October 25, 2022

PDC Commissioners:

I am writing to respond to the staff memo that was sent to you on October 21, 2022.

Below, I have included a list of key passages of staff's memo that I felt warranted a response. I would welcome a written response to this document from Sean or anyone else in the agency prior to the hearing.

I was disappointed to see that staff's memo did nothing to address the issue of *how* agency staff came up with their creative interpretation of what RCW 42.17A.240(7) requires, or why they felt it wasn't necessary to seek approval from the Commission for this interpretation. These are the core frustrations that led me to file these Petitions. I hope that agency staff will address this issue before or during the upcoming hearing.

In their memo, staff suggest that the staff-created interpretation of what RCW 42.17A.240(7) requires is only appropriately challenged in the context of a full-blown adjudicative proceeding before the Commissioners. I disagree.

The Declaratory Order process exists so that members of the agency's regulated community can resolve regulatory uncertainty as to the applicability of statutes, rules, and orders before we as filers find ourselves facing the specter of an adjudicative proceeding. As filers, we have no interest in putting ourselves in legal jeopardy for the mere purpose of challenging staff guidance, however frustratingly bizarre the guidance may be.

And here, there is genuine uncertainty as to whether we are legally obligated to follow the imaginative staff-created interpretive guidance regarding RCW 42.17A.240(7), which was listed in my Petition for Declaratory Order.

For example, does it logically follow from the language of that statute that filers would be required to disclose the number of impressions generated from a Facebook advertisement, as staff-created interpretive guidance dictates? As another example, does RCW 42.17A.240(7) really require filers to disclose the names of all the campaign staffers that share an Uber ride, as staff-created interpretive guidance also dictates? As yet another example, does RCW 42.17A.240(7) require filers to disclose the run dates or quantities for robocalls, as staff-created interpretive guidance dictates, even though WAC 390-16-037 explicitly says that information is not required?

Virtually any reasonable person would look at the language of that statute and relevant administrative rules and say "no" to those questions. Agency staff, apparently utilizing top-secret interpretive methods not available to the general public, look at those questions and say "yes", without sharing how they reached their conclusion.

This is the regulatory uncertainty that we in the agency's regulated community face. It is time for the Commission to weigh in on this issue and resolve this uncertainty, so we know what level of detail we are expected to include when describing expenditures. That is a completely appropriate usage of the Declaratory Order process.

Best,

Conner Edwards
Campaign Treasurer

Responses to Staff Memo

1) ***"The Petitioner asserts that staff's guidance is not based on a statute or a rule, and further that staff may not provide guidance on this, or presumably any, topic, without formal approval by the Commission because staff guidance is not enforceable on its own."***

Response:

This is a complete mischaracterization of what I have said. I have not suggested, nor would I ever suggest, that staff should not be allowed to provide guidance to the public. As I noted in my Petition, the vast majority of guidance that the agency provides to the public is the mere translation of highly legalistic statutory language into plain English that filers can easily understand. This type of guidance is uncontroversial and greatly appreciated by us as filers.

In those rare instances where agency staff encounter an ambiguous provision of RCW 42.17A or WAC 390 that does not clearly define a filer's responsibilities, I believe they are required to do one of three things under the FCPA and APA. First, they could propose initiating APA rulemaking to clarify the ambiguity via the adoption of a new rule. Second, they could draft an Interpretive Statement that details staff's interpretation of the ambiguity for presentation to the Commissioners for possible approval. Finally, they could allow filers to discern the meaning of the ambiguous provisions for themselves and allow the Commissioners to engage in case-by-case adjudication.

What I am opposing here, is when staff take advantage of somewhat vague statutory language (such as the term "purpose" as used in RCW 42.17A.240) to generate their own mandates (such as "include the sizes of the yard signs"), bypassing the APA, the Commissioners, and the public.

My position is that it is not appropriate for Director Lavallee to walk in the PDC's office on a Monday morning and say to agency staff:

"You know that ambiguous statutory language that was adopted in the 70s? Well, I've been thinking a lot about it, and I figured we could use that language to justify forcing filers to disclose the dimensions of the yard signs they purchase. We don't need to do rulemaking or get the Commissioners' approval for that interpretation or reach out to the regulated community at all. So, let's throw that guidance up on the website ASAP. If a filer fails to comply with that and a complaint is filed against them, we will tell the respondent that they need to fix their reports or else we will arrange for an adjudicative proceeding where we will tell the Commissioners to find a violation and levy a penalty. If anyone objects to our interpretation, we'll tell them that they can only challenge our interpretation if they are facing a full-blown adjudicative proceeding. Realistically, I don't think we'll have to worry about anyone doing that."

That is what I am challenging, not the agency's good faith efforts to provide guidance to filers based on the plain language of statutes or official Commission interpretations.

2) "*As an initial matter, the law specifically encourages agencies "to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements," but further cautions that such statements "are advisory only." RCW 34.05.230. The law, therefore, acknowledges the importance for agencies to provide flexible advice to assist the public in complying with statutes and rules, without requiring every such opinion or interpretation to be formally adopted by rule or order."*

Response:

I have no objection to legitimate agency interpretive or policy statements. The ability of the agency to issue legitimate agency interpretive or policy statements is not at issue here.

The drafts of legitimate agency interpretations or policy statements are noted on meeting agendas, members of the public have an opportunity to comment prior to adoption, and the proposals must be adopted by the Commissioners in an open meeting. The guidance that I am challenging does not have those characteristics and does not meet the definition of a legitimate interpretive or policy statement (as admitted by agency staff on page 5 of their memo).

3) "Staff respectfully submits that the Petitioner's argument fails to appreciate that the agency has never asserted, much less attempted, to enforce such guidance."

Response:

This is simply inaccurate.

Recently, in response to a public records request I filed with the PDC, I received an e-mail from agency staff that was sent to a respondent in response to a complaint alleging the violation of staff-created interpretive guidance. It is appended to this response as Attachment A.

In this attachment you can see, highlighted in yellow, that agency staff are representing staff-created interpretive guidance to the respondent as if it were a legal requirement; telling them they need to amend their reports to comply. (Note: non-highlighted portions of the third paragraph represent actual legal requirements under WAC 390-16-037 or WAC 390-16-205.)

In the event that the respondent complies with staff's request to obey staff-created interpretive guidance, the complaint is dismissed by agency staff. In the event the respondent refuses to comply, presumably agency staff initiate adjudicative proceedings against the respondent as alluded to by staff in their memo.

4) "*The law is settled that agency guidance is not independently enforceable agency action. In Washington Education Association (WEA) v. PDC, the Washington Supreme Court rejected a challenge to a PDC interpretive statements because they were advisory only and had no legal or regulatory effect warranting review. … [t]he Court rejected the challenge and agreed with the PDC that the interpretation was issued 'as an aid to the public' and the PDC had taken no action to enforce the guidelines…*" [emphasis added]

There are two important distinctions between the agency guidance that was at issue in *Washington Education Association (WEA) v. PDC*, and the agency guidance relating to descriptive requirements that is at issue here.

First, the agency guidance at issue in *WEA v. PDC* was a properly adopted interpretive statement under the Administrative Procedures Act (APA). The draft was approved at a public meeting of the Commission, members of the public had an opportunity to comment on the interpretive statement prior to adoption, and the proposal was adopted by the Commissioners in an open meeting. The staff-created interpretive guidance relating to descriptive requirements has none of those characteristics.

Second, in *WEA v. PDC*, the agency had taken no action to enforce the guidance at issue in that case, which played heavily in the Court's decision dismissing the challenge. However, the guidance that is at issue here relating to descriptive requirements, *is* being actively enforced against respondents *as if it were an actual rule or statute*. See my response in paragraph 3 above and the attached e-mail from PDC compliance staff (Attachment A).

As a brief aside, the phenomenon I am challenging here (where the agency attempts to evade notice and comment rulemaking by labeling a major substantive legal addition to a statute a mere interpretation) is something that the DC Court of Appeals deals with regularly. Of course, they are analyzing the issues under the Federal APA and not WA's APA, but the laws are substantively similar.

The DC Court of Appeals does not look at how the agency characterizes guidance to determine if the guidance is really a rule, but to whether or not the guidance is "binding" on regulated entities, as well as if the agency's interpretation "significantly broaden[s]" an existing rule, among other things.

The DC Court of Appeals, in striking down a guidance document that the EPA tried to characterize as "interpretive", described this type of situation well.

> *The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 Admin. L. Rev. 59, 85 (1995). The agency may also think there is another advantage — immunizing its lawmaking from judicial review.*
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> *Appalachian Power Co. v. EPA, 208 F.3d 1015, 1019 (D.C. Cir. 2000).*

5) *"It is an even less remarkable proposition that staff-level guidance is not enforceable, since staff have no power to make final determinations as to violations or unilaterally to assess penalties."*

Response:

Less remarkable to who? As members of the agency's regulated community, the guidance that agency staff communicate to us is tremendously important because we have the reasonable expectation that this guidance is an official representation of what state law and administrative rule require as viewed by the agency. In fact, the vast majority of PDC filers do not engage in any analysis of the RCWs or WACs but look exclusively at the guidance offered by staff on the agency's website.

If filers fail to follow staff guidance, we face the prospect of being the target of complaints which can lead to the initiation of adjudicative proceedings at the sole discretion of staff.

Because staff are effectively the gatekeepers that get to decide whether a complaint is dismissed or referred to the Commission for adjudicative proceedings, their guidance is not "unremarkable" to us as filers but is actually extremely important.

6) ***"The fundamental aspect of PDC enforcement procedure is for staff to investigate and present cases for the Commission to determine whether a violation occurred. Any person subject to an enforcement action whereby staff seek a determination that violations of Chapter 42.17A RCW have been committed, and penalties should be levied, can challenge staff's position as to the facts, law, and potential penalty through an adjudicative proceeding."***

Response:

Absolutely no-one wants a contested enforcement action to end up in a full-blown adjudicative proceeding before the Commission. Not only is it intimidating to the filer, but it is also a complete waste of time and resources for the agency and the respondent.

The Declaratory Order process exists so that any uncertainty as to what the law requires can be resolved before things reach this point. When filers have a clear understanding of what the law requires, they can avoid regulatory pitfalls before they happen and not after the fact. That is the goal here.

7) ***"Nothing binds or coerces the Commission to accept staff's position as part of such a proceeding"***

Response:

Of course, from a technical perspective, this is accurate. In reality however, the Commission and agency staff share a very close relationship and Commissioners are extremely likely to defer to staff's interpretation during adjudication.

My understanding is that the agency has a handful of employees that have been working at the PDC since the 1990s, including Phil Stutzman and Kurt Young (both of whom work in compliance). Someone should ask them if they recall even a single instance where the Commissioners have rejected staff's interpretation of the law in an adjudicative proceeding where a statutory interpretation was disputed by the respondent.

8) ***"It would be quite a novel (and entirely unworkable) procedure if any attempt by staff to advise the public was restricted and subject to direct review and approval by the Commission."***

Response:

Again, this is a complete mischaracterization of my position. See my response #1 above. Here is a summary of my position regarding agency guidance.

Nearly all of the guidance that the agency offers to the public is a straightforward translation of the highly legalistic language that is found in RCW 42.17A and WAC 390 into terms the public can easily understand. In my Petition I refer to this as "Plain English" guidance. It is totally appropriate and normal for the agency to offer this type of guidance to the regulated community.

However, in those rare instances where agency staff encounter an ambiguous provision of RCW 42.17A or WAC 390 that does not clearly define a filer's responsibilities, I believe they are required to do one of three things under the FCPA and APA. First, they could propose initiating APA rulemaking to clarify the ambiguity via the adoption of a new rule. Second, they could draft an Interpretive Statement that details staff's interpretation of the ambiguity for presentation to the Commissioners for possible approval. Finally, they could allow filers to interpret the plain meaning of the ambiguous provisions for themselves and allow the Commissioners to engage in case-by-case adjudication.

9) ***"The subject of the petition here is not a rule, order, or statute, but rather a challenge to guidance provided by agency staff".***

Response:

The subject of this Petition is RCW 42.17A.240(7) as well as WAC 390-16-037 and WAC 390-16-205. I am seeking an affirmative answer or denial from the Commission as to whether they view staff's interpretation as accurate in an effort to find clarity as to what we are legally required to put on form C4 when describing expenditures. This is an appropriate use of the Declaratory Order Process.

I am also seeking clarification as to whether agency staff have the ability to issue interpretations of ambiguous statutes despite the prohibitions in RCW 42.17A.110 and WAC 390-05-120. I believe this is also an appropriate use of the Declaratory Order Process, although this question stands apart from the other. I believe it is within the Commission's discretion to answer one question and not the other.

10) ***"The PDC's process further provides that the Commission will decline to consider a petition "when a pending investigation or compliance action involves a similar factual situation." WAC 390-12-250. The subject of the guidance challenged in this petition is the reporting of the purpose of campaign expenditures as required under RCW 42.17A.240(7). As of the time of this memo, the agency has at least two active investigations specifically into allegations of failing to accurately provide required information in the summary campaign contribution and expenditure (C-4) report. The Commission's consideration of the Petitioner's general challenges to the scope of staff's guidance could prematurely terminate the investigation of these cases without due consideration of the facts and circumstances presented in each matter."***

Response:

I encourage you as Commissioners to read the two complaints described by staff here, it's not clear why issuing a Declaratory Order would prematurely terminate either of those investigations. To the extent that this might be the case, the Commission should simply delay entering the Order until the cases have been adjudicated.

Complaint #1 (Snaza): https://pdc-case-tracking.s3.us-gov-west-1.amazonaws.com/5520/111317%20Snaza%20John%20Complaint.pdf

This complaint contains no allegations relating to descriptive requirements.

Complaint #2 (Ewing): https://pdc-case-tracking.s3.us-gov-west-1.amazonaws.com/5572/112981%20Ewing%20Kevin%20Complaint.pdf

This complaint contains no allegations relating to descriptive requirements, although it references an expenditure for business cards that was not reported by the respondent. The requirement that filers disclose the number of printed items (such as business cards) is clearly set forth in WAC 390-16-037 and not something being challenged in the Petition for Declaratory Order.

11) ***"The scope of such a rulemaking topic that attempts to itemize the detail required to report the purpose of every kind of expenditure may prove to be futile. It is hard to imagine ever completing such a task, as it would require the Commission to identify and comprehensively define the scope of required expenditure detail in every conceivable circumstance."***

Response:

Give me a break.

As Commissioner Downing alluded to at the September meeting, RCW 42.17A.240(7) covers a lot of the same subject matter as the RCW 42.17A.345(1)(b), the statute that requires commercial advertisers to make available to the public "the exact nature and extent of the services rendered" for political advertising.

Did the PDC look at that statute and throw its hands up and say: "*Gosh, we could never identify and comprehensively define the scope of required level of detail that commercial advertisers would be required to provide under RCW 42.17A.345(1)(b) in different circumstances, so let's not even try!*"[1]

The agency didn't do that at all. Instead, it engaged in the APA's rulemaking process, provided notice to and solicited feedback from stakeholders and the public, and ultimately adopted WAC 390-18-050 (6) and (7), which clearly set forth the required level of detail that commercial advertisers are required to provide to requesters.

The Commission should do the exact same thing here. With the 2022 General Election nearly concluded, now would be an opportune time for the agency to exercise its rulemaking authority to engage in a collaborative process with the public, agency stakeholders, and agency staff, to formulate a proposal that identifies the level of detail that filers must provide when describing expenditures on form C4.

[1] By the way, if the agency can't identify and comprehensively define the scope of required expenditure details in different circumstances, how on earth does the agency expect us as filers to be able to?