

Discovery in APA Adjudicative Proceedings



Gregory J. Kopta

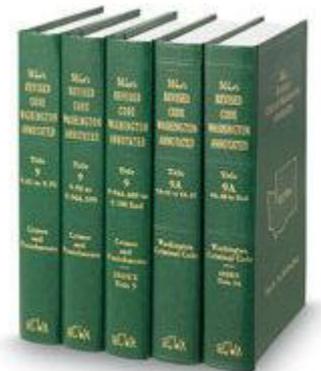
Director, Administrative Law Division

Washington Utilities & Transportation

Commission

RCW 34.05.446

- Discovery is optional – each agency must determine by rule the extent to which discovery is available
- Subject to agency rule, the presiding officer has the authority to:
 - Issue subpoenas
 - Enter protective orders
 - Permit the taking of depositions, requests for admissions, or other procedures under Civil Rules 26-36



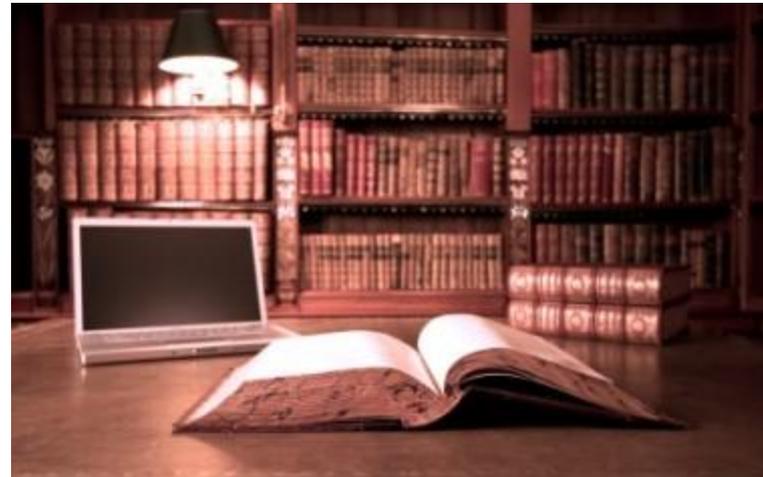


UTC Discovery

- WAC 480-07-400 through 425
- Discovery availability (WAC 480-07-400)
 - Pursuant to agreement among the parties
 - Subpoenas always available
 - Other discovery methods available when:
 - Proceeding involves change in rates;
 - Case is of a potentially precedential nature;
 - Complaints alleging statutory violations; or
 - Commission determines discovery is necessary
- ALJ determines availability of discovery during first prehearing conference and may limit the amount or nature of available discovery

Forms of Discovery

- Prior to Evidentiary Hearing:
 - Data Requests (equivalent to interrogatories)
 - Requests for admission
 - Depositions
 - Party witnesses
 - Third parties
- During/After Hearing:
 - Record requisition
 - Bench requests





Data Requests

- Not evidence unless admitted into the record (WAC 480-07-405(9))
- Responses must include date, person preparing, and any witness with knowledge of the subject matter (WAC 480-07-405(7)(c))
- Responses and any objections must be provided within 10 business days; if unable to respond within that time, must provide an explanation and schedule for response no later than two business days before the response is due (WAC 480-07-405(6)(a) & (7)(b))
- Are continuing in nature and responses must be supplemented if the responding party becomes aware of new or newly discovered information after providing response (WAC 480-07-405(8))
- Are subject to motion to compel (WAC 480-07-405(3))

Confidentiality



- Procedures for designation and treatment of confidential information
 - ALJ may enter protective order (WAC 480-07-423)
 - UTC rule establishes default procedures (WAC 480-07-160)
 - Party seeking confidential treatment responsible for designation subject to subsequent challenge
- Confidential documents require special treatment during evidentiary hearings
 - Must be marked appropriately in testimony and exhibits
 - Requires hearing to be closed with segregated transcript if used in cross-examination of witnesses

Discovery Practice Tips

- Know the agency where you are appearing
- Be familiar with the agency's procedural rules, including:
 - The extent to which the agency permits discovery
 - Whether protective orders are available
 - How to request discovery or a protective order
 - How to use discovery and resolve disputes
- Be prepared to justify your request for discovery or a protective order
- Be respectful of opposing parties and the presiding officer
- No gamesmanship

