which data are disclosed. Only in those circumstances could it be argued that the nature of the employment might make it inevitable that protected information would be disclosed or misused.

46. In sum, any restriction in the affidavit should be strictly limited to situations and activities where the highly confidential information would inevitably be disclosed and its misuse would result in unjust enrichment or unfair competitive disadvantage. Legal services provided by outside counsel or consulting and testimonial services provided by outside experts should be expressly exempted from the employment restriction. The other restrictions on the handling of highly confidential information in the protective order would be adequate to protect that information and the business interests of the parties producing the information.

L. 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.

47. WeBTEC believes the current marking and identification requirements are satisfactory.

M. 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.

48. WeBTEC believes the current filing requirements are satisfactory.

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

49. WeBTEC concurs with Public Counsel's 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.

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

50. WeBTEC has no further recommendations regarding the Commission's procedural at this time.

RESPECTFULLY SUBMITTED this 17th day of January, 2006.

ATER WYNNE LLP

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