Discussion of Comments Concerning Procedural Rules Governing Settlement
Procedural Rules Tune-up – Docket A-050802
March 2, 2006

This narrative supplements the table of comments and Commission responses in this rulemaking. The comment table, or matrix, summarizes the stakeholders' written and oral comments concerning changes to the procedural rules in chapter 480-07 WAC identified in the July 2005 notice initiating the rulemaking. This narrative focuses specifically on the most recent round of written comments concerning the Commission's settlement rules, submitted on January 17, 2006. These comments include stakeholders' responses to several questions the Commission posed during and after the November 10, 2005, workshop.

The ultimate question on this subject is whether the Commission should include in proposed rules the amendments to WAC 480-07-730 and WAC 480-07-740 suggested by Public Counsel and other stakeholders.

In written comments filed on January 17, 2006, Public Counsel states that the Commission should adopt the following amendments to its procedural rules concerning settlements:

> WAC 480-07-730 – NEW SECTION:
>
> (5) Notice of Settlement Negotiations Required:
> (a) Prior to engaging in settlement negotiations with a regulated company in an adjudicative proceeding, commission Staff must provide notification to other parties. Five calendar days before a settlement negotiation with a regulated company, the commission staff shall notify in writing, and by electronic mail, all parties on the master service list of the time and location of the proposed settlement negotiation. If a prehearing conference has not yet been held in the case, notice shall be sent to all persons who regularly appear before the commission in similar adjudicative proceedings. Staff shall maintain a copy of the notice and a record that it was provided.

(b) Any party given notice under this section may attend settlement negotiations. Additional notice of continuing settlement negotiations involving the same issue need only be provided to parties attending the initial settlement negotiation, or who have requested continuing notice.

(c) For purposes of this section 5, "settlement negotiations" means any discussion or other communication, in person or otherwise, between Commission Staff and a company regulated by the Commission whose purpose is to pursue resolution of one or more issues in an adjudicative proceeding. Settlement negotiations do not include requests for information or clarification in aid of discovery.

WAC 480-07-740 – AMENDMENT TO SECTION (2) (c):

(c) ***Rights of opponents of a proposed settlement.*** Parties opposed to the commission's adoption of a proposed settlement retain the following rights: The right to cross-examine witnesses supporting the proposal; the right to present evidence opposing the proposal; the right to present argument in opposition to the proposal; the right to conduct discovery, present evidence, have a hearing, cross-examine witnesses, and present arguments on all disputed material issues of fact and law. The commission's final order adopting, rejecting or conditioning a proposed settlement shall be based upon substantial evidence in the record and shall include findings and conclusions on all disputed issues of fact, law, or discretion presented on the record. ~~and the right to present evidence or, in the commission's discretion, an offer of proof, in support of the opposing party's preferred result. The presiding officer may allow discovery on the proposed settlement in the presiding officer's discretion.~~

Stakeholder Comments Concerning Settlement Practice Under Current Rules

Public Counsel identifies the Industrial Customers of Northwest Utilities (ICNU), Washington Electronic Business and Telecommunications Coalition (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.), as co-sponsors of its proposed amendments. Public Counsel states that the proposed 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.

The Commission asked the stakeholders to consider whether the changes proposed by Public Counsel and others should be adopted considering Commission practice under existing rules. The Commission asked the stakeholders, among other things, to evaluate the settlement process followed in the recent Avista proceeding (Dockets UE-050482 & UG-050483) and Verizon proceedings (Dockets UT-050814 & UT-040788). The Commission requested that those who believe flaws existed in the process in those dockets:

> a) Specify the flaws.
>
> b) State whether, why, and what rule amendments are needed to correct them.

XO responded to this request and commented:

> In the Verizon-MCI merger proceeding, Docket No. UT-050814, the settlement agreement between Staff and the Companies was conditioned on Commission acceptance of the agreement as the sole resolution of the entire case, including the issues raised and conditions proposed by nonsettling parties.
>
> * * *
>
> At a bare minimum, the Commission should prohibit Staff or any other party from attempting to preclude Commission consideration of non-settling parties' interests and issues by conditioning a settlement agreement on the Commission accepting that agreement as the sole resolution of the entire case.

The Final Order in the Docket UT-050814 shows that XO's comments are misdirected. The Stipulation in Docket UT-050814 proposed full resolution of the proceeding on the basis of the conditions it presented. It is, in this regard, the same as every settlement the Commission has reviewed in recent years, whether a multi-party or a full settlement, as those terms are defined in the Commission's procedural rules. *WAC 480-07-730.* Also, like all other settlements filed in recent years, the settling parties asked that their stipulation be approved and adopted without material changes. *Unlike* many settlements, the stipulation expressly proposed that the Commission should resolve the contested issues in the case *on their merits*, if the Commission elected not to approve the stipulation without material changes.

As part of its standard practice pursuant to its existing procedural rules governing the settlement process, the Commission gave XO and other non-settling parties in the Verizon proceeding an opportunity to present their issues for the Commission's consideration during its deliberations. The parties opposing the settlement exercised their rights, as specified in the current procedural rules.[1]

The Commission, in its final order, adopted one of the conditions XO advocated and deferred the company's other issues to the *Triennial Review Remand Order (TRRO)* proceeding in Docket UT-053025, which is currently pending. The Commission expressly agreed with XO that the issues it raised should be addressed expeditiously. However, the Commission stated at paragraph 108 of its order that:

> We are not satisfied that the record in this proceeding is sufficient to make the kinds of decisions XO asks. As noted above, we have

[1] WAC 480-07-740(2)(c) provides that the opponents to a proposed settlement may:

- Cross-examine witnesses supporting the proposal.
- Present evidence opposing the proposal.
- Present argument in opposition to the proposal.
- Offer evidence or, in the commission's discretion, an offer of proof, in support of the opposing party's preferred result.

> opened Docket No. UT-053025 as our follow-up to the *Triennial Review Remand Order (TRRO)* to address these issues.

The Commission encouraged XO to participate actively in the TRRO docket with respect to its issues so they could be resolved in a context more suited to their consideration.

Public Counsel's comments describing the settlement process followed in the Verizon/MCI proceeding directly contradict those of XO.[2] Public Counsel states:

> 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.

Significantly, Public Counsel's comments describe the Commission's standard settlement practice under the existing procedural rules when a proposed settlement is opposed by one or more parties. This standard settlement practice is illustrated by Public Counsel's discussion of "three relatively recent major cases which have successfully employed the 'notice and opportunity' to participate approach contained in the draft rule proposal." Public Counsel discusses in positive terms the settlement practice followed in *WUTC v. PSE*, Dockets UE-011571, et al.; *WUTC v. PSE,* Docket UG-040640, et al.; and *WUTC v. Verizon*, Docket UT-040788.

---

[2] WeBTEC states that it did not participate in the Verizon/MCI proceeding, or the Avista proceeding, discussed below. Nevertheless, WeBTEC submitted comments in response to the Commission's inquiry. WeBTEC's comments track closely those submitted by Public Counsel. Indeed, they are almost verbatim and do not require additional discussion here.

Public Counsel also offers favorable remarks on the Avista settlement process, acknowledging that opposing parties were allowed to prefile evidence on all material issues, not just the settlement. In addition the opposing parties were given the opportunity to cross-examine all witnesses who filed testimony on all issues. Public Counsel complains, however, that the issue at the hearing was expressly limited to whether the settlement should be rejected, accepted, or conditioned. This is, however, the issue in any hearing in which a proposed settlement is considered, whether multi-party, partial, or full. Indeed, it was the issue in the Verizon/MCI proceeding. Notwithstanding Public Counsel's characterization of the Commission's order quoted in the preceding paragraph, the Commission did not reject the settlement and resolve the disputed issues on their merits. The Commission, considering all of the evidence in the record, made findings and conclusions concerning all material facts in dispute,[3] conditioned its approval of the settlement and put to the settling parties their option of either accepting the conditions or having the litigation return to its status at the time the settlement was offered. *WAC 480-07-750(2).*

Public Counsel proposes that a non-unanimous settlement be treated as no more than a "joint position of parties" to be considered as if it were a litigation position to be resolved on the merits. The Commission, under Public Counsel's proposed amendments, would resolve as disputed issues of material fact the differences between the "joint position" of the settling parties and the positions advocated by opposing parties, without regard to the settling parties' actual litigation positions that the proposed settlement would resolve by compromise.

---

[3] Public Counsel and others who support the amendments do not believe that the requirement in RCW 34.05.461(3) that Commission orders must 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…," is sufficient to protect the interests of those who oppose a settlement. PSE and others who oppose the amendments, however, agree that the requirements of RCW 34.05.461(3) are adequate to meet the concerns of non-settling parties without any need to revise WAC 480-07-740. PSE states that the requirement for findings and conclusions on all material facts is supplemented by legal requirements including that Commission orders be based on substantial evidence, that they be neither arbitrary nor capricious, and that they not violate the constitution or any statutes.

During the November workshop, staff and others noted that this approach would eliminate entirely the incentive parties now have to compromise their litigation positions by making trade-offs in the interest of achieving a settlement. They noted that unless the parties arrived at a unanimous settlement, parties that compromise would lose the opportunity to prove by a preponderance of the evidence the facts that support the asserted wisdom of their litigation positions.

In contrast to Public Counsel, ICNU comments that the Avista case "demonstrates that the Commission can easily accommodate the interests of non-settling parties." ICNU states that the Avista process was conducted in a manner consistent with the proponents' proposed changes to the Commission's settlement rules. Avista points out that in the Avista case:

> All parties were allowed to participate in settlement discussions with Staff. After Staff and Avista entered into a settlement agreement, the non-settling parties were provided a fair opportunity to conduct discovery on Avista's original proposal and the settlement agreement, and a full evidentiary hearing on all disputed issues was held. Finally, in the Commission's final order, the Commission reviewed and resolved most of the non-settling parties' specific issues. Therefore, ICNU and Public Counsel were provided all the procedural rights in the Avista proceeding that they would be entitled to under the proposed changes to the settlement rules.

ICNU concludes by noting the proposed amendments would do no more than ensure that the Commission would continue the practices followed in the recent Avista proceeding.

Verizon, PacifiCorp, Avista, the Washington Independent Telephone Association (WITA), Qwest and Puget Sound Energy (PSE) filed comments opposed to Commission adoption of the amendments proposed by Public Counsel and others. These stakeholders do not agree that the proposed amendments would ensure that current settlement practices in Commission proceedings would

continue. They contend that the proposed amendments are more likely to frustrate the settlement process than to preserve it or enhance it. WITA's comment that "[t]he amendments that are proposed by Public Counsel and others are too restrictive and would result in an environment that would discourage settlements" exemplifies what the other stakeholders contend.

Qwest expresses concern that "[t]he proposed changes would chill settlement negotiations, and unnecessarily complicate and potentially protract proceedings, without any real benefit to the parties or the Commission." Qwest's principal concern is the restriction that would prevent the company and Commission staff from engaging in one-on-one negotiations. Qwest says this is a particular concern because of the number of parties in Commission proceedings that have very different and sometimes narrow interests. Yet, under the proposed amendments, if Qwest wished to work with Staff to resolve any issue in a proceeding it would be required to bring all other parties into the discussion regardless of their interest. Qwest states that "this is unnecessary and would create incentives, and the ability, for a party to hold the negotiations hostage for a favorable resolution of a particular issue."

PSE also couches its comments in the context of Commission proceedings characterized by multiple parties "with very different, often narrow interests in the proceedings." PSE states that a particular party's concerns may be technically complicated and require "extensive discussion, brainstorming, and data gathering and modeling." PSE acknowledges the proposed rule language would allow PSE to meet one-on-one with parties other than staff to resolve such issues, but is concerned that it would be precluded from doing so with staff, even concerning issues only disputed by staff.

> PSE submits that this is unnecessary and would lead to increased gamesmanship in the negotiation process. For example, a party with no real interest in a particular issue could seek to extract some concession from Commission Staff, the regulated company, or the other parties as the cost of not interfering with a negotiated resolution that has been worked out between the party that truly

has an interest in an issue, the regulated Company, and Commission Staff.

Avista expresses similar concerns. Avista comments that under the proposed amendments settlements would move forward only if all parties agree with the end result. Avista expects that the effect of the proposed rule would be to require parallel tracks of litigation and settlement, which would dampen the prospects for settlement because utilities would have little or no incentive to enter into negotiations if they are required to litigate all the issues in the case.

PacifiCorp says that a prescriptive rule, such as proposed WAC 480-097-730, is not warranted to ensure that all parties have an opportunity to participate in the settlement process. PacifiCorp comments that the issues Public Counsel raises are addressed by current Commission practice, including setting settlement conferences as part of the procedural schedule.

Avista agrees with PacifiCorp that the current rules are adequate to protect all parties' interests. Avista cites its own recent experience in which settlement meetings were scheduled well in advance, following significant opportunities for discovery. In addition, non-settling parties had sufficient opportunity to participate in settlement discussions, and the opportunity to present their issues though pre-filed testimony and exhibits, by cross-examination, and by briefs. Avista concludes that "[t]he process, under existing rules, provided full opportunity for all parties to be heard."

Qwest comments that the proposed amendments to WAC 480-07-740 inappropriately restrict the presiding officer and the Commissioners with respect to determining the appropriate additional process required considering the circumstances of individual cases in which a multi-party settlement is proposed. Qwest comments that the Commission has demonstrated that it can and will provide non-settling parties with ample opportunity to object to settlements under the current rules.

Northwest Energy Coalition suggests that Washington's rules should be amended to bring the settlement process closer to the process in Oregon. Specifically, NWEC states that in Oregon:

> Dates of settlement discussions are determined during the pre-hearing conference along with all other dates (for testimony, replies, etc.). In contrast, settlement discussions at the Commission arise on an ad hoc basis – in terms of the timing of those discussions (in at least one recent case actually preceding the first prehearing conference) as well as who initiates the conversation.

The Commission, for some time now, has followed the practice of setting dates for one or more settlement conferences during the first prehearing conference. These are built into the procedural schedule. This practice could be reflected in the Commission's procedural rule and there appears to be no objection to that idea in the stakeholder comments.

The Commission inquired specifically about the stakeholders' experiences in Oregon as compared to Washington because Public Counsel and others assert that the amendments they propose are based on the Oregon PUC's settlement rules. The Commission asked stakeholders, based on their actual experience during the past two or three years, to compare and contrast Oregon's rules and practice governing voluntary settlements (OAR 860-014-0085) with the Washington Commission's rules and practice.

Public Counsel states it has no actual experience with the Oregon procedures, but believes the "Oregon experience . . . disproves some of the concerns raised by opponents as to the unworkability of this approach in Washington.

WeBTEC also states it has no direct experience with the Oregon rule, but that the members of its "sister organization, Oregon TRACER" report that there is nothing at all "unworkable" about the rule. WeBTEC continues:

> 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.

ICNU has had considerable experience with the settlement process in Oregon. ICNU points out that the Oregon rule provides "[a]ny party may attend any settlement conference in which the Commission staff participates." ICNU states the Oregon rule has worked well and allowed all interested parties to participate in the settlement process, yet has not prevented staff or other parties from entering into non-unanimous settlements. ICNU states that in one settlement between staff and PacifiCorp, ICNU was given the opportunity to participate in negotiations, but opposed the settlement achieved. ICNU was allowed to conduct discovery regarding the settlement and to cross-examine witnesses regarding the factual basis underlying the settlement. ICNU states the Oregon Commission reviewed ICNU's disputed issues before issuing its final ruling adopting the settlement.

ICNU comments that, after adequate notice, the Oregon rule allows staff to conduct settlement discussions with less than all the parties. The comments do not clarify what constitutes adequate notice. Nor do the comments explain whether Oregon staff actually sought express authority, or simply that no one objected.

Comparing the Oregon rules to the amendments proposed in this rulemaking, it does not appear that the amendments, in fact, are based on the Oregon rule. The only section of the proposed amendments that appears to be based at all on the Oregon rules is subsection (5) (b), which provides:

> Any party given notice under this section may attend settlement negotiations. Additional notice of continuing settlement negotiations involving the same issue need only be provided to parties attending the initial settlement negotiation, or who have requested continuing notice.

Even this does not track the Oregon rule. The Oregon rule applies only to "any settlement conference in which the Commission Staff participates." The first sentence of the rule proposed by Public Counsel is much broader: It appears to apply whether or not Staff is involved and applies not just to settlement conferences, but to "settlement negotiations." The Oregon rule defines "settlement conference" as "any meeting called for the purpose of discussing resolution of issues in a proceeding." The amendments proposed to Washington's rules define "settlement negotiations" to include "any discussion or other communication, in person or otherwise, between Commission Staff and a company regulated by the Commission whose purpose is to pursue resolution of one or more issues in an adjudicative proceeding." This is an extremely broad definition that goes far beyond what the Oregon rule requires.

The proposed amendments to the Commission's rules also include very prescriptive notice requirements in terms of who must be notified,[4] when they must be notified,[5] and how they must be notified.[6] The Oregon rules simply require "reasonable prior notice."

In light of these prescriptive notice and participation requirements, the Commission put to the stakeholders the question whether it 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. The Commission also asked whether the rules would restrict parties' ability to caucus with one or more other parties, but not all, during a scheduled settlement conference. Public Counsel and WeBTEC answer both questions in the negative. These stakeholders once again refer to "the successful practice that has been used in a number of Commission cases." They describe the existing process as one that "is well understood by the parties" and state:

---

[4] "Other parties" or, if no prehearing conference has been held, "all persons who regularly appear before the commission in similar adjudicative proceedings."
[5] Five calendar days before a "settlement negotiation."
[6] "In writing" and "by electronic mail."

> 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.

We emphasize that this "successful practice" that "is well understood" takes place under the Commission's existing rules. It occurs precisely because the current rules are well understood and allow sufficient flexibility for the parties to shape the process to the needs of each case. The proposed amendments, contrary to what Public Counsel and WeBTEC state, would not "simply codify" the "successful practice" that occurs under existing rules. As is clear from the comments opposing the amendments, and from staff's oral comments during prior workshops, the proposed amendments would impede, if not eliminate, the settlement processes that have been an important part of the Commission's regulatory mission over many years.

The contrasts between the Oregon rules and the proposed amendments to WAC 480-07-740 (2)(c) are even more striking. The Oregon rules provide the following settlement review process:

> (4) A stipulation or settlement shall not be binding on the Commission or Administrative Law Judge (ALJ). Settlements and stipulations shall be reduced to writing, served on the parties to the case, and filed for review by the Commission or the ALJ. Unless waived by the Commission or ALJ, settlements and stipulations filed for review shall be supported by an explanatory brief or written testimony filed and served concurrently therewith. Parties may present oral or written stipulations on the record at the hearing or other appropriate time with leave of the Commission or ALJ.
>
> (5) Within 20 days of the filing of the settlement or stipulation, any party may file written objections to the settlement or stipulation or request a hearing. Upon request or its own motion, the Commission or ALJ may set another time period for objections and request for hearing. Objections may be on the merits or based upon

failure of staff or a party to comply with this rule. The Commission or ALJ may hold a hearing to receive testimony and evidence regarding the settlement or stipulation. The Commission or ALJ may require evidence of any facts stipulated, notwithstanding the stipulation of the parties. The parties shall be afforded notice and an opportunity to submit proof, if such evidence is requested.

(6) If a stipulation is rejected, the Commission or ALJ shall provide the parties sufficient opportunity on the record to present evidence and argument on the matters contained in the settlement or stipulation. No further hearing need be held where a review hearing has already been held under section (5) of this rule and the Commission or ALJ determines that the issues were fully addressed in the prior hearing.

The Commission's corresponding rules provide:

WAC 480-07-730

(4) **Notice to commission.** Parties must advise the commission if they reach a full, partial, or multiparty settlement and may suggest preferred procedural alternatives for review of the settlement, subject to the requirements of WAC 480-07-740. The commission will determine the appropriate procedure in each proceeding consistent with the requirements of WAC 480-07-740.

WAC 480-07-740

(c) ***Rights of opponents of a proposed settlement.*** Parties opposed to the commission's adoption of a proposed settlement retain the following rights: The right to cross-examine witnesses supporting the proposal; the right to present evidence opposing the proposal; the right to present argument in opposition to the proposal; and the right to present evidence or, in the commission's discretion, an offer of proof, in support of the opposing party's preferred result. The presiding officer may allow discovery on the proposed settlement in the presiding officer's discretion.

WAC 480-07-750

(1) The commission may decide whether or not to consider a proposed settlement. The commission will approve settlements

> when doing so is lawful, the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the commission.
>
> (2) If the commission considers a proposed settlement, it may accept the proposed settlement, with or without conditions, or may reject it.
>
> (a) If the commission rejects a proposed settlement, the litigation returns to its status at the time the settlement was offered and the time for completion of the hearing will be extended by the elapsed time for consideration of the settlement.
>
> (b) If the commission accepts a proposed settlement upon conditions not proposed in the settlement, the parties may seek reconsideration of the decision and the settling parties must within the time for reconsideration state their rejection of the conditions. If a party rejects a proposed condition, the settlement is deemed rejected and (a) of this subsection applies.

Thus, Washington's rules are quite similar to Oregon's rules, but are even more explicit in identifying the rights of all parties in the settlement consideration process. Both the Washington and Oregon rules provide for the Commission's exercise of discretion in shaping the review process to the needs of the individual proceeding.

The proposed amendments, by contrast, would limit, if not eliminate the Commission's discretion and would make Washington's rules far more prescriptive than Oregon's.

Stakeholder Responses to the Commission's Other Inquiries

The Commission asked stakeholders to clarify whether the proponents of the amendments intend that the notice requirement apply only to staff, or to all parties. The proponents respond that the intent is to apply the requirement only to staff. Public Counsel, NWEC and WeBTEC assert staff has special resources, a

special role and, despite staff's participation in adjudications as an independent party, staff is subject to the Commission's authority in ways other parties are not.

The stakeholders opposing the amendments comment, in general, that if the Commission requires notice of settlement negotiations, it should require notice by and to all parties.

The Commission asked the stakeholders to give their views of how the settlement process in Commission proceedings differs from the process in civil proceedings, and how any differences should be reflected in the settlement rules. Public Counsel and WeBTEC respond that the Commission has a special role both in adjudicatory proceedings generally and in approving settlement agreements. With reference to Public Counsel's quite similar comments, WeBTEC comments that "when the Commission adopts a settlement, it is not simply acting as a disinterested arbiter of private interests [as in the civil courts]; it is exercising its statutory authority to regulate particular economic activities in the public interest." These stakeholders point out that the Commission cannot delegate its responsibility to the parties in an adjudicatory proceeding. Thus, the Commission considers whether it can adopt a proposed settlement as the Commission's own resolution of the issues. In light of this, "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."

These stakeholders also remark that Commission settlement practice is different because it allows for non-unanimous settlements to be the basis for resolving a case, a result not possible in civil litigation. Thus, in the administrative settlement process, the procedural rights of parties who do not agree to a settlement must be preserved by rule.

Verizon comments in this connection that 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

putative class members objection to a potential settlement in a class action lawsuit. Verizon states that the civil litigation model, if anything, undercuts any basis for making the Commission's settlement process even more formalistic.

All stakeholders agree there should be no limitation under the rules on a mediator or settlement judge's ability to caucus with one or more parties without participation by others.

Those opposing the amendments comment that discovery in the settlement review process should not be an absolute right and should remain subject to the Commission's exercise of discretion as at every other stage of a proceeding. The proponents say they do not intend for discovery to be an absolute right, whatever the language they propose may suggest.

Response to Proposed Amendments

The stakeholders' comments, including those offered by Public Counsel and other proponents of the suggested amendments, show the Commission's settlement practice is working satisfactorily under the current rules. The comments by those opposed to the amendments show that they could have significant negative impacts on settlement practice in Commission proceedings. For these reasons, and those discussed above, we conclude the proposed amendments are unnecessary and could be counter-productive, if adopted. Accordingly, we do not include the amendments in the proposed rule changes.

Commission practices concerning notice of settlement conferences should be incorporated into the Commission's alternative dispute resolution rules. , The proposed rules include the following change to WAC 480-07-700 to reflect current practices:

WAC 480-07-700
Alternative dispute resolution.

*** * ***

3) **Settlement conference.** The commission ~~may invite or direct the parties~~ will set in the procedural schedule established for an adjudicatory proceeding one or more dates upon which the parties will have an opportunity to confer among themselves, or with a designated person, concerning the prospects for settlement. Settlement conferences must be informal and without prejudice to the rights of the parties. Any resulting settlement or stipulation must be submitted to the commission in writing and is subject to commission approval.

The Commission's current rules and the Administrative Procedure Act fully address the concern expressed by Public Counsel and others that in non-unanimous settlements opposing parties should have the right to present their case and to receive a decision on the merits of material issues raised.[7] As is clear from the comments by all stakeholders, the Commission already provides those who oppose a settlement opportunities to present evidence, to cross-examine witnesses, and to present argument. Opponents to settlements have the same rights to discovery as any other party at any stage of a proceeding. The Commission should retain in the process of considering a proposed multi-party settlement the same degree of discretion it has throughout the hearing process to govern discovery, the presentation of evidence, the cross-examination of witnesses and the presentation of argument.

[7] RCW 34.05.461(3) provides, in part: "Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefore, on all material issues of fact, law, or discretion presented on the record."