

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

A-130355

In the Matter of)	
)	
Rulemaking to Consider Possible Corrections)	COMMENTS OF THE INDUSTRIAL
and Changes in Rules in WAC 480-07,)	CUSTOMERS OF NORTHWEST
Relating to Procedural Rules)	UTILITIES REGARDING PROPOSED
)	CHANGES TO WAC CHAPTER 480-07
)	
)	

I. INTRODUCTION

1 On March 30, 2017, the Washington Utilities and Transportation Commission (“WUTC” or the “Commission”) issued notice that it would receive comments regarding proposed revisions to Part III, Subpart B of Washington Administrative Code (“WAC”) Chapter 480-07. The Industrial Customers of Northwest Utilities (“ICNU”) appreciates the invitation to participate in this rulemaking docket and submits these comments regarding the revised draft rule proposals.

II. COMMENTS

2 The Commission has asked stakeholders to comment on its draft rules governing adjudicated proceedings.^{1/} ICNU has participated in this proceeding from the beginning, and devoted considerable time to its many phases and iterations.^{2/} This process now appears to be winding down to a conclusion, but not before addressing issues that are of critical importance to

^{1/} See WAC 480-07, sections 300-498.

^{2/} This docket was opened in 2013, and now spans a four-year period.

ICNU. In this iteration, the Commission’s rules focus on the all-important processes and procedures affecting the rights of ICNU and other parties that appear in proceedings before the Commission.

3 It appears that the draft rules are intended to clarify the existing rules for stakeholders, while taking steps to streamline the Commission’s adjudicative processes. ICNU has generally found Staff’s recommendations to be helpful in purpose and design. However, ICNU’s interests may not always align with Staff’s recommendations. ICNU hopes that the Commission will consider its comments, and reflect on the impacts discussed below.^{3/}

Part III, Subpart B: General Rate Proceedings

480-07-510 (1) Testimony and exhibits

4 The Commission has long understood the procedural and substantive problems caused by company rebuttal testimony that is not intended to respond to the testimony filed by opposing parties.^{4/} Such non-responsive testimony may introduce new substantive issues to the company’s case-in-chief, change or modify methodologies used to calculate material financial results, present a new study that supports the company’s initial as-filed position, or introduce a new request for relief.^{5/} Because these material changes are made in the company’s rebuttal

^{3/} The comments made herein address certain issues that ICNU hopes the Commission will consider prior to the stakeholder workshop on June 12, 2017.

^{4/} The Commission has ruled that a company could not introduce revised figures in rebuttal testimony. WUTC v. Harbor Water Co., Inc., Docket No. U-87-1054-T, 3rd Suppl. Order, 1988 Wash. UTC LEXIS 68 at *37, *65–66 (May 7, 1988). The Commission views the purpose of the rebuttal round of testimony as an opportunity “to rebut evidence presented by other parties in their response testimonies.” WUTC v. Pacific Power & Light, Dockets UE-140094 et seq (consolidated), Order 08 ¶ 80 (Mar. 25, 2015).

^{5/} New evidence presented on rebuttal should only be allowed when “extraordinary circumstances” create a need and excluding it would cause a “severe hardship for the moving party.” WUTC v. Harbor Water Co., Inc., Docket No. U-87-1054-T, 3rd Suppl. Order, 1988 Wash. UTC LEXIS 68 at *37 (May 7, 1988).

filing, non-company parties have little or no time to engage in meaningful discovery, produce a thorough analysis of the issues, and file cross-rebuttal testimony.^{6/} As a result, the rights of non-company parties and the evidentiary record relied upon by the Commission are harmed.

5 The Commission endeavors to develop a complete and accurate record from which to base its decisions.^{7/} Unfortunately, non-responsive rebuttal testimony can leave the Commission with few procedural options to protect its record. Generally, a second round of cross-rebuttal testimony is discouraged, as the usually tight procedural schedule has little room for modification.^{8/} Without the timely opportunity to develop substantive cross-rebuttal testimony, a non-company party is left with its chances on cross-examination to explore the substantive changes proposed by the company. The Commission’s record and the due process rights of non-company parties suffer as a result.

6 The Commission has, on occasion, provided a party the opportunity to present in-person, live cross-rebuttal testimony in response to a company’s late-filed testimony or evidence. However, this procedural tool is not a substitute for the in-depth, pre-filed testimony that would normally constitute substantive rebuttal.

7 Under the examples presented above, the non-company party would be denied the opportunity to present and defend its version of the newly-filed facts, or its expert’s opinion on

^{6/} Improper rebuttal evidence is evidence that addresses new issues that are not raised by opposing parties, which is “outside the scope of the prudence review.” WUTC v. Puget Sound & Light Co., Docket UE-920433 et seq (consolidated), Order 19 Supplemental p. 38 (Sept. 27, 1994).

^{7/} The Commission has given weight to the “importance of a full and complete record.” WUTC v. Puget Sound Energy, Dockets No. UE-111048 and UG-111049 (consolidated) Order 07 ¶ 5 (Jan. 27, 2012).

^{8/} New evidence offered during rebuttal testimony “can be unsettling to the parties and potentially can disrupt a carefully planned procedural schedule close in time to a planned evidentiary hearing.” WUTC v. Pacific Power & Light, Docket No. UE-140094 (consolidated), Order 08 ¶ 79 (Mar. 25, 2015).

the modified methodology or new study presented by the company. This result leads to due process challenges that could undermine the Commission's decision. Again, the Commission seeks to develop the best record possible. A company's non-responsive rebuttal testimony conflicts with this objective, does damage to the record, and makes it difficult for the Commission to make fully informed decisions.

8 ICNU recommends that the Commission address the issue of non-responsive rebuttal testimony in a new section of the rule. Here, the Commission would state clearly that non-responsive rebuttal testimony by any party would not be allowed without the prior approval of the Commission. Such approval would only be granted when the Commission finds that other parties have a reasonable period to meaningfully respond without unreasonably disrupting the docket's procedural schedule. To this end, ICNU proposes that draft rule 480.07.510 (1) be modified as follows:

Testimony and exhibits. (a) The company's initial submission for filing must include all testimony and exhibits the company intends to present as its direct case if the commission suspends the tariff changes and commences an adjudication. The company must serve a copy of the submission on the public counsel unit of the Attorney General's Office at the time the company makes the submission to the commission if the proceeding is the type in which public counsel generally appears or has appeared in the past. The submission must include a results-of-operations statement showing test year actual results and any restating and pro forma adjustments in columnar format supporting its general rate request. The company must also identify each restating and pro forma adjustment and the effect of that adjustment on the company's operations and rate of return. The testimony must include a written description of each proposed restating and pro forma adjustment describing the reason, theory, and calculation of the adjustment. (b) Testimony and exhibits filed in response to the company's initial filing or to the responsive filings of the parties must address the evidence and testimony previously filed in the docket. Any party seeking to amend, supplant, or augment its previously filed testimony and exhibits, or to expand the substantive issues set forth in the docket's filed testimony, must first obtain Commission approval, and demonstrate

that the proposed modification or expansion of the evidence will not materially affect the docket's procedural schedule or the due process rights of the parties.

9 In sum, ICNU recommends that the Commission adopt the proposed new section in this rulemaking. Should the Commission agree, it would add an effective tool to address the procedural problems and due process challenges associated with the introduction of new or materially different testimony during the rebuttal phases of general rate cases. The first sentence in new section (b) sets forth the Commission's expectation for rebuttal testimony. The pre-approval requirement set forth in the second sentence will ensure that non-responsive testimony is limited to those occasions when the Commission's procedural schedule and the due process rights of the parties are addressed and protected. If adopted, this new language will result in a better and more complete record from which to base Commission decisions.

480-07-510(3) Work Papers

10 ICNU generally supports the Commission's modification to the rules regarding workpapers. Notwithstanding, ICNU recommends that the paragraph on workpaper requirements, 480-07-510(3)(d), be more specific to ensure that parties provide workpapers in formats which are usable and auditable to parties. The tight procedural schedules in proceedings often do not allow for multiple rounds of discovery to request workpapers that should have been included in the initial filing of a utility. In addition, it is possible for a party to break links and hard-code values in a spreadsheet in order to obfuscate data or make it difficult for parties to perform a meaningful review of the workpapers. To avoid this sort of gamesmanship, ICNU supports adding the following sentence to 480-07-510(3)(d): "Spreadsheet files may not include

hard-coded numbers, except where the source of the hard-coded number is plainly identified and the source has been made available to parties.”

480-07-515 Limited Rate Proceeding

11 It appears that the proposed Limited Rate Proceeding (“LRP”) rule is intended to replace the recently conceived Expedited Rate Filing (“ERF”) process. In the limited sense that the rule may decrease certain ambiguity which has surrounded ERF process, the proposal could be viewed as a step in the right direction. However, the proposed rule offers little to encourage the ultimate support of non-company parties.

12 Most notably, the proposed rule would expand the ERF’s limited scope to include most operating costs now covered by a general rate case (“GRC”) filing. Excluded from review are power costs, revenue attributable to power costs, costs associated with operation of generation rate base, rate of return and capital structure, and rate spread and rate design. The rule also calls for a six-month procedural schedule – nearly halving the suspension period for a GRC.

13 Finally, the proposed rule would allow a company to “stack” three rate proceedings into less than three years – opening with a GRC and following with two LRPs. It appears to ICNU that the proposed rule offers companies what is effectively a three-year rate plan after the conclusion of each GRC.^{9/} ICNU opposes giving them this procedural advantage.

^{9/} Here, the term “rate plan” means the Commission’s pre-approval to present evidence representing some, but not all, components of its operations costs and revenues when seeking to change rates.

14 ICNU begins its comments on the proposed rule with a brief history of the ERF
and its purpose. The rule’s details and possible impacts will then be discussed.

15 When first approved by Commission, the ERF had no particular structure or
governing directives. Rather, the Commission allowed the ERF to be used to set rates, along
with its thoughts on how an ERF should be used. The ERF was never meant to act as a
substitute for a full GRC. It was intended, instead, to be a “simple and straight-forward process
to *update* the test period relationships between rate base and net operating income.”^{10/} The
Commission has also described the ERF as “a *one-time true up* for changes to delivery expenses
and revenues from the test year....”^{11/} Hence, an ERF filing is bound to the GRC that precedes
it, and can be simply viewed as another “chapter” of the “parent” case.

16 Consistent with this intent, the Commission made clear that an ERF must be filed
near in time to its “parent” rate case.^{12/} This guideline was intended to maintain a reasonable
relationship between the evidence relied upon by the Commission in its rate order and the costs
asked to be recognized in the ERF filing.^{13/} In other words, a “true up” or an “update” using the
foundation of a recent rate case would be more likely to result in “fair, just, reasonable, and
sufficient rates.”^{14/}

^{10/} WUTC v. Puget Sound Energy, Docket No. UE-130137, et seq (consolidated) Order 07 ¶ 33 (June 25, 2013) (emphasis added).

^{11/} Id. at ¶ 80 (emphasis added).

^{12/} The ERF is “a process that would allow a company’s rates to be *updated shortly after a GRC* to address cost recovery issues arising from the regulatory lag that is an inherent part of the ten month GRC process in which rates are based on audited data from an historic test year.” Id. at ¶ 80 (emphasis added).

^{13/} Id. at ¶ 33-36.

^{14/} This assumes of course that one still accepts as fact that costs, revenues, rate base, capital ratios and other fiscal indicia become less representative of actual costs over time.

17 The Commission was attracted to the ERF because it held the promise of deferring rate cases, thus relieving the pressures placed upon Commission Staff and parties by recurring rate case filings.^{15/} If this is still the Commission’s concern, the proposed rule is not the answer. ICNU believes that rule language permitting the stacking of two post-rate case LRPs would only exacerbate the pressures on the Commission and its Staff – not relieve them.

18 The rule would allow a company to file a LRP within one year of the rate effective date of its last GRC or its first LRP.^{16/} There is no “stay out” or “cooling” period stated in the rule.^{17/} Therefore, a company could file its first LRP within ninety days of the entry of the order in its last GRC. The six-month countdown to a final order would then begin.^{18/} Assuming a Commission order within the six-month period and a second LRP filing shortly thereafter, the Commission could be required to process two LRP rate case filings within a year after a company’s last GRC. Under this hypothetical, the Commission could be asked to issue rate orders and change customer rates three times in less than eighteen months. The company could then file a new GRC immediately after the second LRP, and start a new LRP clock.

19 This hypothetical may seem unlikely, but the rule would certainly permit a company to cluster rate case filings in this way, which will feel very much like GRCs to ratepayers and the Commission. The Commission has long-favored rate stability, but the new rule would encourage the antithesis of this principle.

^{15/} Id. at ¶ 80.

^{16/} See Proposed Rule 480.07.515(1)(a) (March 29, 2017).

^{17/} This is also true for general rate cases, but in such circumstances the period of review is nearly twice as long.

^{18/} See Proposed Rule WAC 480-07-515(3)(a) (March 29, 2017).

20 Nor will the rule lead to the conservation of resources. The potential increase in rate filings in an abbreviated period will only increase the existing burdens already felt by the Commission and its Staff – not ameliorate them. For ICNU and other like parties, the costs to participate in the GRC/LRP/LRP sequence of cases would be considerable. When examined from a resource allocation perspective, the proposed rule would only benefit the companies by expediting and clustering their opportunities for rate increases. It would provide no benefits for the Commission, ratepayers, and non-company parties.

21 Turning away from the rule’s procedural elements, these comments now address its substantive provisions. In sum, ICNU strongly opposes the limited review called for the proposed rule.^{19/}

22 The legislature’s basic charge to the Commission is to set rates that are fair, just, reasonable, and sufficient.^{20/} When performing this duty, ICNU urges the Commission to undertake a comprehensive review of a company’s rate base, charges, expenses, capital structure, and return on equity when general rates are implicated, as it long has.^{21/} It is absolutely necessary to pay close attention to the full complexity of ratemaking in every proceeding, given that the smallest of details contribute to establishing rates that are indeed “fair, just, reasonable, and sufficient.”^{22/}

^{19/} See Proposed Rule WAC 480-07-515(1)(b-i) (March 29, 2017).

^{20/} RCW § 80-28-020.

^{21/} See, e.g. MCI Telecomm. Corp. v. GTE Nw. Inc., Docket No. UT-970653, Second Supplemental Order p. 6 (Oct. 22, 1997).

^{22/} Id., citing RCW § 80-36-140. The Commission has previously recognized that even rules designed to “speed and simplify” must be understood to allow for highly involved and complex proceedings. See WUTC v. Puget Sound Energy, Dockets No. UE-121697 et al., Order 07 ¶ 185 (June 25, 2013) (citing WAC 480-07-500(3)) (“The efficiencies promoted by these special rules are important in the context of a

ICNU sees the limited review called for by the proposed rule as problematic; perhaps leading to rate decisions that do not reflect the “high degree of analytical rigor” generally provided by a full record developed over a longer period of review.^{23/} The proposed rule expressly calls for a streamlined and less invasive review by the Commission in LRPs, having excluded from review a company’s return on equity, capital structure, and generation-resource rate base, among other things.^{24/} These rate components can have a significant impact on rates – up or down. If, for example, they are excluded, the Commission is less likely to understand the relationships between revenues and return or system operations and the allocation of costs. These alone are critical components of ratemaking that should not be ignored when a company seeks to change rates.²⁵

ICNU is also concerned that mechanisms like an LRP would lead to a cursory review of a company’s filing. This danger is exacerbated by the shortened period of review called for by the rule. And unlike the ERF, the rule demands more than an “update” or “true up” of the Company costs and rates.^{26/}

tariff filing that opens the utility to a comprehensive and detailed review of all of its rates, terms and conditions of service, raising a host of complex issues including cost of capital and capital structure, numerous restating adjustments and pro forma adjustments, rate spread and rate design, prudence reviews of significant resource acquisition decisions, and others.”)

^{23/} WUTC v. Pacific Power, Dockets No. UE-140762 et al., Order 08 at ¶ 167 (March 25, 2015) (quoting WUTC v. Puget Sound Energy, Inc., Dockets No. UE-090704 and UG-090705, Order 11 ¶ 26 (April 10, 2010)); accord WUTC v. Avista, Dockets No. UE-150204 and UG-150205 (consolidated), Order 05 at ¶ 238 (Jan. 6, 2016).

^{24/} See Proposed Rule WAC 480-07-515(1)(a)-(i) (March 27, 2017).

^{25/} ICNU believes that rates should be determined through a thorough review of a company’s filing.

^{26/} For example, the proposed rule requires the filing of a new test year and certain costs of operations. Id. at 480-07-515(1)(b).

25

Assuming the Commission will need four to six weeks to conduct a hearing, review the record, and write a final order, non-company parties could have little more than four months to hire consultants, conduct discovery, file any procedural or substantive motions, and prepare for hearing.^{27/} ICNU does not believe that this shortened period is sufficient to produce evidence supported by the same analytical rigor as that afforded GRCs. It is simply too short a time. The Commission can certainly acknowledge that a company controls the timing of its filing, and it has up to one year to prepare its case. Commission Staff, ICNU, and other non-company parties will have a little over four months to prepare their cases. The advantage to the company is both obvious and significant.

26

The time crunch imposed upon non-company parties could be mitigated by requiring a company to file a notice of intent to file an LRP sixty days prior to its intended filing date, along with a detailed description of the cost and revenue factors to be addressed in its filing. This would allow the non-company parties to muster resources and hire necessary consultants. However, even with the extra sixty days, the non-company parties would be unlikely to produce a record with the analytical rigor of evidence produced over the length of a general rate case. In the end, it is the Commission that benefits from a thorough and rigorous review of the company's evidence. This effort creates the full and complete record from which a reasoned decision will be based. The LRP's shortened period of review is unlikely to produce such a record for the Commission.

^{27/} The four-month estimate includes the time it would take staff to review the filing for compliance with the rule, the Commission to suspend the filing, and the time it will take to hear the case.

27

Finally, ICNU would like to caution the Commission about adopting rules that may lead to the dangers of single-issue ratemaking.^{28/} The Commission has often stated that such single issue or limited rate making is against the public interest.^{29/} Such piecemeal, limited, or single issue ratemaking has the potential danger of producing rates and charges that are not just, reasonable, and sufficient, since appropriate rates are best determined “by a comprehensive review of [a] company’s” rate base, charges, and expenses.^{30/} Even though the Commission has alleged that mechanisms like the ERF (and perhaps the LRP) are intended to prevent regulatory lag and prevent overtaxing of resources by the parties,^{31/} the Commission has also clearly stated that single-issue ratemaking is “not ... a productive use of the Commission’s resources.”^{32/}

28

The Commission has historically strongly favored the benefits associated with “a full review of revenue and expenses” and has been skeptical of approving any mechanism that does not implement such a full review.^{33/} For the reasons stated above, ICNU opposes the adoption of the LRP, and remains skeptical that any alternative ratemaking mechanism, whether the ERF or the LRP, would result in “fair, just, reasonable, and sufficient” rates.

^{28/} While the LRP rule’s filing requirements seem to address ICNU’s general concerns about single issue ratemaking, the issue remains pertinent when the Commission is considering alternative ratemaking mechanisms.

^{29/} See Re US West Commc’ns., Inc., Docket No. UT-920085, Third Supplemental Order p. 8 (April 15, 1993) (concluding that “authorization of the [equal life group] method for computing intrastate depreciation is not in the public interest, as it amounts to single issue ratemaking.”).

^{30/} MCI Telecomm. Corp. v. GTE Nw. Inc., Docket No. UT-970653, Second Supplemental Order pg. 6 (Oct. 22, 1997).

^{31/} WUTC v. Puget Sound Energy, Dockets No. UE-130137 et seq (consolidated) Order 07 ¶ 32 (June 25, 2013).

^{32/} MCI Telecomm. Corp. v. GTE Nw. Inc., Docket No. UT-970653, Second Supplemental Order p. 7 (Oct. 22, 1997).

^{33/} WUTC v. Puget Sound Energy, Inc., Docket Nos. UE-060266 and UG-060267 (consolidated) Order 08 ¶ 42 (Jan. 5, 2007).

III. CONCLUSION

29 ICNU appreciates the opportunity to submit these comments regarding proposed revisions to the Commission's procedural rules within WAC Chapter 480-07. ICNU respectfully requests that the Commission and Staff consider making further modifications to the proposed ruled based on the points discussed.

Dated this 15th day of May, 2017.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Patrick J. Oshie

Patrick J. Oshie

Davison Van Cleve, P.C.

507 Ballard Rd.

Zillah, WA 98953

Telephone: (360) 870-2218

Facsimile: (503) 241-8160

E-Mail: pjo@dvclaw.com

Of Counsel for Industrial Customers of Northwest Utilities