

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of
Amending/Adopting/Repealing

WAC 480-07

Relating to
The Commission's procedural rules,
governing the conduct of business before
the Commission, including rules
governing formal proceedings.

DOCKET

GENERAL ORDER R-588

ORDER AMENDING, REPEALING
AND ADOPTING RULES
PERMANENTLY

- 1 **STATUTORY OR OTHER AUTHORITY:** The Washington Utilities and Transportation Commission (Commission) takes this action under Notice WSR #16-24-061, filed with the Code Reviser on December 5, 2016. The Commission brings this proceeding pursuant to RCW 80.01.040 and RCW 80.04.160.
- 2 **STATEMENT OF COMPLIANCE:** This proceeding complies with the Administrative Procedure Act (RCW 34.05), the State Register Act (RCW 34.08), the State Environmental Policy Act of 1971 (RCW 43.21C), and the Regulatory Fairness Act (RCW 19.85).
- 3 **DATE OF ADOPTION:** The Commission adopts this rule on the date this Order is entered.
- 4 **CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE:** RCW 34.05.325(6) requires the Commission to prepare and publish a concise explanatory statement about an adopted rule. The statement must identify the Commission's reasons for adopting the rule, describe the differences between the version of the proposed rules published in the register and the rules adopted (other than editing changes), summarize the comments received regarding the proposed rule changes, and state the Commission's responses to the comments reflecting the Commission's consideration of them.

5

OFFICE OF THE CODE REVISER STATE OF WASHINGTON FILED
DATE: February 28, 2017 TIME: 9:20 AM
WSR 17-06-051

To avoid unnecessary duplication in the record of this docket, the Commission designates the discussion in this Order, including appendices, as its concise explanatory statement, supplemented where not inconsistent by the staff memoranda preceding the filing of the CR-102 proposal and the adoption hearing. Together, these documents provide a complete but concise explanation of the agency actions and its reasons for taking those actions.

6 **REFERENCE TO AFFECTED RULES:** This Order amends the following sections of the Washington Administrative Code:

Amend	WAC 480-07-010	Scope of this chapter.
Amend	WAC 480-07-100	Scope of Part I.
Amend	WAC 480-07-110	Exemptions from and modifications to commission rules; conflicts involving rules.
Amend	WAC 480-07-120	Office hours.
Amend	WAC 480-07-125	Physical address; telephone; fax; web portal; e-mail; internet.
Amend	WAC 480-07-130	Time periods specified for acts governed by this chapter.
Amend	WAC 480-07-140	Communicating with the commission.
Amend	WAC 480-07-141	Receiving and filing a document is not acceptance.
Repeal	WAC 480-07-143	Submitting documents in rule-making proceedings.
Repeal	WAC 480-07-145	Filing documents in adjudicative proceedings.
Amend	WAC 480-07-150	Service of documents in adjudicative proceedings.
Amend	WAC 480-07-160	Confidential information.
Amend	WAC 480-07-170	Official communications from the commission.
Adopt	WAC 480-07-175	Inspection and production of documents in commission investigations.
Amend	WAC 480-07-180	Incorporated and referenced materials in commission rules and orders.
Adopt	WAC 480-07-190	Electronic signatures.
Amend	WAC 480-07-220	Monitoring rule-making proceedings; lists of interested persons.
Amend	WAC 480-07-230	Inquiring about rule-making proceedings.
Adopt	WAC 480-07-250	Submitting documents in rule-making proceedings.

Amend	WAC 480-07-300	Scope of Part III
Amend	WAC 480-07-305	Commencement of an adjudicative proceeding.
Amend	WAC 480-07-307	Probable cause determinations.
Amend	WAC 480-07-310	Ex parte communication.
Amend	WAC 480-07-330	Presiding officers.
Amend	WAC 480-07-340	Parties—General.
Amend	WAC 480-07-345	Appearance and practice before the commission.
Amend	WAC 480-07-355	Parties—Intervention.
Amend	WAC 480-07-360	Parties—Master service list.
Adopt	WAC 480-07-365	Filing documents in adjudicative proceedings.
Amend	WAC 480-07-370	Pleadings—General.
Amend	WAC 480-07-375	Motions.
Amend	WAC 480-07-380	Motions that are dispositive—Motion to dismiss; motion for summary determination; motion to withdraw.
Amend	WAC 480-07-385	Motion for continuance, postponement, or extension of time.
Amend	WAC 480-07-390	Briefs; oral argument; findings and conclusions.
Amend	WAC 480-07-395	Pleadings, motions, and briefs—Format requirements; citation to record and authorities; verification; errors; construction; amendment.
Amend	WAC 480-07-400	Discovery.
Amend	WAC 480-07-405	Discovery—Data requests, record requisitions, and bench requests.
Amend	WAC 480-07-410	Discovery—Depositions.
Amend	WAC 480-07-415	Discovery conference.
Amend	WAC 480-07-420	Discovery—Protective orders.
Repeal	WAC 480-07-423	Discovery—Protective orders—Submission requirements for documents.
Amend	WAC 480-07-425	Discovery disputes.
Amend	WAC 480-07-430	Prehearing conferences.
Amend	WAC 480-07-440	Hearing notice.
Amend	WAC 480-07-450	Hearing—Failure to appear.
Amend	WAC 480-07-460	Hearing—Predistribution of exhibits and prefiled testimony.
Amend	WAC 480-07-470	Hearing guidelines.
Amend	WAC 480-07-490	Hearing—Exhibits and documentary evidence.
Amend	WAC 480-07-495	Hearing—Rules of evidence; official notice.
Amend	WAC 480-07-498	Hearing—Public comment.

7 **PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS THEREUNDER:**
The Commission filed a Preproposal Statement of Inquiry (CR-101) on March 20, 2013,
at WSR # 13-07-071.

8 The statement advised interested persons that the Commission was considering
undertaking a rulemaking to consider possible corrections and changes to certain sections
in WAC 480-07, the Commission's procedural rules governing the conduct of business
before the Commission, including in formal proceedings. The Commission also informed
persons of this inquiry by providing notice of the subject and the CR-101 to everyone on
the Commission's list of persons requesting such information pursuant to RCW
34.05.320(3), to all interested persons in the previous procedural rules rulemaking docket
A-050802, and to all persons on the Commission's list of utility attorneys, transportation
attorneys, and telecommunications attorneys. Pursuant to the notice, but rescheduled at
later dates, the Commission received comments on May 17, 2013, and held a stakeholder
workshop on August 21, 2013.

9 **SUBSEQUENT COMMENTS AND WORKSHOPS:** The Commission received
additional comments on the rules that are the subject of this order on or about December
20, 2013; October 23, 2014; July 20, 2015; and June 30, 2016. The Commission also held
additional workshops on these rules on January 15, 2014, and November 19, 2014.

10 **SMALL BUSINESS ECONOMIC IMPACT ANALYSIS:** The Commission reviewed
the proposed rules to determine their economic impact on small businesses that are
subject to Commission regulation. The Commission regulates a wide variety of
companies, from single owner/operator transportation companies and small water
companies to the largest electric and natural gas utility in the state. The rules in WAC
480-07 govern the procedures that all companies must follow in their dealings with the
Commission, and thus the rules that are the subject of this order will affect small
businesses.

11 That effect, however, will be positive. The Commission is revising these rules to clarify
its procedures and to reflect current practices and technology. Among other changes, the
rules will now require that companies submit documents to the Commission only in
electronic form, rather than in both hard and soft copy. The Commission also will serve
documents only electronically, speeding delivery and eliminating unnecessary paper.
Companies that are parties to Commission adjudications will benefit further from rule
revisions that establish or facilitate definitive identification and submission requirements
for prefiled testimony, exhibits, briefs, and other documents.

- 12 Only two proposed revisions to the existing rules could have a significant economic impact on small businesses – the removal of the requirement to submit paper copies of most filings and the elimination of submission by facsimile transmission (fax). Submitting only electronic copies of documents will eliminate paper, copying, and postage costs and therefore will reduce the amount all businesses must spend to make filings with the Commission. With respect to fax filing, most, if not all, businesses have access to the Internet and the capability of submitting documents through the Commission’s web portal or via email. Accordingly, eliminating the option to submit documents via fax should have only a minor economic impact. The Commission nevertheless will work with small businesses that may continue to rely on faxing to enable them to make those filings.
- 13 **NOTICE OF PROPOSED RULEMAKING:** The Commission filed a notice of Proposed Rulemaking (CR-102) on December 5, 2016, at WSR #16-24-061. The Commission scheduled this matter for oral comment and adoption under Notice WSR #16-24-061 at 1:30 p.m., Monday, January 30, 2017, in the Commission's Hearing Room, Second Floor, Richard Hemstad Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. The Notice provided interested persons the opportunity to submit written comments to the Commission.
- 14 **WRITTEN COMMENTS:** The Commission received comments on the proposed rules on January 13, 2017. Summaries of those written comments and Commission Staff’s responses and recommendations are contained in Appendix A, attached to, and made part of, this Order.
- 15 **RULEMAKING HEARING:** The Commission considered the proposed rules for adoption at a rulemaking hearing on January 30, 2017, before Chairman David W. Danner, Commissioner Philip B. Jones, and Commissioner Ann E. Rendahl. The Commission heard a presentation and comments from Gregory J. Kopta, Director, Administrative Law Division, representing Commission Staff, and oral comments from representatives of the Public Counsel Unit of the Attorney General’s Office, Puget Sound Energy, Pacific Power & Light Company, Northwest Natural Gas Company, Union Pacific Railroad, the Industrial Customers of Northwest Utilities, and CenturyLink, all of whom provided greater detail in support of their prior written comments.
- 16 **SUGGESTIONS FOR CHANGE THAT ARE REJECTED/ACCEPTED:** Written and oral comments suggested changes to the proposed rules. The Commission adopts Staff’s recommendations and reasons to reject those suggestions contained in the

summary matrix in Appendix A,¹ except that for purposes of this phase of the rulemaking, we do not adopt the proposed amendments to the definition of “confidential information” in WAC 480-07-160(2), to the procedure in WAC 480-07-160(5) governing challenges to confidentiality designations in adjudications, or to language in WAC 480-07-160(6)(b)(i) and (iii) concerning “parties” that have designated information as “confidential” or “highly confidential.”²

Definition of Confidential Information

- 17 Several stakeholders in their written and oral comments disagree with the proposed revision to the definition of confidential information. The proposed rule would define that term to include only the information specified in RCW 80.04.095 and RCW 81.77.210. The definition in the existing rule is more expansive and also covers information that is exempt from public disclosure under the Public Records Act (PRA or Act) or protected under the terms of a Commission protective order.
- 18 The stakeholders are concerned that limiting the definition of “confidential information” governed by this rule would leave no process for identifying or protecting personally identifiable data in records utilities provide to the Commission, as well as other information that is exempt from public disclosure.³ In addition, where the term “confidential” is used in this rule in the context of documents submitted pursuant to a protective order, stakeholders are concerned that the Commission may inadvertently release protected information if it is not designated as confidential or highly confidential.

¹ In addition, we concur with Staff’s further explanation at the adoption hearing that WAC 480-07-175 is not intended to circumvent attorney-client privilege or other bases for objecting to providing documents the Commission may request and that if a public service company disagrees with the Executive Director’s or administrative law judge’s decision overruling the company’s objection to a Commission request for documents, the company may seek administrative review under the process applicable to review of initial orders in WAC 480-07-825.

² In addition to supplementing its written comments, Puget Sound Energy commented at the adoption hearing that the proposed revisions to WAC 480-07-160(4)(d)(i)(A) to add the words “Designated information is” unnecessarily extends the existing phrase of “Confidential per protective order in docket [insert docket number]” or “Confidential per WAC 480-07-160” that must be included on each page of a document that includes such information. Companies, however, generally comply with this requirement by using a running footer in the document that appears on every page, even if no information on that page is designated as confidential. We find that the proposed additional words are less of an administrative inconvenience than requiring the marking be *only* on pages that include such information and that the revised marking minimizes the confusion that could result from using a running footer – particularly with the implementation of electronic-only filing and the corresponding lack of colored paper on which pages containing confidential information would otherwise need to be printed.

³ *E.g.*, RCW 42.56.330(2).

- 19 The procedures in WAC 480-07-160, however, implement the requirements in RCW 80.04.095 and RCW 81.77.210, which require a court order before the Commission can refuse to disclose information designated as confidential. The Commission has an independent obligation to withhold information the Act exempts from disclosure, and subjecting such information to the requirement to obtain a court order could result in unintentional release of that information in violation of the PRA.
- 20 We recognize the importance of protecting customer-specific and other exempt information, and find that risks of inadvertent disclosure of this information are inherent in both the existing rule and the proposed amendment. Further discussions are necessary to develop alternative language that will better enable companies, parties to proceedings, and the Commission to identify and distinguish between information that is designated as confidential pursuant to RCW 80.04.095 or RCW 81.77.210 and information that is exempt from disclosure under RCW 42.56.330(2) or other provisions of the PRA.
- 21 We find that maintaining the existing definition of confidential information poses the least risk of mistakenly disclosing exempt information while the Commission explores better ways to protect such information. Accordingly, except for amendments at the end of WAC 480-07-160(2), *i.e.*, the addition of the phrase “or 81.77.210” and the addition of the last sentence, we do not adopt the proposed revisions in the first paragraph of WAC 480-07-160 and in WAC 480-07-160(2) that modify the definition of confidential information. This rulemaking remains open to address other rules in WAC Chapter 480-07, and we will work with stakeholders to develop language to resolve this issue.

Challenges to Confidential Designations in Adjudications

- 22 Stakeholders also have legal, practical, and financial issues with the proposed revisions to WAC 480-07-160(5). Those revisions would replace Commission review of challenges to confidentiality designations with the same process the Commission uses when a person requests public documents that contain information that has been designated as confidential.
- 23 The stakeholders contend that the last sentence in RCW 80.04.095 and RCW 81.77.210 grants the Commission authority to enter protective orders that govern the protection afforded confidential information and that authority includes the power to determine whether that information has been correctly designated as confidential. The stakeholders therefore maintain that a challenge to the designation of information as confidential under a protective order is legally distinct from a public records request. The stakeholders also contend that requiring the provider of confidential information to go to court in the midst of a Commission adjudication would be disruptive and needlessly expensive, and that the

Commission is in a better position than a court to determine whether the challenged information should be protected from public disclosure.

24 The Commission, on the other hand, proposes to clarify in these rules the procedure required upon a request for confidential information under the PRA. We also seek to ensure that Commission procedures are consistent with the PRA, as Washington courts repeatedly interpret the Act's disclosure obligations liberally and narrowly confine exemptions.⁴

25 We find that these issues warrant additional exploration. Pending further discussion on amendments to this subsection, we will refrain from revising the language in WAC 480-07-160(5), except to add RCW 81.77.210 to the list of bases for treating information as confidential. The Commission will consider further amendments to WAC 480-07-160, if necessary, to reflect the results of Commission consultation with stakeholders as this rulemaking continues.

Requests for Information Designated as Confidential

26 For the same reasons discussed above, and given the need for additional discussion about the process for requests for confidential information in adjudications in which parties are subject to a protective order, we also refrain from adopting the phrase "(and the party that has designated the information as confidential or highly confidential, if different)" as proposed in WAC 480-07-160(6)(b)(i) and (iii). The Commission will consider whether to make these or any other additional amendments to WAC 480-07-160 following further process in this rulemaking.

27 **COMMISSION ACTION:** After considering all of the information regarding this proposal, the Commission finds and concludes that it should amend, repeal, or adopt the rules as proposed in the CR-102 at WSR #16-24-061 with the following changes discussed in paragraphs 16-26 above:

WAC 480-07-160 Strike the last two sentences in the first paragraph of the proposed rule (beginning with "This rule does not apply . . ." through ". . . that redacts that information.").

WAC 480-07-160(2) Reinstatement of the existing language proposed to be stricken from this subsection.

⁴ *E.g., Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

WAC 480-07-160(5) Reinstates the existing language proposed to be stricken from this subsection; insert "RCW 81.77.210," after "RCW 80.04.095," in the second sentence; and strike all language proposed to be added to this subsection.

WAC 480-07-160(6)(b) Strike the phrase "(and the party that has designated the information as confidential or highly confidential, if different)" proposed to be added in subsections (i) and (iii).

28 **STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE:** After reviewing the entire record, the Commission determines that the sections in WAC Chapter 480-07 listed in paragraph 6 above should be amended, repealed, or adopted as applicable to read as set forth in Appendix B, as rules of the Washington Utilities and Transportation Commission, to take effect pursuant to RCW 34.05.380(2) on the thirty-first day after filing with the Code Reviser.

ORDER

29 **THE COMMISSION ORDERS:**

30 The Commission amends WAC 480-07 to read as set forth in Appendix B, as rules of the Washington Utilities and Transportation Commission, to take effect on the thirty-first day after the date of filing with the Code Reviser pursuant to RCW 34.05.380(2).

31 This Order and the rule set out below, after being recorded in the register of the Washington Utilities and Transportation Commission, shall be forwarded to the Code Reviser for filing pursuant to RCW 80.01 and RCW 34.05 and WAC 1-21.

DATED at Olympia, Washington, February 28, 2017.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



DAVID W. DANNER, Chairman



PHILIP B. JONES, Commissioner



ANN E. RENDAHL, Commissioner

Note: The following is added at Code Reviser request for statistical purposes:

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, amended 0, repealed 0; Federal Rules or Standards: New 0, amended 0, repealed 0; or Recently Enacted State Statutes: New 0, amended 0, repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, amended 0, repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, amended 0, repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, amended 0, repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, amended 0, repealed 0; Pilot Rule Making: New 0, amended 0, repealed 0; or Other Alternative Rule Making: New 0, amended 0, repealed 0.