



600 University Street, Suite 3600  
Seattle, Washington 98101  
main 206.624.0900  
fax 206.386.7500  
www.stoel.com

January 17, 2006

TIMOTHY J. O'CONNELL  
Direct (206) 386-7562  
tjoconnell@stoel.com

**VIA ELECTRONIC AND U.S. MAIL**

Carole Washburn, Executive Secretary  
Washington Utilities & Transportation Commission  
1300 Evergreen Park Drive, SW  
Olympia, WA 98504

**Re: A-050802**  
***In the Matter of a Rulemaking to Consider Possible Corrections and Changes in***  
***Rules in Chapter 480-07 WAC, Relating to Procedural Rules***

Dear Ms. Washburn:

Enclosed please find the original and twelve copies of Verizon's Comments in the above-referenced matter..

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Timothy J. O'Connell". The signature is written in a cursive style with a large initial "T".

Timothy J. O'Connell

Encls.

Oregon  
Washington  
California  
Utah  
Idaho

**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

VERIZON'S 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>.**

Verizon's comment: Verizon generally supports an inclusive approach to settlement negotiations but it does not support the proposed rules. The rule does not appear to be necessary and risks overly formalizing the process and hampering it in perhaps unforeseen ways. The Commission has consistently carefully weighed the procedural and substantive merits of non-unanimous settlements signed by the Staff, noting expressly that the Staff is a party like any other party. See, for example, the recent order in the Avista rate case (UE-050482/UG-050483), ¶¶ 24 – 37 and fn. 1 on page 4.

Should the Commission nevertheless wish to consider some such rule, Verizon recommends that it consider the Idaho rules. A copy is appended to these comments and the rules are available at [http://www.puc.state.id.us/webrules/Rules%20of%20Procedure\\_04.pdf](http://www.puc.state.id.us/webrules/Rules%20of%20Procedure_04.pdf). These rules are more realistic and flexible than the proposed rules. See Attachment 1.

Verizon does not intend to diminish the concerns that lead to this proposed rule, but the petitioning parties simply have not made any showing that the Commission's current practices regarding non-unanimous settlements need any reform at all. Thus, any proposal—such as the current petition—that would have the effect of precluding even the most preliminary and exploratory settlement discussions with Staff should be rejected.

**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.**

Verizon's comment: Verizon's only knowledge of the Avista settlement comes from reading the order approving the settlement. No "flaws" are apparent. The fact that there were substantive and procedural disagreements does not mean that the process was flawed or that new rules are needed to dictate a different process in the future.

Verizon believes the settlement process in its recent proceedings demonstrates that the existing rules and processes are sufficient to attain reasonable results while accommodating parties' procedural rights.

**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.**

Verizon's comment: Verizon has not been a participant in any proceeding in Oregon in recent years in which the OPUC's procedural rules helped—or hindered—a settlement.

**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.**

Verizon's comment: Since Public Counsel et al propose the rule on the premise that the Commission Staff has some special role, any such rule should be limited to the Staff. Moreover, applying such a rule to other parties could raise First Amendment

issues. Again, though, Verizon does not agree with the proposal to place limits or requirements on negotiations with Staff.

**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.**

Verizon's Comments: The Commission's existing practices give non-settling parties far more extensive rights and opportunities to explain and support their rationale for opposing settlement than is typically given to putative class members objecting to a potential settlement in class action litigation. *See, e.g., Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 188-89 (2001). The civil litigation model, if anything, undercuts any basis for making the Commission's settlement procedures more formalistic.

**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?**

Verizon's comment: No, on both counts. In order for a settlement judge to serve a meaningful role in assisting the parties to come to a compromise, he or she essentially functions as a mediator. The ability of a settlement judge/mediator to candidly discuss the strength and weakness of each party's case is critical. This ability would be compromised if the settlement judge was unable to meet with the parties separately. The same rationale applies to parties meeting amongst themselves, in whatever configuration makes sense to drive the settlement process. At the end of the day, parties' substantive rights are dependent on the outcome of the settlement process, and the Commission's well-documented searching review of those settlements, rather than artificial formalisms in the settlement process.

Put another way, the settlement process should be flexible – if one party does not wish to invite another party to every (or any) settlement discussion, so be it. The

important point is that the Commission must ultimately rule on whether a settlement is in the public interest, and any non-settling party has the right to present its position to the Commission.

**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.**

Verizon's comment: The statute alone is sufficient – virtually as a matter of law. That is to say, if a final order does not contain findings and conclusions on all material issues, then it is subject to judicial review and reversal. If the Commission does not address an issue, but the order is not thereby subject to reversal, then the issue was not material. The Commission should reject proposals that would lengthen its order drafting process merely to ensure that every argument raised in every party's brief is individually addressed, even if that argument is not material.

**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)?**

Verizon's comment: The proposal appears intended to create “absolute rights,” i.e., entitlements not subject to modification by the ALJ. Yes – the existence of such a rule might allow discovery abuses. Verizon does not see a need for having special discovery rights for non-settling parties.

**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.**

Verizon's comment: No. No need to do so has been demonstrated.

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

Verizon's comment: There may be many such circumstances, and the current rule appropriately does not attempt to list them all. Circumstances include the degree of

possible damage to the company and the chances of inadvertent disclosure or other improper use.

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

Verizon's comment: Again, the Commission should not attempt to before-the-fact develop a definitive list.

To respond with one concern, however, the risk of inadvertent use is important with regard to employment restrictions. Once a person has seen confidential/highly confidential material it of course becomes part of his or her general knowledge. At some subsequent point in time he might not clearly remember the source of such knowledge and may therefore inadvertently disclose or use it in an improper way.

**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.**

Verizon's comment: The requirement of WAC 480-07-160 (3)(b)(i) and (ii) to mark each page that contains confidential information is burdensome and unnecessary and conflicts with the requirement of subsection (3)(c) that redacted copies be filed. Marking is most readily accomplished using footers, and the requirement to pick and choose pages can create a tremendous amount of extra work. Verizon suggests the following changes:

(i) *Paper copies.* In addition to the requirements of subsections (3)(b)(iii) and (3)(c), ~~When~~ when the document is in paper format, the provider must clearly mark each copy with the designation "confidential per WAC 480-07-160." The provider must place this mark on the first page of a multipage document and at least each specific page where the provider claims there is confidential information.

(ii) *Electronic copies.* In addition to the requirements of subsections (3)(b)(iii) and (3)(c), ~~When~~ when the document is in electronic format, such as an electronic mail message, or a word processing or spreadsheet file, the "confidential per WAC 480-07-160" mark must be inserted on the first page in the file and at least on each page that the provider claims contains confidential information.

The duplicative and differently worded provisions of WAC 480-07-423(2) should be eliminated. That rule should just cross reference WAC 480-07-160.

**(2) ~~Submission-Marking; redaction~~**

Confidential and highly confidential material produced during discovery and filed with the commission shall be marked and redacted as required by WAC 480-07-160.

~~—(a) **Confidential information.** The first page and individual pages of a document determined in good faith to include confidential information must have the legend that reads: "Confidential per protective order in WUTC Docket No. [insert]." Placing a confidential legend on the first page of an exhibit indicates only that one or more pages contain confidential information and will not serve to protect the entire contents of the multipage document. Each page that contains confidential information must be marked separately to indicate where confidential information is redacted. Confidential information must be submitted on yellow or canary paper with contrasting highlighter (e.g., gray or blue) used to mark the confidential portions.~~

~~—(b) **Highly confidential information.** The first page and individual pages of a document determined in good faith to include highly confidential information must be marked by a stamp that reads: "Highly confidential per protective order in WUTC Docket No. [insert]." A "highly confidential" stamp on the first page of a document indicates only that one or more pages contain highly confidential information and will not serve to protect the entire contents of a multipage document. Each page that contains highly confidential information must be highlighted to indicate where highly confidential information is redacted. The unredacted versions of each page containing highly confidential information, and provided under seal, also must be marked with the "highly confidential. . ." stamp and must be submitted on light blue paper with contrasting highlighter (e.g., gray or yellow) used to mark the highly confidential portions.~~

~~—(c) **Redacted version.** A separate version of each document that is designated as confidential or highly confidential must be provided on white paper with all of the confidential or highly confidential information redacted either by blacking out the information or replacing it with brackets and blank space. The first page must be marked as required in subsections (a) and (b) of this section, and additionally must be marked "redacted."~~

To pick up to "confidential" and "highly confidential" distinctions covered by WAC 480-07-423, WAC 480-07-160(3)(iii) should be amended as follows:

(iii) *Protective order, if any, must be cited.* If the provider submits confidential information under the provisions of a protective order, the "confidential" or "highly confidential" mark ~~on each page that includes confidential information~~ must state: "Confidential per protective order in WUTC Docket No. [insert docket number]."

(c) *Unredacted and redacted versions.* The provider must submit confidential and redacted versions of a document as required by this subsection and by subsections (d) and (e). The redacted and portions of the unredacted versions must have the same pagination and line numbering.

(d) *Unredacted version under seal.* The provider must submit the portions ~~a version~~ of the document as to which confidentiality is claimed ~~as a complete document~~ (unredacted version) labeled and submitted in a sealed envelope or similar wrapping. ~~Each~~ All pages of the unredacted version ~~that includes information claimed to be confidential~~ must be printed on yellow or canary paper with the confidential information marked by contrasting highlighter or marked with "BEGIN CONFIDENTIAL" and "END CONFIDENTIAL" in bold face type or, if designated highly confidential under a protective order, on light blue paper with the highly confidential information marked by contrasting highlighter marked with "BEGIN HIGHLY CONFIDENTIAL" and "END HIGHLY CONFIDENTIAL" in bold face type.

(e) *Redacted version.* The provider must submit the redacted version so labeled and in the same manner as a document as to which confidentiality is not claimed. The redacted version will be available for public disclosure if requested.

**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.**

Verizon's comment: See #12, above.

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


Verizon's comment: Verizon opposes Public Counsel's proposed additions to the rules governing ex parte communications. Preliminarily, Verizon notes that Public Counsel does not even claim that there is a need for this revision to the rules—Public Counsel commends the Commission's "exemplary" record of dealing with ex parte communications. Public Counsel's August 26, 2005 Comments, at 3. More substantively, Public Counsel's proposal underestimates the routine nature of regulated



companies' attempts to keep their regulators fully informed about developments in their industry. Any proposal that would create disincentives for the free flow of information is a proposal that should be viewed with suspicion. In the absence of any need, such a proposal should be rejected.

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

Verizon's comment: Verizon supports suggestions for revisions to WAC 480-07-140 and 150, making electronic filing (with hard copies served by overnight mail) as a default filing procedure. This has worked well, and ALJs should not be required to permit this process for every individual filing.

By:   
Timothy J. O'Connell  
Stoel Rives LLP  
600 University Street, Suite 3600  
Seattle, WA 98101  
206-386-7562  
Counsel for Verizon Northwest Inc.

**RULES 271 THROUGH 280 - SETTLEMENTS**

**271. PASSIVE SETTLEMENTS (RULE 271).**

Settlements in formal proceedings in which a party agrees to concur in, accept, or not to oppose another party's positions previously on record with the Commission are called passive settlements. Any party may reach a passive settlement with any other party on any issue without prior notification to the Commission or any other party. (7-1-93)

**272. PROCEDURES FOR ACTIVE SETTLEMENTS (RULE 272).**

Settlements in formal proceedings in which one (1) or more parties negotiate an agreement differing from positions of one (1) or more of the parties previously on record with the Commission are called active settlements. Any party other than the Commission Staff may enter into an active settlement with any party other than the Commission Staff without prior notification to the Commission or other parties. The Commission Staff, however, is precluded from entering into an active settlement without first notifying all other parties that it intends to begin or has begun settlement negotiations. The Commission Staff must give all other parties an opportunity to participate in or be apprised of the course of the settlement negotiations before a final settlement agreement is reached. Settlement

negotiations are confidential, unless all participants to the negotiation agree to the contrary. (7-1-93)

**273. SUGGESTION FOR OR INQUIRY ABOUT SETTLEMENTS (RULE 273).**

Through notice or order or on the record at prehearing conference or hearing, the Commission or an individual Commissioner may inquire of the parties in any proceeding whether settlement negotiations are in progress or contemplated or invite settlement of an entire proceeding or certain issues. In issuing such an invitation for settlement, the Commission or an individual Commissioner may indicate acceptable ranges of settlement, preclude certain issues from settlement, or otherwise inform the parties of his, her or their views on settlement in aid of securing a just, speedy and economical determination of the issues presented to the Commission. Neither the Commission nor individual Commissioners will indicate ex parte their views on the merits of any proposed settlement. (7-1-93)

**274. CONSIDERATION OF SETTLEMENTS (RULE 274).**

Settlements must be reviewed under this rule. When a settlement, be it active or passive, is presented to the Commission, the Commission will prescribe procedures appropriate to the nature of the settlement to consider the settlement. For example, the Commission may summarily accept settlement of an essentially private dispute that has no significant implications for regulatory law or policy or for other utilities or customers upon the written request of the affected parties. On the other hand, when one (1) or more parties to a proceeding is not party to the settlement or when the settlement presents issues of significant implication for other utilities, other customers or the public interest, the Commission may convene an evidentiary hearing to consider the reasonableness of the settlement and whether acceptance of the settlement is just, fair, and reasonable, in the public interest, or otherwise in accordance with law or regulatory policy. (7-1-93)

**275. BURDENS OF PROOF (RULE 275).**

Proponents of a proposed settlement carry the burden of showing that the settlement is reasonable, in the public interest, or otherwise in accordance with law or regulatory policy. In any instance in which parties or affected persons oppose the settlement, proponents of the settlement should be prepared to call witnesses and argue in favor of the settlement. Opponents of the settlement should be prepared to examine supporting witnesses, offer their own witnesses, or argue against the settlement. The Commission may require the development of an appropriate record in support of or opposition to a proposed settlement as a condition of accepting or rejecting the settlement. (7-1-93)

**276. SETTLEMENT NOT BINDING (RULE 276).**

The Commission is not bound by settlements. It will independently review any settlement proposed to it to determine whether the settlement is just, fair and reasonable, in the public interest, or otherwise in accordance with law or regulatory policy. When a settlement is presented for decision, the Commission may accept the settlement, reject the settlement, or state additional conditions under which the settlement will be accepted. In the last instance, the parties will have twenty-one (21) days to state their acceptance or rejection of the additional conditions imposed by the Commission. If the Commission rejects the settlement or if the Commission's conditional acceptance of a settlement is rejected by the parties to the settlement, the Commission will notify the parties of procedures to be followed to decide the issues for which settlement was rejected by the Commission. (7-1-93)