

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

In the Matter of Amending ) DOCKET NO. U-991928  
WAC 480-80-335 )  
 ) GENERAL ORDER NO. R-472  
Relating to )  
 )  
Utilities General - Tariff - Special Contracts for ) ORDER AMENDING AND  
Electric, Water, and Natural Gas Utilities ) ADOPTING RULE PERMANENTLY  
..... )

- 1 **STATUTORY OR OTHER AUTHORITY:** The Washington Utilities and Transportation Commission takes this action under Notice WSR # 00-11-044, filed with the Code Reviser on May 11, 2000. The Commission brings this proceeding pursuant to RCW 80.04.160 and RCW 80.01.040.
- 2 **STATEMENT OF COMPLIANCE:** This proceeding complies with the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.05 RCW), the State Register Act (chapter 34.08 RCW), the State Environmental Policy Act of 1971 (chapter 34.21C RCW), and the Regulatory Fairness Act (chapter 19.85 RCW).
- 3 **DATE OF ADOPTION:** The Commission adopted this rule on the date this order is entered.
- 4 **CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE:** The proposal would implement the requirements of Executive Order 97-02, requiring agencies to review rules for clarity, intent and statutory authority, need, effectiveness and efficiency, coordination, cost, and fairness. The proposal would describe and define the essential terms and conditions of a special contract for the sale of regulated utility services subject to the approval of the Commission under WAC 480-80-335. The essential terms and conditions of a special contract under this section will be made available to the public by the Commission in its review of any proposed special contract.
- 5 **REFERENCE TO AFFECTED RULES:** This rule amends the following section of the Washington Administrative Code: WAC 480-80-335 by reorganizing and rewriting the current rule, and adding a new subsection.
- 6 **PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS THEREUNDER:** The Commission filed a Preproposal Statement of Inquiry (CR-101) on December 23,

1999, at WSR #00-02-011.

- 7 **ADDITIONAL NOTICE AND ACTIVITY PURSUANT TO PREPROPOSAL STATEMENT:** The statement advised interested persons that the Commission was considering entering a rulemaking on the rule governing the Commission's regulation of special contracts for electric, water, and natural gas utilities. The Commission also informed persons of the inquiry into this matter by providing notice of the subject and the CR-101 to all persons on the Commission's list of persons requesting such information pursuant to RCW 34.05.320(3) and by sending notice to all affected companies.
- 8 Pursuant to the notice, the Commission received written comments from ARCO Products Company (ARCO), Avista Utilities (Avista), Northwest Industrial Gas Users (NWIGU), PacifiCorp, Puget Sound Energy, Inc.(PSE), and the Industrial Customers of Northwest Utilities (ICNU). In addition, the Commission engaged in one stakeholder workshop on January 20, 2000. The workshop participants included representatives from Avista , Cascade Natural Gas, NWIGU, PacifiCorp, PSE, and the Investor Owned Water Utilities Association of Washington.
- 9 Staff began drafting and rewriting the rule after a review of the submitted written comments and the general discussion at the stakeholder workshop. A preliminary draft of the rule was sent to all affected stakeholders on February 11, 2000, requesting written comments by February 28, 2000. Written comments were received from ARCO, Avista, ICNU, NWIGU, and PSE.
- 10 The draft rule was revised and on April 18, 2000, the Commission served the revised rule to interested persons for comments. No comments were received.
- 11 **NOTICE OF PROPOSED RULEMAKING:** The Commission filed a notice of Proposed Rulemaking (CR-102) on May 11, 2000, at WSR #00-11-044. The Commission scheduled this matter for oral comment and adoption under Notice WSR #00-11-044 at 9:30 a.m., Wednesday, July 12, 2000, in the Commission's Hearing Room, Second Floor, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. The Notice, served to interested persons on May 12, 2000, provided the opportunity to submit written comments to the Commission. Interested persons were asked to consider a modifier before the word "discrimination" such as "material" or "significant."
- 12 **WRITTEN COMMENTS:** Pursuant to the notice served on May 12, 2000, the Commission received written comments from PassWord Telephone & Radio Communications Center (PassWord), ARCO, Avista, NWIGU, PSE, and ICNU.
- 13 ICNU supported the proposed revisions and "believes that the amendments to the special contracts rules are essential to allow the public to effectively evaluate discrimination issues." PassWord suggested the following minor rewording of Subsection (4):

In no event may a contract become effective on a date that precedes commission approval unless such earlier effective date is specifically approved.

A contract cannot lawfully become effective prior to Commission approval. The language proposed by PassWord would permit approval of an effective date prior to Commission approval and must be rejected.

- 14 Avista, NWIGU and PSE submitted written comments concerning Subsection (5)(b). Avista recommended the terms "undue and unreasonable" be included before "discrimination." NWIGU suggested that some modifier be added before the word "discrimination." PSE proposed adding the following language:

Each contract filed for commission approval shall be accompanied by such documentation as may be necessary to show that the contract does not provide the customer with an undue or unreasonable preference and does not result in unjust discrimination . . .

- 15 Staff proposed that this language be redrafted by removing the reference to discrimination and directing the applicant to the specific statutes it must comply with as part of the approval process. RCW 80.28.090 and RCW 80.28.100 address the concerns raised by Avista, NWIGU and PSE regarding unreasonable preference and unjust discrimination. These statutory references assure consistency between the statutes and the rule.

- 16 NWIGU and PSE submitted comments on Subsection (7). NWIGU agreed with the proposed rule language in (7)(d), stating, "Knowing the price is critical to judging whether a special contract results in unlawful discrimination. A clear standard requiring public disclosure of essential terms and conditions of special contracts, including price terms, will create needed certainty." PSE maintains, "The draft rule in its current form, by not accommodating the situation where an 'essential term' falls within the scope of information that may lawfully be protected by RCW 80.04.095, is contrary to that statute and, for that reason, may not survive judicial scrutiny if the rule is challenged." PSE suggests the following language:

(7) Filings under this section may be submitted with portions designated "confidential" pursuant to WAC 480-09-015. However, unless the commission waives this requirement for good cause shown, any filing that designates the essential terms and conditions of the contract as "confidential" shall be rejected by the commission as not in compliance with the public inspection requirements of RCW 80.28.050. Essential terms and conditions are: . . . . Good cause is shown for waiving the disclosure requirements if it is demonstrated that the information requested to be treated confidentially is protected under Chapter 42.17

RCW or RCW 80.04.095.

The language suggested by PSE is discussed below.

- 17 In response to the May 12, 2000, notice, ARCO reaffirmed comments it submitted to the Commission on February 28, 2000. In those comments ARCO asserted the specific determination of what is confidential and what is not can only be made case-by-case. ARCO recommended that Subsection (7) of the proposed draft be revised to read as follows:

(7) Filings under this section shall include a description of the contract's essential terms and conditions and may be submitted with portions designated "confidential" pursuant to WAC 480-09-015. Essential terms and conditions include, but are not limited to, the . . . [include (a) through (f) as appear in Staff Draft]

- 18 The Commission acknowledges that there may be some apparent tension between the provisions of RCW 80.28.050, which require that terms of tariffs (including special contracts that are by operation a Company tariff) be public, and the provisions of RCW 80.04.095, which allow the protection of certain information which if made public, could result in private loss. The principle that the Commission adopts in the rule is that tariff provisions, including the provisions of special contracts, must be disclosed. Because of the importance of public awareness, the Commission rejects the commenters' suggestion that the nondisclosure provision applies to take precedence whenever it is invoked. If a person believes that the statute allowing protection of information outweighs the principle of disclosure for certain specific information in a particular case, the person may seek exemption from application of the rule by application to the Commission under WAC 480-80-010(2). Upon such a request, the Commission will then be in a position to grant or deny the request or to determine when faced with an actual situation that waiver or exemption may not be appropriate in any circumstances.

- 19 **RULEMAKING HEARING:** The rule proposal was considered for adoption, pursuant to the notice, at a rulemaking hearing scheduled during the Commission's regularly scheduled open public meeting on July 12, 2000, before Chairwoman Marilyn Showalter, Commissioner Richard Hemstad, and Commissioner William R. Gillis. The Commission heard oral comments from Fred Ottavelli, representing commission staff, James VanNostrand representing PSE, and Edward Finklea representing NWIGU.

- 20 **SUGGESTIONS FOR CHANGE THAT ARE REJECTED:** PSE and ARCO expressed concern the rule should be waived when a utility or company is able to show an essential term would fall within the scope of RCW 80.04.095. Following considerable discussion, the Commission observed the draft rule allows for the possibility of an exception, as stated above, and expresses appropriate policy and balance between the statutes.

- 21 **COMMISSION ACTION:** After considering all of the information regarding this  
proposal, the Commission adopted the proposed rule.
- 22 **STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE:** In reviewing  
the entire record, the Commission determines that WAC 480-80-335 should be amended  
to read as set forth in Appendix A, as a rule of the Washington Utilities and  
Transportation Commission, to take effect pursuant to RCW 34.05.380(2) on the thirty-  
first day after filing with the Code Reviser.

**ORDER**

THE COMMISSION ORDERS:

- 23 1) WAC 480-80-335 is amended as set forth in Appendix A, as a rule of the  
Washington Utilities and Transportation Commission, to take effect on the thirty-  
first day after the date of filing with the Code Reviser pursuant to RCW  
34.05.380(2).
- 24 2) This Order and the rule set out in Appendix A, after being recorded in the register  
of the Washington Utilities and Transportation Commission, shall be forwarded to  
the Code Reviser for filing pursuant to chapters 80.01 and 34.05 RCW and  
chapter 1-21 WAC.
- 25 3) The Commission adopts the Commission Staff open public meeting memoranda,  
presented when the Commission considered filing a Preproposal Statement of  
Inquiry, when it considered filing the formal notice of proposed rulemaking, and  
when it considered adoption of this proposal, in conjunction with the text of this  
Order, as its Concise Explanatory Statement of the reasons for adoption, as  
required by RCW 34.05.025.

DATED at Olympia, Washington, this 7<sup>th</sup> day of August, 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

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

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

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

Number of Sections Adopted on the Agency's own Initiative: New 0, amended 1, repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, amended 1, repealed 0.

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