

ZACHARY D. KRAVITZ
Associate Counsel
Tel: 503.220.2379
Fax: 503.220.2584
Email: zdk@nwnatural.com



September 29, 2017

VIA ELECTRONIC FILING

Steven V. King
Executive Director and Secretary
State of Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, Washington 98504-7250

RE: Docket A-130355: NW Natural’s Comments – Rulemaking to Consider Possible Corrections and Changes in Rules in WAC 480-07, Relating to Procedural Rules

Dear Mr. King,

Northwest Natural Gas Company (“NW Natural”) submits these comments in response to the notice issued September 6, 2017, inviting written comments in the above-referenced rulemaking proceeding. Specifically, the notice invites comments on Washington Utilities and Transportation Commission Staff’s (“Commission Staff”) draft changes to the Washington Utilities and Transportation Commission’s (“Commission”) rule governing the designation and handling of confidential information, WAC 480-07-160, also dated September 6, 2017 (“Draft Rule”). NW Natural appreciates this opportunity to provide comments regarding the Draft Rule.

In an earlier phase of this proceeding, Commission Staff identified a conflict in the existing rule regarding the treatment of information exempt from disclosure under the Public Records Act (“PRA”), which failed to differentiate the treatment of exempt information from information that is non-exempt but otherwise confidential.¹ Initially, Commission Staff proposed to resolve the conflict by recommending revisions to WAC 480-07-160 that would: (1) change the definition of confidential information to include only the information specified in RCW 80.04.095 and RCW 81.77.210, and exclude information exempt from disclosure under the PRA or subject to a protective order; and (2) change the process for challenging the designation of information as confidential,

¹ *Rulemaking to Consider Possible Corrections and Changes in Rules WAC 480-07, Relating to Procedural Rules, Docket A-130355, Analysis of Staff Proposed Revisions to WAC 480-07-160 Governing Information Designated as Confidential (Jan. 25, 2017).*

requiring instead a court order to resolve any such challenge. NW Natural filed comments recommending that the Commission decline to adopt them Staff's proposed changes.² Other utility stakeholders also expressed concern regarding Commission Staff's proposal, and the Commission ultimately declined to adopt most of these proposed changes, concluding instead that further stakeholder involvement and process would be necessary.³

Staff's current proposal, the Draft Rule, takes a different approach to resolving the conflict in the existing rule by requiring the categorization of information receiving confidential treatment and providing a process to challenge the designation of confidential or highly confidential information subject to a protective order. The Draft Rule improves upon on Staff's earlier proposal, but NW Natural is still concerned that it creates an unnecessarily complex process for designating and handling confidential information, which will result in a significant administrative burden for the party providing the information. NW Natural recommends that Commission Staff convene a stakeholder workshop to further explore the conflict within the existing rule and to work collaboratively to craft a workable solution that will maintain the relative administrative ease of the current process for designating and handling confidential information.

The proposals in the Draft Rule are cumbersome and create substantial administrative burden for the utility in designating confidential information.

Under the existing framework, there are essentially two ways to designate information as confidential: (1) if no protective order is in place, under a claim of confidentiality under WAC 480-07-160, or (2) if a protective order is in place, as confidential pursuant to the protective order. Additionally, information that is particularly sensitive may be designated as highly confidential under a protective order providing for heightened protection. NW Natural believes that this approach facilitates the free and efficient exchange of information between parties, and has worked well for the Commission and stakeholders in the past.

In contrast, the Draft Rule would eliminate the generic "confidential" designation and instead require the provider of "restricted" information to categorize and designate restricted information as exempt under the PRA, valuable commercial information, protected information, highly confidential information, or some combination of these categories.⁴ This approach seems unnecessarily complicated and duplicative. In most cases, confidential information would be designated under at least two categories.⁵ For example, NW Natural routinely seeks a protective order in its major proceedings before the Commission to protect confidential information—much of which is also "valuable commercial information." Accordingly, under the Draft Rule, NW Natural would designate the information as both "valuable commercial information" and "protected information." Additionally, in some cases, certain confidential information that NW Natural provides to the Commission may also qualify as a trade secret, which would be exempt from disclosure under the

² NW Natural filed comments on June 30, 2016 and January 13, 2017.

³ *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 A-130355, General Order R-588 at ¶¶ 17-26 (Feb. 28, 2017).

⁴ Draft WAC 480-07-160(5)(a), (6)(a), (7)(a), (8)(a).

⁵ The Draft Rule contemplates that a document may include more than one category of confidential information. Draft WAC 480-07-160(2) and (9).

PRA.⁶ In such cases, the restricted information may be designated under three separate categories—exempt information, valuable commercial information, and protected information. Because utilities as providers of information would need to take extra steps to ensure that the information being shared is properly designated according to all applicable categories, the practical impact of the Draft Rule will likely require additional legal review prior to sharing confidential information—which will only increase both the time and expense of responding to discovery and other requests for information.

Thus, in the Draft Rule, it appears that Commission Staff is elevating the identification of information that may be exempt from disclosure under the PRA over the more fundamental purpose of the rule—to allow for the timely and efficient exchange of information between the utilities and the Commission and other stakeholders. NW Natural recognizes that it is important for the Commission to have a process in place to respond to public record requests in a manner that will avoid inadvertent disclosure of materials exempt from disclosure under the PRA, but questions whether it may be more efficient to resolve such requests on a case-by-case basis. NW Natural would appreciate learning more about the volume of public records requests received by the Commission and the Commission’s current process for determining whether information is exempt from disclosure under the PRA. Additionally, to the extent Commission Staff believes there are other problems with the current process, NW Natural would like to better understand Commission Staff’s perspective.

NW Natural recommends that Commission Staff convene a workshop to further explore options for addressing the best way to resolve the issue of identifying information exempt from disclosure under the PRA.

In the Commission’s General Order R-588, the Commission noted stakeholder concerns regarding the draft changes to WAC 480-07-160, and declined to adopt most of Commission Staff’s proposed changes to the rule.⁷ The Commission instead left the rulemaking open, noting that additional process and consultation with stakeholders would be necessary to resolve the issues regarding changes to WAC 480-07-160.⁸ Before undertaking further revisions to the Draft Rule, NW Natural urges Commission Staff to schedule a workshop with stakeholders to discuss the concepts behind the draft changes to WAC 480-07-160 and to explore the best approach for resolving the conflict in the existing rule.

For the above reasons, NW Natural respectfully requests that WAC 480-07-160 not be modified as proposed in the Draft Rule. NW Natural further requests that Commission Staff convene a workshop with stakeholders, and would be happy to work with the Commission Staff and other interested

⁶ Under RCW 42.56.070(1), the PRA itself exempts certain types of records from disclosure, and there are “other statutes” which exempt or prohibit disclosure of specific information or records. Washington courts have consistently concluded that the Washington Uniform Trade Secrets Act constitutes an “other statute,” and accordingly trade secrets are exempt from disclosure under the PRA. *Spokane Research & Def. Fund v. City of Spokane*, 96 Wash.App. 568, 577, 983 P.2d 676 (1999) (citing *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash.2d 243, 262, 884 P.2d 592 (1994)).

⁷ *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 A-130355, General Order R-588 at ¶¶17, (Feb. 28, 2017).

⁸ *Id.*

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parties to address any perceived problems with the current process and to collaborate to develop a better process if it is determined that better process is needed.

Sincerely,

/s/ Zachary D. Kravitz

Zachary D. Kravitz
Associate Counsel
NW Natural