

Chapter 246-25 WAC

ANTITRUST IMMUNITY AND COMPETITIVE OVERSIGHT

(Formerly chapter 245-02 WAC)

WAC

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SUBSTANTIVE RULES

WAC 246-25-010 Definitions. Unless the context requires otherwise, the definitions contained in this section apply throughout this chapter.

(1) **"Attorney general"** means the antitrust section of the office of the attorney general.

(2) **"Applicant"** means a certified health plan, health care facility, health care provider, or other person involved in the development, delivery, or marketing of health services or certified health plans.

(3) **"Parties"** means the natural persons, corporations, or associations involved in the plan or activity which is the subject of the proposal being reviewed.

(4) **"Petition"** means the document that shall be filed with the commission pursuant to RCW 43.72.310(3) by an applicant in order to request approval of conduct that could tend to lessen competition in the relevant market.

(5) **"Proposal"** means the plan or activity that is being reviewed.

(6) **"Request for informal opinion"** means the document that may be filed with the commission pursuant to RCW 43.72.310(1) by an applicant.

(7) **"Exclusive dealing clause"** means a clause in a contract between a certified health plan and a health care provider or facility by which the provider or facility agree not to provide services to another certified health plan.

(8) **"Health care network"** means a group of providers or facilities controlled by the providers, facilities or intermediary organizations including, but not limited to, physician-hospital organizations and independent practice associations.

(9) **"Most favored nations clause"** means terms in a contract between a certified health plan and a health care provider or facility by which the provider or facility agrees they will not charge other plans a lower price than the price charged the plan instituting the clause.

(10) **"Rural area"** means a geographical area outside the boundaries of Metropolitan Statistical Areas (MSAs) or an area within an MSA, but more than thirty minutes average travel time from an urban area of at least ten thousand population.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-010, filed 1/28/99, effective 1/28/99; 95-04-115, § 245-02-010, filed 2/1/95, effective 10/1/95.]

WAC 246-25-020 General policy statement—Antitrust immunity and competitive oversight. (1) The purpose of WAC 245-02-020 through 245-02-050 is to implement provisions of the act that require the commission to adopt rules governing antitrust immunity, competitive oversight, and conduct of certified health plans, health care providers, and health care facilities. The provisions of these rules shall be strictly construed. Whenever there is doubt as to the meaning of these rules or as to their applicability to particular conduct or circumstances, these rules shall be interpreted in a manner consistent with existing antitrust law principles of this state and of the federal government, including final orders of the Federal Trade Commission and final decisions of the federal courts interpreting the various federal antitrust statutes.

(2) Unless explicitly permitted under this chapter or pursuant to a petition approved in accordance with the provisions of RCW 43.72.310 (3) and (4), nothing in these rules shall be deemed or interpreted to permit activities or to grant immunity for those activities prohibited under RCW 43.72.300(3) or any other activity which would constitute a per se violation of state or federal antitrust laws.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-020, filed 1/28/99, effective 1/28/99; 95-04-115, § 245-02-020, filed 2/1/95, effective 10/1/95.]

WAC 246-25-025 Scope and applicability. The provisions of WAC 245-02-010 through 245-02-050 shall govern contracts and conduct among health care providers, health

care facilities, and certified health plans entered into or renewed on and after October 1, 1995.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-025, filed 1/28/99, effective 1/28/99; 95-04-115, § 245-02-025, filed 2/1/95, effective 10/1/95.]

WAC 246-25-030 Cooperative activities—Policy statement. The commission recognizes that reforms in the health system will occur through the development of comprehensive, integrated, and cost-effective health services delivery systems. Because the health services market place is evolving in anticipation of changes required by the act, it would not be appropriate to establish with precision specific areas where cooperative activities are entitled to immunity from antitrust laws. Pursuant to RCW 34.05.023, the commission therefore adopts as an interim policy statement the *Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust* issued by the U.S. Department of Justice and the Federal Trade Commission on September 27, 1994. These nine policy statements address: (1) Mergers among hospitals; (2) hospital joint ventures involving high-technology or other expensive health care equipment; (3) hospital joint ventures involving specialized clinical or other expensive health care services; (4) providers' collective provision of nonfee-related information to purchasers of health care services; (5) providers' collective provision of fee-related information to purchasers of health care services; (6) provider participation in exchanges of price and cost information; (7) joint purchasing arrangements among health care providers; (8) physician network joint ventures; and (9) analytical principles relating to multiprovider networks.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-030, filed 1/28/99, effective 1/28/99; 95-04-115, § 245-02-030, filed 2/1/95, effective 10/1/95.]

WAC 246-25-035 Consumer access to local health services in rural areas. An applicant may petition the commission for approval of a managed health care finance and delivery system in a rural area that may violate existing antitrust law principles or provisions of WAC 245-02-040, 245-02-045 or 245-02-050 but is necessary to preserve local access to regular and ongoing health services in a rural area. In addition to the requirements set forth in WAC 245-02-110, et seq., such petitions shall include information demonstrating that the proposed system: (a) Has been developed through a community-based process that takes into consideration the concerns of local residents, health care providers, public and private health care facilities, local community organizations, and appropriate state agency health planning organizations located in or with responsibility for health services in rural areas, (b) will achieve quality improvements and cost efficiencies over present health service capabilities in the rural area, (c) will result in local access to regular and ongoing services required under the uniform benefits package, (d) will combine health care service delivery and financing, and (e) will or will not have special community governance arrangements. Nothing contained in this section shall be deemed to relieve an applicant from meeting the requirements imposed by law for registration and certification of certified health plans.

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[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-035, filed 1/28/99, effective 1/28/99; 95-04-115, § 245-02-035, filed 2/1/95, effective 10/1/95.]

WAC 246-25-040 Collective negotiations—Policy statement—Permitted negotiations—Petitions. (1) The board finds that collective negotiation by competing health care providers of certain nonfee terms and conditions of contracts with health carriers may result in procompetitive effects in the absence of any express or implied threat of retaliatory collective action by health care providers. However, the board finds few or no procompetitive effects in permitting competing health care providers to collectively negotiate contract terms and conditions that include fees or prices for provider services. The potential anticompetitive harms arising from collective exchanges of fee or price information by competing providers and collective negotiation by competing providers of the fees to be paid providers by health carriers far outweigh any potential gains in simplifying provider and health carrier negotiations, any reduction in transaction costs, and any potential gains in cost-effective health care delivery systems. To the contrary, the board finds that collective negotiation of fees or other prices for services by competing health care providers creates the potential to thwart the cost containment goals of health care reform by enabling health care providers to resist health carrier and purchaser pressure to reduce or limit the increase in prices for health care services. Except as herein provided, nothing contained in this section shall authorize any person or entity to engage in activities that would constitute violations of state or federal antitrust laws.

(2) Competing health care providers within the service area of a health carrier may meet and communicate for the purposes of collectively negotiating the following terms and conditions of contracts with health carriers:

- (a) Respective provider and health carrier liability for the treatment or lack of treatment of health carrier enrollees;
- (b) Administrative procedures including methods and timing of provider payment for services;
- (c) Dispute resolution procedures relating to disputes between health carriers and providers including disputes between providers and health carriers that originate from enrollees;
- (d) Patient referral procedures;
- (e) Formulation and application of reimbursement methodology, e.g., risk pools, capitation, and capitation between providers and hospitals, except as provided in section 3;
- (f) Quality assurance programs;
- (g) Health service utilization review procedures; and
- (h) Carrier provider selection and termination criteria, or whether to engage in selective contracting.

Nothing herein shall be construed to allow a boycott.

(3) Competing health care providers shall not meet and communicate for the purposes of collectively negotiating the following terms and conditions of contracts with health carriers:

- (a) The fees or prices for services, including those arrived at by applying any reimbursement methodology procedures;

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(b) The conversion factor in a resource based relative value scale reimbursement methodology or similar methodologies;

(c) The amount of any discount on the price of services to be rendered by providers;

(d) The dollar amount of capitation or fixed payment for health services rendered by providers to health carrier enrollees; or

(e) The inclusion or alteration of terms and conditions to the extent they are the subject of government regulation prohibiting or requiring the particular term or condition in question; however, such restriction does not limit provider rights to collectively petition government for a change in such regulation.

(4) Competing health care providers' exercise of collective negotiation rights granted by this section shall conform to the following criteria:

(a) Providers shall communicate or negotiate with health carriers through a third party who is authorized by the providers;

(b) Each competing provider involved in the communication and negotiation with health carriers shall make an independent decision to accept or reject a specific offer from a health carrier;

(c) Health carriers communicating or negotiating with the providers' representative shall remain free to contract with or offer different contract terms and conditions to individual competing providers;

(d) The providers' representative shall not recommend to providers that providers accept or reject the health carrier offer; the representative may only deliver the offer to providers and communicate to providers an evaluation of the positive or negative aspects of the offer;

(e) The providers' representative shall not represent more than 30% of the market of practicing providers for the provision of services of a particular provider type or specialty in the service area or proposed service area of a health carrier with less than 5% of the market, as measured by 1) the number of covered lives as reported by the Insurance Commissioner, or 2) the actual number of consumers of prepaid comprehensive health services; and

(f) The providers' representative shall comply with the provisions of subsection (5) of this section.

(5) Any person or organization proposing to act or acting as a representative of providers for the purpose of exercising the authority granted under this section shall comply with the following requirements:

(a) Before engaging in any collective negotiation with health carriers on behalf of competing health care providers, the representative shall file with the board information identifying the representative, the representative's plan of operation, and the representative's procedures to ensure compliance with this section;

(b) Before engaging in any collective negotiations with health carriers on behalf of providers, the representative shall furnish for the board's approval, a brief report identifying the proposed subject matter of the negotiations or discussions with health carriers and the efficiencies expected to be achieved thereby.

Approval shall be withheld by the board if the proposed negotiations would exceed the authority granted under this

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section. The representative shall supplement the report to the board as new information becomes available that indicates that the subject matter of the negotiations with the health carrier has or will change;

(c) Within fourteen days of a health carrier decision declining negotiation, terminating negotiation, or failing to respond to a request for negotiation the representative shall report to the board the end of negotiations;

(d) Before reporting the results of negotiations with a health carrier and before giving providers an evaluation of any offer made by a health carrier, the representative shall furnish for the board's approval prior to dissemination to providers, a copy of all communications to be made to providers related to negotiations, discussions, and health carrier offers.

(6) With the advice of the attorney general, the board shall either approve or disapprove the activity as identified in the report within thirty days of filing. If disapproved, the board shall furnish a written explanation of any deficiencies along with a statement of specific remedial measures as to how such deficiencies could be corrected. A representative who fails to obtain the board's approval is deemed to act outside the authority granted under this section.

(7) Nothing contained in this section is intended to authorize competing providers to act in concert in response to a report issued by the providers' representative related to the representative's discussions or negotiations with health carriers. The representative of the providers shall advise providers of the provisions of this section and shall warn providers of the potential for legal action against providers who violate state or federal antitrust laws by exceeding the authority granted under this section.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-040, filed 1/28/99, effective 1/28/99; 96-11-133, § 245-02-040, filed 5/22/96, effective 6/22/96; 95-04-115, § 245-02-040, filed 2/1/95, effective 10/1/95.]

WAC 246-25-045 "Most favored nations clauses"—Policy statement. "Most favored nations clauses" may discourage discounting by the affected seller, may facilitate oligopolistic pricing and deter entry by more efficient competitors. "Most favored nations clauses" are often used as a replacement for innovation or efficiency by large competitors and act as a disincentive for creativity by small competitors. The commission finds that the use of "most favored nations clauses" in contracts between a health care provider or facility and a certified health plan create the potential to thwart the cost containment goals of health care reform. For these reasons, the use of "most favored nations clauses" in contracts between a health care provider or facility and a certified health plan is prohibited.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-045, filed 1/28/99, effective 1/28/99; 95-04-115, § 245-02-045, filed 2/1/95, effective 10/1/95.]

WAC 246-25-050 Exclusive dealing clauses—Policy statement. (1) Exclusive dealing clauses in health care provider and facility contracts with certified health plans may enhance the quality of health services, achieve economic efficiencies, or improve the cost-effective use of health services and equipment. Exclusive dealing clauses may also reduce competition among certified health plans, providers, and

facilities when the clauses prevent other competitors from entering the relevant market, thereby increasing the probability of the creation of a monopoly in that market.

(2) A contract between a certified health plan and a health care facility or provider may not contain an exclusive dealing clause if the plan holds more than forty percent of the relevant market.

(3) A contract between a certified health plan and a health care facility or provider may contain an exclusive dealing clause if the plan holds twenty percent or less of the relevant market.

(4) A contract between a certified health plan and a health care facility or provider may contain an exclusive dealing clause if the plan holds between twenty and forty percent of the relevant market and the commission has explicitly permitted its use. To obtain such approval, a plan must request an informal opinion as to use of the clause in the particular circumstances or seek approval by written petition pursuant to the procedures set forth in WAC 245-02-110, et seq.

(5) A contract between a health care network and a health care facility or provider may not contain an exclusive dealing clause if the health care network holds more than forty percent of the relevant market.

(6) A contract between a health care network and a health care facility or provider may contain an exclusive dealing clause if the health care network holds twenty percent or less of the relevant market.

(7) A contract between a health care network and a health care facility or provider may contain an exclusive dealing clause if the network holds between twenty and forty percent of the relevant market and the commission has explicitly permitted its use. To obtain such approval, a network must request an informal opinion as to use of the clause in the particular circumstances or seek approval by written petition pursuant to the procedures set forth in WAC 245-02-110, et seq.

(8) The provisions of this section do not apply to contracts between a staff or group model health maintenance organization and its health care facilities or providers.

[Statutory Authority: RCW 43.72.310. 99-04-049, recodified as § 246-25-050, filed 1/28/99, effective 1/28/99; 95-04-115, § 245-02-050, filed 2/1/95, effective 10/1/95.]

PROCEDURAL RULES

WAC 246-25-100 Purpose. The purpose of WAC 245-02-110 through 245-02-175 is to implement RCW 43.72.310 by setting forth the form and procedure for: (1) Requests for informal opinions from the attorney general as to whether particular conduct is authorized by the act, and (2) written petitions to the commission requesting approval of conduct that could tend to lessen competition in a relevant market.

[Statutory Authority: RCW 43.72.310. 99-04-049, recodified as § 246-25-100, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-100, filed 2/1/95, effective 3/4/95.]

WAC 246-25-110 Form of petition and request for informal opinion. A petition, request for informal opinion, or request for adjudicatory proceeding shall adhere generally to the following form:

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(1) At the top of the page shall appear the wording "before the Washington Health Services Commission." On the left side of the page, below the foregoing, the following caption shall be set out "In the Matter of (name of applicant)." Opposite the foregoing caption shall appear the words "petition," or "request for informal opinion," or, "request for adjudicatory proceeding," whichever is applicable.

(2) The materials required by WAC 245-02-115 through 245-02-125 shall be attached to the foregoing.

(3) The petition or request shall be signed and dated by the entity named in the first paragraph, or by its attorney. The original and five copies shall be filed with the commission as described in WAC 245-02-130.

(4) Information required by this chapter may be submitted in hard copy or in machine readable form:

(a) If hard copy, documents shall be submitted and organized by request;

(b) If in machine readable form, the data should comply with specifications acceptable to the commission and attorney general, which will be provided upon request.

[Statutory Authority: RCW 43.72.310. 99-04-049, recodified as § 246-25-110, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-110, filed 2/1/95, effective 3/4/95.]

WAC 246-25-115 Contents of requests for informal opinions and written petitions. The following information shall accompany any written petition or request for informal opinion submitted to the commission:

(1) **Identification of parties.** Identify all parties to the proposal, and their parent entities, and for each one state:

(a) The name(s) under which it is doing business, or proposes to do business, in Washington;

(b) Its business address(es);

(c) Its type of business organization (for example, corporation, sole proprietorship, partnership, or association);

(d) A brief description of the nature or type of business conducted at each of its business locations within the state of Washington; and

(e) The person to whom questions regarding the request or petition should be directed.

(2) **Nature and description of proposal.** State or describe:

(a) The nature and type of transaction (for example, joint venture, acquisition, or merger)

(b) The business(es) involved or affected;

(c) The products and services involved or affected;

(d) The scheduled timeline, including expected dates of any major events required to consummate the proposed activity;

(e) The geographic area(s) in which business will be conducted;

(f) Whether the same products or services as those listed in (c), above, are currently offered within thirty miles of the geographic area(s) identified in (e), above, and if so, by whom; and

(g) The extent to which the participants share substantial risk including, but not limited to: (1) The extent to which the venture agrees to provide services on a capitated basis, or (2) the extent to which the venture creates significant financial incentives for its participants as a group to achieve specified cost containment goals, such as withholding a substantial

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amount of compensation due to participants, with distribution of that amount to participants only if the cost containment goals are met.

(h) A general description of any anticipated impact of the proposal on competition, including but not limited to the description of the business(es) involved or affected, the effect upon the parties in their competition with each other, the changes in market share among certified plans, health care providers or health care facilities in the geographic product or service area, the presence and entry of new market participants sufficient to deter or counteract the anti-competitive effects of the proposed activity, and availability of arrangements less restrictive to competition that would achieve the same or similar benefits to the community in health care delivery.

(i) The exclusive or nonexclusive nature of the proposal including, but not limited to (1) the extent to which viable competing networks or plans with adequate provider participation currently exist in the market, (2) the extent to which providers in the proposed network actually participate in other networks or contract individually with health benefit plans, or other evidence of their willingness and incentives to do so, (3) the extent to which providers in the proposed network will earn substantial revenue outside the network, (4) the absence of any indication of significant departicipation from other networks in the market as a result of the proposed venture, and (5) the absence of any indications of coordination among the providers in the network regarding price or other competitively significant terms of participation in other networks or plans.

(3) **Simultaneous review.** Identify any other state or federal agency reviewing the proposal and state the date on which each review was requested.

(4) Identify the name and address of all employee organizations representing the applicant's employees.

(5) **Description of how conduct will meet the goals of health care reform.** Describe in narrative form how the proposal will:

(a) Enhance the quality, access and cost of health services to consumers;

(b) Gain cost efficiency in the provision of health services;

(c) Improve utilization of health services, facilities and equipment;

(d) Avoid duplication of health services resources;

(e) Facilitate the exchange of information relating to performance expectations;

(f) Develop comprehensive, integrated, and cost-effective health services delivery in the geographic, product or service area;

(g) Reduce competition among certified health plans, health care providers, or health care facilities;

(h) Have an impact on the quality, availability, or price of health services to consumers;

(i) Reduce the number of people employed or otherwise impact how employees deliver health care services; and

(j) Change or otherwise have an impact on employee to patient ratios and how this will affect the quality of health services available to consumers.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-115, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-115, filed 2/1/95, effective 3/4/95.]

WAC 246-25-120 Continuing oversight and reporting requirements. Written petitions and requests for informal opinions must include, in narrative form, a description of the nature of the continued supervision and oversight the parties' believe would be necessary and appropriate to ensure the proposal continues to be consistent with the petition or request and that its benefits continue to outweigh its disadvantages. The description shall include a recommendation for the form of annual or more frequent progress reports appropriate to the transaction and sufficient to allow the commission and attorney general to evaluate the continuing conduct.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-120, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-120, filed 2/1/95, effective 3/4/95.]

WAC 246-25-125 Additional information. An applicant shall submit additional relevant information it believes is sufficient to support its petition or request for an informal opinion. The commission or attorney general may require the submission of additional information as may be required to complete the analysis necessary to form an opinion or respond to a written petition. Depending on the size, scope and nature of the proposed transaction, the material may include some or all of the following:

(1) Contracts, agreements, correspondence, corporate minutes, memoranda, or other documents describing the proposal;

(2) Financial statements for the parties to the proposal for the most recent fiscal year;

(3) Documents filed with any other state or federal agency with respect to the proposal;

(4) Plans, studies, or reports prepared in anticipation of the proposal;

(5) The parties' and their parent organizations' articles of incorporation, bylaws, and documents sufficient to identify the names of the parties' board of directors, owners, and officers; and

(6) Advertisements, brochures, or other publications used for marketing the parties' products or services within the state of Washington during the last fiscal year.

If the proposal includes collaboration between parties, including but not limited to mergers or joint ventures, the commission or the attorney general may request some or all of the following additional information depending on the size, scope, and nature of the proposed transaction:

(1) Each participant's contribution of capital, equipment, or other value to the transaction;

(2) Each participant's ownership interest and its expected consideration or return from the proposal;

(3) Each participant's nonmonetary involvement in the arrangement;

(4) The market share of each participant in the proposed collaborative effort, for each of the products sold by that participant, identifying the relevant geographic market; and

(5) A statement describing whether arrangements less restrictive to competition would achieve the same or similar benefits as those described in response to section (4) above.

If the proposal is for the merger of acute care inpatient hospitals, the commission or the attorney general may request some or all of the following additional information for the three years prior to the proposed merger, depending on the size, scope, or nature of the proposed merger:

(1) Data reported to the Comprehensive Hospital Abstract Reporting System (CHARS), in computerized form if possible;

(2) Copies of the parties' responses to the American Hospital Association's Annual Hospital Survey;

(3) The identities of the ten largest purchasers of hospital services for each hospital; and

(4) The average number of licensed, staffed, and occupied beds for each year.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-125, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-125, filed 2/1/95, effective 3/4/95.]

WAC 246-25-130 Submission of information. (1) The applicant requesting an informal opinion or submitting a written petition shall direct the request or written petition to the Chair of the Commission at the Washington Health Services Commission, P.O. Box 41185, Olympia, Washington 98504-1185. Upon receipt of an informal opinion request or written petition, the commission will send a copy of the request or written petition to the Office of the Attorney General, Antitrust Section, 900 Fourth Avenue, Suite 2000, Seattle, Washington 98164-1012.

(2) The applicant shall also send a copy of the petition and request for informal opinion to any organization representing employees of the applicant.

(3) Each petition and request for informal opinion shall contain a certificate from each person submitting information stating that the information submitted is true and accurate to the best of that person's knowledge.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-130, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-130, filed 2/1/95, effective 3/4/95.]

WAC 246-25-131 Public notice and comment. (1) The commission may solicit comments from the public on the petition, request for informal opinion or request for adjudicatory proceeding by causing notice to be published in the state register of the subject matter of a petition, request for informal opinion or request for adjudicatory proceeding, and indicating how, when and where persons may comment.

(2) No later than three days after its publication in the state register, the commission shall cause a copy of the notice of a petition, request for informal opinion or request for adjudicatory proceeding to be mailed to each person who has made a request to the agency for a mailed copy of such notice. The commission will charge for the actual cost of providing individual mailed copies of these notices.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-131, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-131, filed 2/1/95, effective 3/4/95.]

WAC 246-25-135 Commission to provide copy of informal opinion to applicant. (1) Within five days of receipt of an attorney general's informal opinion requested by the commission under RCW 43.72.310(1), the commission

shall mail a copy of the informal opinion to the requesting applicant. The applicant shall provide a copy of the informal opinion to the employee organizations representing the applicant's employees.

(2) No later than three days after its mailing of a copy of the informal opinion to the requesting party, the commission shall cause a copy of the attorney general's informal opinion to be mailed to each person who has made a request to the agency for a mailed copy. The commission may charge for the actual cost of providing individual mailed copies of these informal opinions.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-135, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-135, filed 2/1/95, effective 3/4/95.]

WAC 246-25-140 Attorney general to provide informal opinion and advice on petitions to the commission. As required by RCW 43.72.310(1), the attorney general will respond to a request for an informal opinion, or for advice regarding a written petition. The attorney general shall have discretion over the scope of the informal opinion or advice provided.

(1) An informal opinion rendered by the attorney general pursuant to RCW 43.72.310(1) will include the following:

- (a) A statement of the facts relied upon in the opinion;
- (b) A statement of the issues presented by the applicant;
- (c) The attorney general's analysis; and
- (d) The attorney general's conclusion as to whether the proposed conduct is authorized by chapter 43.72 RCW.

(2) If the attorney general concludes that the proposed conduct is authorized, the informal opinion will include the following, taking into account the size, scope, and nature of the proposed conduct:

(a) A general description of the nature of the continued supervision and oversight the attorney general believes is necessary and appropriate to ensure the proposal continues to be authorized by chapter 43.72 RCW and that its benefits continue to outweigh its disadvantages;

(b) A general description of the form of annual, or more frequent, progress reports the attorney general believes is appropriate to the transaction and sufficient to allow the commission and the attorney general to evaluate the continuing conduct; and

(c) An indication of the types of data the attorney general believes are necessary to evaluate continuing conduct.

(3) The informal opinion, and any written advice provided to the commission regarding a written petition, should include an explanation of when and under what conditions the attorney general would commit not to file an antitrust enforcement action if the informal opinion concludes that the proposed conduct is authorized, or if the commission approves the petition.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-140, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-140, filed 2/1/95, effective 3/4/95.]

WAC 246-25-145 Applicant may request an adjudicative proceeding or file a petition. An applicant may request an adjudicative proceeding in the following circumstances:

(1) Where the applicant has received an informal opinion pursuant to RCW 43.72.310 and within thirty days of the applicant's receipt of the opinion, the applicant requests an adjudicatory proceeding to determine whether the proposed conduct should be authorized pursuant to RCW 43.72.310 (2)(a) because it is likely to achieve the policy goals of chapter 43.72 RCW and a more competitive alternative is impractical;

(2) If the attorney general concludes in its informal opinion that the conduct proposed is not authorized by chapter 43.72 RCW, the requesting applicant shall have thirty days from the date of receipt of the informal opinion from the commission to file a written petition with the commission requesting approval of conduct that could tend to lessen competition in the relevant market pursuant to RCW 43.72.310(3). The petition shall constitute an application for an adjudicatory proceeding under RCW 34.05.413; or

(3) Pursuant to RCW 43.72.310(3) an applicant may file a written petition with the commission requesting approval of conduct that could tend to lessen competition in the relevant market regardless of whether it has previously sought an informal opinion. The petition shall constitute an application for an adjudicatory proceeding under RCW 34.05.413.

[Statutory Authority: RCW 43.72.310. 99-04-049, recodified as § 246-25-145, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-145, filed 2/1/95, effective 3/4/95.]

WAC 246-25-150 Decision not to conduct an adjudication. If the commission decides not to conduct an adjudicatory proceeding in response to an application, the commission shall furnish the applicant a copy of its decision in writing, with a brief statement of the commission's reasons and of any administrative review available to the applicant.

[Statutory Authority: RCW 43.72.310. 99-04-049, recodified as § 246-25-150, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-150, filed 2/1/95, effective 3/4/95.]

WAC 246-25-155 Adjudicative proceeding—Rules of procedure. An application for an adjudicatory proceeding shall be accompanied by all of the information required for requests for informal opinions and written petitions, as described in WAC 245-02-115 to 245-02-125. The applicant may incorporate by reference any materials previously provided to the commission or attorney general. Except as set forth in WAC 245-02-160 through 245-02-175, the commission adopts for its use the Model Rules of Procedure set forth in chapter 10-08 WAC.

[Statutory Authority: RCW 43.72.310. 99-04-049, recodified as § 246-25-155, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-155, filed 2/1/95, effective 3/4/95.]

WAC 246-25-160 Adjudicative proceedings—Notice of hearing. (1) Within thirty days of receipt of an application for adjudicatory proceeding or petition, the commission shall notify the applicant of any obvious errors or omissions, request any additional information it requires and is permitted by law to require regarding the application for adjudicatory proceeding or petition, and notify the applicant of the name, mailing address, and telephone number that may be contacted regarding the application.

(1/28/99)

(2) Within sixty days after receipt of the application, the commission shall commence an adjudicatory proceeding by serving notice of hearing on the applicant and all other persons required by RCW 34.05.434; 34.05.417 (1)(b), or decide not to conduct an adjudicatory proceeding and furnish the applicant with a copy of its decision in writing, with a brief statement of its reasons for doing so and of any administrative review available.

[Statutory Authority: RCW 43.72.310. 99-04-049, recodified as § 246-25-160, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-160, filed 2/1/95, effective 3/4/95.]

WAC 246-25-165 Presiding officer. The determination of the presiding officer for an adjudicatory proceeding before the commission shall be governed by RCW 34.05.425.

[Statutory Authority: RCW 43.72.310. 99-04-049, recodified as § 246-25-165, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-165, filed 2/1/95, effective 3/4/95.]

WAC 246-25-170 Commission to retain jurisdiction. A grant or denial of authority to engage in proposed conduct shall be deemed a final order of the commission. Where authorization is granted, the commission shall retain jurisdiction over the applicant for purposes of continuing oversight and supervision as required by RCW 43.72.310(6).

[Statutory Authority: RCW 43.72.310. 99-04-049, recodified as § 246-25-170, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-170, filed 2/1/95, effective 3/4/95.]

WAC 246-25-175 Adjudicative proceedings—Reconsideration. A petition for reconsideration of a final order under RCW 34.05.470 shall be filed with the commission.

[Statutory Authority: RCW 43.72.310. 99-04-049, recodified as § 246-25-175, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-175, filed 2/1/95, effective 3/4/95.]

WAC 246-25-180 Notice of modification or withdrawal of authorization. If at anytime during its ongoing supervision of authorized conduct pursuant to RCW 43.72.310(6), the commission determines that reason exists to revoke or modify its authorization, the commission shall immediately notify the applicant in writing. An applicant may request an adjudicatory proceeding within thirty days of receipt of the notice. If no adjudicatory hearing is requested by the applicant within thirty days of receipt of the notice, the commission shall immediately revoke or modify its authorization.

[Statutory Authority: RCW 43.72.310. 99-04-049, recodified as § 246-25-180, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-180, filed 2/1/95, effective 3/4/95.]