BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Rule-Making to Consider Possible Corrections and Changes in Rules In Chapter 480-07 WAC, Relating to Procedural Rules. (CR-102)	DOCKET NO. A-050802

CR 102 COMMENTS OF PUBLIC COUNSEL

Attorney General of Washington

May 4, 2006

I. INTRODUCTION

The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) files these comments in response to the Washington Utilities and Transportation Commission's (Commission) April 4, 2006, *Notice of Opportunity to Submit Written Comments on Proposed Rules*.

These comments focus on a limited of number items raised by the rulemaking. In order to make a complete record, Public Counsel hereby incorporates by reference its prior comments in this docket. In addition, for purposes of the record, Public Counsel attaches a complete copy of its Second Comments, filed January 17, 2006.

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ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 981064-1012
(206) 464-7744

II. COMMENTS ON PROPOSED RULES REGARDING SETTLEMENT PROCEDURES

A. Background

For several years, Public Counsel and a number of other consumer parties have raised strong concerns about problems with the settlement process at the Commission. Problems in two areas – notice and opportunity to participate, and rights of non-settling parties – were not imaginary or trivial, but based on experiences in significant cases, including *inter alia,* 2004 PacifiCorp and Avista rate cases.[1] They were sufficiently severe to cause virtually all of the consumer parties who appear before the Commission to voice their concerns initially in litigated cases where problems occurred, to support legislation (H.B. 1800, 2005 Session), to express their concerns in meetings with Commissioners and at a Bench-Bar conference, to file a petition for rulemaking,[2] and to participate actively in this rulemaking.

Since January 2005, there has been an effort at the Commission to recognize these problems and to address them. As a result, there has been a discernible change in Commission settlement process. In recent major cases, Staff has provided advance notice of settlement negotiations to all parties and an opportunity to participate. In cases where settlement was non-unanimous, subsequent hearing procedures have provided a better opportunity for opponents to put on an opposing case, and the Commission has addressed the opponents' issues in the final order. These are all salutary developments. Public Counsel's concern expressed in these comments is that these improvements are not adequately reflected in the rules.

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[1] *WUTC v. PacifiCorp*, Docket No. UE-032065; *WUTC v. Avista*, Docket No. UG-041515.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 981064-1012
(206) 464-7744

B. Notice and Opportunity to Participate in Settlement Discussions

While Public Counsel applauds the improvements that have occurred recently, unless these improvements are captured and reflected in some way in its rules, there is nothing to prevent the real problems we have seen in the past from re-emerging as personnel changes and as memories fade, or under the pressures of particular cases. Nothing in the proposed rule issued on March 2, 2006, for example, would prohibit a regulated company and Staff negotiators from engaging in private bilateral settlement negotiations and reaching a non-unanimous settlement without notifying or including other parties to the case. That would be a truly unfortunate result. There are significant benefits to the Commission in all-party negotiations. They increase the likelihood of all-party settlements satisfying the full range of interests in a case. Even where settlement is not unanimous, further proceedings in the case can focus on the merits, rather than on disputes over real or perceived unfairness in the settlement process. Based on recent practice, it appears to be the Commission's intent to encourage inclusive settlement processes, yet the rules do not fully address this.

The Discussion Paper states that the new "Commission practices concerning notice of settlement conferences should be incorporated into the Commission's alternative dispute resolution rules." [3] The language reads:

> 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.

[2] *In the Matter of the Petition of ICNU, WeBTEC, CUA, NWEC, the Energy Project, AWISH, and Public Counsel for Amendment of WAC 480-07-730 and 480-07-740*, Docket No. A-051427.

[3] While the Discussion Paper includes the proposed change, presumably through oversight, it does not appear in the full set of the draft rules. Public Counsel believes that the change is still within the scope of the CR 102 notice.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 981064-1012
(206) 464-7744

Public Counsel supports this change as a positive step in the right direction. It does not fully address the concerns of Public Counsel and the other parties supporting changes in this area, however, because it does not incorporate a general principle that there be notice to all parties when settlement discussions are to take place. Thus, as noted, the rule does not by its terms preclude a scenario where bilateral settlement discussion could occur between Staff and regulated utilities, prior to the prehearing conference, or separate from the dates scheduled for all parties to meet.

The Commission has expressed its unwillingness to adopt the full proposed rule language to address this issue presented by Public Counsel and other parties. Public Counsel understands that part of the concern is that rule changes not be adopted that create cumbersome and unworkable notice requirements for settlement. Public Counsel believes this fear is not well-founded, and that these arguments by some parties are based on a misinterpretation of the intended operation of the rule. However, in order to address this perception, while getting at one of the key concerns of the proponents, Public Counsel would suggest the following narrower language, as an addition to the Commission's new ADR rule language:

Public Counsel recommended language is in bold and underlined text.

WAC 480-07-700

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. **After the initial filing and prior to engaging in an initial settlement negotiation at any other time with a regulated company in an adjudicative proceeding, Commission Staff must provide notice and an invitation to participate to all parties.** 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.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 981064-1012
(206) 464-7744

The purpose of this addition is simply to clarify that, at a minimum, all parties to the proceeding must be invited to participate in settlement at the outset of discussions between Staff and the regulated company, whenever they occur. While the rule does not address procedural requirements after discussion starts, as Public Counsel has observed in its prior comments, this has not been an area of dispute. Once all parties and their counsel have notice and an opportunity, they have historically conducted settlement discussions in a professional, fair, and efficient manner without the need for prescriptive process rules. It is only where parties have not had a chance to participate that problems have arisen. The narrow proposal offered above is an effort to address that key aspect of the problem.

Public Counsel also notes that including a clear requirement for notice when settlement is initiated would make the settlement rules parallel to the Commission's mediation rules. The mediation rules provide that "[c]opies of the request [for mediation] must be served on all parties to the negotiation" and that "[a]ll parties are required to participate in good faith if the Commission agrees to mediate." WAC 480-07-710(2). If this notice and participation framework is reasonable for mediation, it likewise seems reasonable for settlement conferences among the parties themselves.

Given that WAC 480-07-700 is intended to facilitate consensus on disputed matters, it would be appropriate for interested stakeholders to attempt to achieve consensus on the rule and then propose that language to the Commission for its consideration. We encourage such ongoing discussions and offer our active participation towards that effort.

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ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 981064-1012
(206) 464-7744

C. Procedural Rights of Non-Settling Parties

The Discussion Paper also states that Public Counsel "[does] not believe" that RCW 34.05.461(3)[4] is sufficient to protect the interests of those who oppose a settlement. Discussion Paper, p. 6, note 1. Public Counsel would characterize our position differently. What Public Counsel has said is that the rules need to be amended to make clear that the statute will apply in non-unanimous settlement situations so that the Commission will, in fact, rule on material issues of fact and law raised by non-settling parties.

The problem is that the current rules themselves do not address this point. Indeed, they seem to point in the opposite direction. The issues in a settlement hearing on a non-unanimous settlement are typically described with reference to WAC 480-07-750. *See, e.g., WUTC v. Avista,* UE-050482, UG-050483, Order No. 05, ¶¶ 17-20. The inquiry described in WAC 480-07-750(1) sets out a three-part inquiry for reviewing settlements, including non-unanimous settlements, which requires a determination of whether the settlement is contrary to law, offensive to public policy, and supported by evidence as a reasonable resolution. The Commission "must determine one of three possible results" – approval without condition, approval with conditions, or rejection. *Id.* There is no reference to the findings required by RCW 34.05.461(3). On its face, at least, the rule leaves no room for consideration of material issues of fact or law raised by non-settling parties. In practice, these rules have in the past been applied to limit the scope of the evidence presented by Public Counsel in opposition to

[4] RCW 34.05.461(3) states in relevant part:

> 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 and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 981064-1012
(206) 464-7744

settlements, to narrow the scope of the Commission's order to settlement issues only. As the Discussion Paper observes, the recent Verizon/MCI merger order, however, did make findings on "all material facts in dispute." The new proposed rules, however, do not reflect that this is part of the review process for settlements.

On this issue, therefore, in lieu of adoption of Public Counsel's proposed changes to WAC 480-07-740, Public Counsel would suggest that the new practice be reflected by adding a reference to RCW 34.05.461(3) in WAC 480-07-750(1). For example, a final sentence could be added to the last sentence as follows: "The Commission will issue its decision on a proposed settlement in an order, pursuant to RCW 34.05.461(3)."

III. COMMENTS ON OTHER PROPOSED RULES

A. WAC 480-07-310 Ex parte communications

Public Counsel requests that the Commission reconsider our recommended rule amendment designed to provide additional transparency regarding company contacts with the Commission prior to the filing of an adjudicative proceeding. The proposed language provides:

> WAC 480-07-310– ADD:
> When a regulated company has communicated directly with one or more commissioners regarding an issue which was later set for adjudication by the Commission, the nature and content of the communication shall be disclosed by the company in a filing in the docket established by the commission.

The Comments Summary responds that the proposal is impractical and that it does not define what constitutes an issue, that there is no time limit, and that the rule would require Commissioners to keep notes of all contacts.

With regard to the last point, the rule requires the regulated company to make the disclosure, and then only if the matter is filed with the Commission and becomes an adjudication. The contact is not defined as an *ex parte* contact under the definition of the rule,

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 981064-1012
(206) 464-7744

but instead as a matter that must be disclosed by a company if and when the subject of the communication becomes an issue in an adjudicative proceeding. The Commission itself does not have a disclosure requirement under the proposed amendment. This obviates the burden on the Commissioners suggested in the Comments Summary.

With regard to the definition of "issue," the rule could be clarified by using a term from the existing rule such as "the merits of the proceeding." With regard to the timing, setting a time limit is a reasonable suggestion to make the rule workable. A 90-day time limit would be appropriate.

A modified proposal with these changes would read:

Proposed Rule Locations-- WAC 480-07-310(1)(b)(existing sub(1) becomes (1) (a)), or WAC 480- 07-310(6):

> When a regulated company has communicated directly with one or more commissioners regarding the merits of a proceeding which was later set for adjudication by the Commission, the nature and content of any such communication which occurred within 90 days prior to the filing shall be disclosed by the company in a filing in the adjudicative docket established by the commission.

Public Counsel respectfully suggests that this amendment is a balanced approach to this issue. Companies are not prohibited from these contacts by the rule and may continue to meet with Commissioners prior to filings. At the same time, the rule acts as a deterrent to a company seeking to use the immediate pre-filing period to engage in detailed advocacy on factual and legal issues on matters they know will shortly be before the Commission. As a result of the required disclosure, other interested parties will at least have the chance to respond in the adjudication to any issues raised, if they choose to do so. No additional burden is placed on the Commission. At the same time, the

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 981064-1012
(206) 464-7744

Commission benefits from an increased openness and appearance of fairness in its proceedings.

B. WAC 480-07-510 General Rate Proceedings – Electric, natural gas, pipeline, and telecommunications companies

Public Counsel requests that the rule be amended to reflect the current practice of most regulated companies of serving their entire general rate case filing on Public Counsel, including work papers. As written, WAC 480-07-510(1) can be read to require only the service of testimony and exhibits, but not work papers. In sum, Public Counsel proposes the following changes to the CR 102 draft: [5]

- The requirement of service on Public Counsel is moved to the opening paragraph of the rule so that it is clear that Public Counsel should be served the entire filing.
- The requirement that the company provide an electronic copy of the filing to the Commission is moved from subsection (1) to the opening general paragraph so that it is clear that the entire filing must be submitted in electronic format.
- Items not included in the work papers because they are too voluminous must be clearly identified.
- In addition to the requirement to file any new or revised tariff sheets, the company must provide tariff sheets containing any definitions and any tariff sheets referenced by the new or revised tariff sheets, regardless of whether additions or changes are proposed to these tariff sheets.
- The rule clarifies that the term "methodology" in the cost study requirement includes those inputs and assumptions used in developing any study and must be provided in the initial filing.

[5] Public Counsel recognizes this proposal is made late in the process. However, the open rulemaking provides the Commission an opportunity to address an issue that arose in the pending Cascade Natural Gas case regarding the interpretation of the rate case filing requirements. Docket No. UG-060256.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 981064-1012
(206) 464-7744

Public Counsel's proposed amendments are set out below in bolded, italic and either underlined or strike-through type as appropriate. Otherwise the language presented continues to reflect the changes proposed by the Commission in the CR 102 draft Notice. We have left out sections of the rule not affected by our proposal.

WAC 480-07-510 General rate proceedings--Electric, natural gas, pipeline, and telecommunications companies. General rate proceeding filings for electric, natural gas, pipeline, and telecommunications companies must include the information described in this section. The commission may reject a filing that fails to meet these minimum requirements, without prejudice to the company's right to refile its request in conformance with this section. ***In addition, the company must provide one electronic copy in the format ((~~or formats authorized in these rules or by the commission secretary~~)) identified in WAC 480-07-140(6). Material that the company has not ((~~been~~)) produced under ((~~the company's~~)) its direction and control and that is not reasonably available to it in electronic format, such as generally available copyrighted published material, need not be provided in electronic format but must be identified as available. One paper and one electronic copy of the complete filing, including workpapers, must be served on public counsel within one day of filing with the commission.*** The company must provide:

(1) **Testimony and exhibits.** ((~~Twelve~~)) Nineteen paper copies of all testimony and exhibits that the company intends to present as its direct case if the filing is suspended and a hearing held. ***~~In addition, the company must provide one electronic copy in the format ((or formats authorized in these rules or by the commission secretary)) identified in WAC 480-07-140(6). Material that the company has not ((been)) produced under ((the company's)) its direction and control and that is not reasonably available to it in electronic format, such as generally available copyrighted published material, need not be provided in electronic format but must be identified as available.~~*** The utility must provide an exhibit that includes a results-of-operations statement showing test year actual results and the restating and pro forma adjustments in columnar format supporting its general rate request. The utility must also show each restating and pro forma adjustment and its effect on the results of operations. The testimony must include a written description of each proposed restating and pro forma adjustment describing the reason, theory, and calculation of the adjustment.

(2) **Tariff sheets.** ((~~Three copies~~)) A copy of the proposed new or revised tariff sheets in legislative format, with strike-through to indicate any material to be deleted or replaced and underlining to indicate any material to be inserted***, ~~in paper and electronic format, unless already provided as an exhibit under subsection (1) of this section.~~ any definitions contained in the tariff and any tariff sheets referenced by the new or revised tariff sheets.***

(3) **Work papers and accounting adjustments.** Three copies of all supporting work papers of each witness in a format as described in (b) of this subsection must be filed with the utility's general rate request and in each subsequent round of testimony filed (e.g., response, rebuttal). If the testimony,

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 981064-1012
(206) 464-7744

exhibits, or work papers refer to a document, including, but not limited to, a report, study, analysis, survey, article or decision, that document must be provided as a work paper unless it is a reported court or agency decision, in which case the reporter citation must be provided in the testimony. If a referenced document is voluminous, it need not be provided with the filing but must ***be clearly identified in the filing*** and be made available if requested. The following information ((~~must be included in the company's work papers, if it is not included in the testimony or exhibits~~)) is required for work papers that accompany the company's filing and all parties' testimony and exhibits:

(6) **Cost studies.** The company must include any cost studies it performed or relied on to prepare its filing, identify all cost studies conducted in the last five years for any of the company's services, and describe the methodology***, including the inputs and assumptions it*** used in ***preparing*** such studies.

IV. CONCLUSION

Public Counsel respectfully requests that the Commission consider these comments as it concludes this rulemaking.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 981064-1012
(206) 464-7744