



**State of Washington
PUBLIC DISCLOSURE COMMISSION**

711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908
(360) 753-1111 • FAX (360) 753-1112

Toll Free 1-877-601-2828 • E-mail: pdc@pdc.wa.gov • Website: www.pdc.wa.gov

Memo

To: PDC Commissioners
From: Sean Flynn, General Counsel
Date: October 21, 2022
Re: Recommendations on Edwards' Petitions for Declaratory Order and Rulemaking

This memo presents three petitions recently filed by Conner Edwards on the same topic regarding agency guidance provided on the reporting of campaign expenditure activity. The petitions include a Petition for Declaratory Order, a Petition for Rule Amendment, and a Petition for Conversion of Interpretive into Rule. Each petition was received by the PDC on September 9, 2022.¹ The following comprises staff's evaluation regarding the sufficiency of each petition and recommendations for the Commission's consideration.

The Commission is familiar with the general issues raised in these petitions. The Petitioner has raised the same concerns on multiple occasions, which both staff and the Commission Chair specifically have addressed. The basis of all three petitions is a general challenge to guidance by agency staff as provided on the agency website and within the new web-based application for the campaign contribution and expenditure (C-4) report, regarding the requirement that campaigns record the "purpose" of each reported expenditure, under RCW 42.17A.240(7).² 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.

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

¹ The Petitioner additionally emailed a "Response to comments on Petition for Declaratory Order" on September 29, 2022, and requested it to be included as supplemental material to the original petitions.

² The guidance within the new C-4 application appears in the form of text boxes that accompany the description field for filers to complete. The filing application does not require or otherwise force the filer to enter any specific text into the description field. The application also includes a drop-down field of general expenditure categories, including open-ended or catch-all categories so filers are not forced to choose any specific designation where appropriate.

public in complying with statutes and rules, without requiring every such opinion or interpretation to be formally adopted by rule or order. It is unremarkable that the PDC, whether the Commission or staff, provides such guidance to assist filers with meeting the general requirements under RCW 42.17A.240, including the purpose of each expenditure. This is consistent with routine services provided by innumerable state and federal administrative agencies.

The questions the Petitioner raises here presume agency guidance can be challenged whenever someone disagrees with the interpretation of the agency, because such guidance cannot be enforced on its own. Staff respectfully submits that the Petitioner's argument fails to appreciate that the agency has never asserted, much less attempted, to enforce such guidance. Thus, to the extent staff's guidance is an accurate interpretation of the statutes and rules administered by the PDC, it is those statutes and rules that must be enforced, not the guidance itself.

The law is settled that agency guidance is not independently enforceable agency action.³ In *Washington Education Association (WEA) v. PDC*,⁴ 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.⁵ Like the Petitioner's current position, the WEA disagreed with the PDC's interpretation concerning the limits on use of public facilities in campaigns as applied to school districts. The WEA challenged the interpretation as unlawful agency action, not having been formally adopted by rule or declaratory order. The 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. The WEA's challenge presented "nothing more than an academic or hypothetical question" on the correctness of the interpretation and did not affect any constitutional or other rights.⁶

The holding in *WEA* squarely applies to the Petitioner's argument. 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.⁷ 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. *See* Chapter 390-37 WAC. Nothing binds or coerces

³ 150 Wn.2d 612 (2003).

⁴ *See also Teamsters Local Union No. 117 v. Human Rights Comm'n*, 157 Wn.App. 44 (Div. 2, 2010) (citing WEA to deny review of an agency opinion letter); *Sumas Mt. Community v. Forest Practices Bd.*, 2018 Wash.App. Lexis 2528 (Div. 1, 2018) (citing WEA to deny review of an agency manual).

⁵ The interpretation was issued as guidelines for school districts and provides "the Commission's view of the meaning of . . . relevant administrative rules and case law. . . [and] . . . is intended to provide guidance regarding the Commission's approach and interpretation of how the statutory prohibition on the use of public school facilities for campaigns impacts activities These Guidelines are meant to aid and assist in compliance with the law." *PDC Interpretation 01-03* (last amended in 2006).

⁶ *Id.* at 623.

⁷ RCW 42.17A.110(2) ("The Commission shall not . . . delegate authority to determine that a violation of this chapter has occurred or to assess penalties for such violations.").

the Commission to accept staff's position as part of such a proceeding. 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. To allow such challenges outside of the enforcement process would require the Commission to issue advisory opinions, which generally are not warranted, as explained below.

Taken to its logical conclusion, the Petitioner's argument would prevent agency staff from answering routine questions from the public at the front counter, by phone, or by email. The agency's entire customer service staff, which regularly earns plaudits from the regulated community, would be reduced to advising stakeholders to read the law for themselves, or else risk running afoul of the Petitioner's objections. Staff therefore submits that the petitions before the Commission fundamentally miscast the role of administrative agencies.

Petition for Declaratory Order

Any person may petition an agency for a declaratory order regarding "the applicability to specified circumstances of a rule, order, or statute enforceable by the agency." RCW 34.05.240(1). The petition must show that an actual controversy exists so that the order "will not be merely an advisory opinion." RCW 34.05.240(1)(b). The Commission may decline to enter a declaratory order, stating the reasons for its action. RCW 34.05.240(5)(d). *See also* WAC 390-12-250(5).

The subject of the petition here is not a rule, order, or statute, but rather a challenge to guidance provided by agency staff.⁸ While Commission staff believe its guidance to be a correct interpretation of the PDC's statutes and rules, as noted above, such informal agency guidance is not itself independently enforceable, so there is no actual controversy for the Commission to address. The petition merely seeks an advisory opinion as to the purely legal question presented whether the agency staff may provide guidance without specific approval from the Commission.

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.⁹ 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.

⁸ The petition specifically requests the Commission to enter an order that "1) the Executive Director (or their designee) may not issue interpretive guidance without approval from the Commission, and 2) that the violation of staff-created interpretive guidance relating to descriptive requirements does not constitute a violation of the FCPA."

⁹ PDC case numbers 112981 & 111317.

Beyond the impact on the cases directly alleging insufficient expenditure reporting, the agency regularly receives complaints for late or inaccurate reports. A standard part of any investigation of C-4 reports is a review of the content of the report, including expenditure description, regardless of whether that issue is included in the complaint. As of October 10, 2022, the agency had at least 35 cases in which the failure to timely and accurately report campaign activity is under investigation.

For the reasons provided above, staff recommends the Commission deny the petition for declaratory order.

Petition for Rule Amendment

The petition for rule amendment, like the other petitions, is based on the same premise that agency staff may not provide guidance without formal adoption by Commission order or rule. The substance of that position is addressed above, and if the Commission accepts that agency staff may provide guidance to assist the filing community, it would be grounds to deny this petition.

This petition proposes additional language to current WAC 390-16-037 for reporting the description of certain specific expenditure activity, including payments to sub-vendors, mileage reimbursements, and broadcast, digital, newspaper, and radio advertising. Immediately following the proposal, however, the Petitioner disavows the very proposal itself: “I do not support the substance of the changes proposed in this APA rulemaking petition.” Instead, the Petitioner explains that the petition is merely intended as a “first draft” and that the Commission is not bound to adopt the language.

The Petitioner is correct that the Commission is not bound to adopt a proposed rule amendment, and since the Petitioner does not support their own proposal, the petition should be denied. The Petitioner’s broader interest is to have the Commission engage in rulemaking that “definitively identifies” the detail required to be reported under the purpose of campaign expenditures. 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. Indeed, the half-century history of the PDC and its rulemaking is replete with illustrative examples in rule, in recognition of the futility of attempts to capture every possible factual variation in a reasonable body of regulations.

In an area such as this, the Commission must necessarily have the freedom to consider such unique questions as may arise in the context of the specific facts and circumstances of an actual case. The Commission’s decision not to engage in rulemaking in the manner sought by the Petitioner or others does not mean they will have no recourse should they disagree with any guidance provided to them. Rather, should a particular person become subject to a complaint, and further disagree that their method of reporting was insufficient, they will be provided due process and have the ability to challenge their alleged violation through the enforcement process.

To prevail in a proceeding involving a reporting deficiency relating to a lack of detail, staff will have to demonstrate that its interpretation is consistent with the PDC's statutes and rules.

For these reasons, a more reasonable approach to rulemaking, apart from the purportedly comprehensive approach offered by the Petitioner, may be to target a particular category of expenditure reporting where more definition is sought. For example, the agency's current rulemaking agenda includes possible rulemaking for how to report a campaign's digital advertising activity, as well as reporting by continuing political committees. If the agency initiates rulemaking on these topics, the rulemaking would incorporate a period to solicit public comments and allow for a robust collaborative process like the Petitioner urges.

For these reasons staff recommends the Commission deny the petition for rule amendment.

Petition for Conversion of Interpretive Statements into Rule

The petition for conversion of interpretive statements into rule identifies a list of "current staff-created interpretive guidance" and requests that the Commission initiate rulemaking incorporating such guidance for adoption into rule. This petition incorporates the same premise as the other two petitions, which has been addressed above.

This petition is further flawed for mistakenly identifying "staff-created" guidance as a subject for conversion into rule. Under the applicable procedure, a person may request the conversion of "interpretive and policy statements" into rules. RCW 34.05.230(2). However, that process applies to interpretive or policy statements that are, by definition, authorized by the agency head (or their designee). *See* RCW 34.05.010(8)&(15). The interpretations identified here are staff-created guidance, which are not the type of interpretive or policy statements subject to conversion, since the Commission, as the policy-making body, has not created, adopted, or endorsed such statements.

For the reasons provided above, staff recommends the Commission deny the petition for conversion of interpretive statements into rule.