BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PACIFICORP dba PACIFIC POWER & LIGHT COMPANY	Docket No. UE-031942 APPLICATION FOR MITIGATION OF PENALTY

Pursuant to RCW 80.04.405, PacifiCorp doing business as Pacific Power & Light Company ("PacifiCorp") respectfully applies for mitigation of the penalty assessed in the November 26, 2003 order assessing penalty (the "Order") of the Washington Utilities and Transportation Commission (the "Commission") in this docket.

PacifiCorp respectfully urges the Commission to exercise its discretion to mitigate or excuse the penalty assesses in the Order. A penalty seems unwarranted in the circumstances present here, where:

- The particular rules at issue (Chapter 480-107 WAC) are capable of a variety of interpretations, and PacifiCorp's interpretation – that draft request for proposals ("RFP") filings may not be required unless a utility intends to acquire new resources via a Commission-approved RFP – appears reasonable.
- The particular rules at issue have not been uniformly implemented or enforced since their adoption in 1989.
- The circumstances present in the industry when the rules were adopted in 1989 are vastly different today, and require a re-working of the rules to maintain their relevance and to reflect existing practices. The Commission has recognized as much by commencing a rulemaking to re-examine the RFP and Least Cost Planning ("LCP") rules in light of advances in the electric utility industry. (Docket No. UE-030423 and UE-030311)
- PacifiCorp has complied with the essential requirements of the rule by (1) submitting an avoided cost filing that conforms to the LCP recently approved by the Commission, and (2) regularly issuing RFPs throughout its system to periodically provide an opportunity for developers to offer proposals and for the Company to gather pricing information from the market. There is no question that PacifiCorp is in compliance with the requirements imposed on utilities under the Public Utility Regulatory Policies Act of 1978 ("PURPA").

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FACTUAL BACKGROUND

A. PacifiCorp's LCP and RFP Filings

On January 24, 2003, PacifiCorp filed its LCP with the Commission pursuant to WAC 480-100-238. At the time, it was not PacifiCorp's intention to acquire new resources via a Commission-approved RFP. In response to inquiries from Commission staff, PacifiCorp explained its understanding that the RFP process was elective and that it was not looking to acquire new resources via a Commission-approved RFP.

On August 14, 2003, PacifiCorp filed its biennial avoided cost rates in accordance with Chapter 480-107 WAC. PacifiCorp's avoided cost calculations indicated a period of system-wide energy sufficiency for the period between 2003 and 2006. In its avoided cost filing, PacifiCorp reaffirmed its intention not to seek new resources through a

Commission-approved RFP process. The letter accompanying PacifiCorp's avoided cost filing stated:

> "Although PacifiCorp is currently seeking to acquire certain types of resources through specifically-tailored solicitations, it does not propose to issue a Commission-approved RFP in Washington as a means of securing additional resources. Accordingly, this filing can be considered to be an RFP with a resource block of zero. WAC 480-017-040." (Aug. 14, 2003 Letter from Christy Omohundro to Carole Washburn at 2.)

Based on discussions with Commission Staff subsequent to the August 14 filing, PacifiCorp filed a formal RFP for a supply block of zero on September 25, 2003. On October 3, 2002, the Commission issued a letter which formally accepted PacifiCorp's LCP. On November 26, 2003, Commission entered the Order assessing an $11,300 penalty for failure to file a draft RFP from April 23 to August 14, 2003.

B. Rulemaking Process To Revisit Chapter 480-107 WAC

During the same period in which PacifiCorp was expected to file a draft RFP, the Commission initiated a rulemaking procedure to reconsider the RFP rules. On April 18, 2003, the Commission issued a Notice of Opportunity to File Written Comments concerning the Commission's review of Chapter 480-107 WAC. According to the CR-101 Statement, the review:

> "will examine whether the current rule provides the results that it was originally intended to achieve and whether the rule is consistent with laws, with appropriate and lawful policies, and with the advances in technology in the electric industry." (April 18, 2003 CR-101 Statement in Docket No. UE-030423 at 1.)

The Commission's review covers such topics as "conditions that trigger," "conditions to waive" and "schedule for" an RFP process. (*Id.*)

In response to the Notice, PacifiCorp filed comments proposing that the Commission retain the RFP process as an optional – not exclusive – means for acquiring new resources. (May 16, 2003 Comments of PacifiCorp in Docket No. UE-030423 at 5.) PacifiCorp further proposed that the rule be restructured to (1) make the RFP process more streamlined and flexible to permit utilities to respond to changes in dynamic markets, and (2) provide an identifiable benefit from use of the process, such as enhanced regulatory certainty. (*Id.* at 5-6.)

Puget Sound Energy ("PSE") filed comments proposing that the Commission reconcile the regulations in Chapter 480-107 WAC – which recognize that the RFP process is not the exclusive process for acquiring new resources – with indications that the Commission views the RFP process as the preferred means of doing so. (May 16, 2003 Comments of PSE at 3.) PSE also echoed PacifiCorp's comments that any revision to the RFP process should provide greater flexibility and regulatory certainty (*Id.*)

ARGUMENT

PacifiCorp respectfully submits that imposition of a penalty is inappropriate for at least four reasons. First, Chapter 480-107 WAC should not be construed to *require* an RFP filing unless a utility makes the election to acquire new resources via a Commission-approved RFP. Second, the ongoing rulemaking proceeding to revise the RFP rules strongly suggests that the rules are unclear and unworkable in their present form. Third, fairness suggests that PacifiCorp not be punished for not filing an RFP, a practice that has been widely followed by utilities and apparently condoned by the Commission in the fourteen years since the regulations were implemented. Fourth,

PacifiCorp complied with the essential features of Chapter 480-107 WAC in its filings.

Each of theses bases are addressed below.

A. Chapter 480-107 WAC Should Not Be Construed to Require an RFP Filing When A Utility Does Not Seek To Acquire New Resources via a Commission-Approved RFP

Chapter 480-107 WAC gives utilities flexibility to determine whether to acquire resources through a Commission-approved RFP or via other means.

WAC 480-107-001(1) provides that

> "[t]hese rules *do not preclude electric utilities from* constructing electric resources, operating conservation programs, purchasing power through negotiated purchase contracts, or otherwise taking action to satisfy their public service obligations." (emphasis added)

This language was added during the rulemaking process in 1989 to clarify that while utilities were *encouraged* to use Commission-approved RFPs as a means of acquiring resources, there was not a *requirement* that competitive bidding be the *exclusive* means of acquiring resources. The next sentence in the rule makes it clear that resources can be acquired other than through competitive bidding:

> Information about the price and availability of electric power obtained through the bidding procedures described in these rules may be used, in conjunction with other evidence, in general rate cases and other cost recovery proceedings pertaining to *resources not acquired through these bidding procedures*. (emphasis added)

Thus, a utility has a choice in resource acquisitions: (1) it can proceed with an RFP approved by the Commission, or (2) it can acquire resources through any other means.

Based on the above, PacifiCorp has long interpreted the regulations as only requiring an RFP when, based on its LCP and other relevant considerations, a utility

elects to acquire new resources via a Commission-approved RFP. Accordingly, as in prior periods when it elected not to acquire resources through a Commission-approved RFP, PacifiCorp did not file a draft RFP within the timeframe contemplated in WAC 480-107-060(2)(a).

The instant penalty proceeding indicates that the Commission interprets Chapter 480-107 WAC as requiring a utility to automatically file a draft RFP in connection with its LCP, even when the utility does not intend to acquire resources through a Commission-approved RFP. Such an interpretation appears to be inconsistent with the text and context of the regulations and with a reasonable resource acquisition policy. Several arguments support this conclusion.

First, this interpretation seemingly contradicts WAC 480-107-001(1), which expressly provides that a Commission-approved RFP is not the exclusive means of acquiring new resources. The interpretation negates the flexibility contained in WAC 480-107-001(1) by requiring every utility to file an RFP irrespective of its resource acquisition strategy.

Second, this interpretation is likely to result in unnecessary "zero resource-block" RFP filings by utilities. It has been the practice of utilities in Washington to file RFPs with a resource-block of zero in an effort to comply with the regulations, while at the same time preserve the flexibility allowed under the rules to acquire resources through other means. (*See* PacifiCorp's 2003 RFP; Avista Energy's 2003 RFP.) The filing, review and approval process for such RFPs are time-consuming and expensive for the Commission, the utilities and other interested parties. Such expenditures seem to be

largely unnecessary, as no new resource development will occur pursuant to "zero resource-block" RFP filings.

Third, the RFP filing timelines in WAC 480-107-160 are unworkable irrespective of the resource block proposed by the filing utility. During the 90-day period in which the utility is supposed to develop and file its RFP, it will likely not have obtained Commission approval of its LCP. Because any Commission-required changes to a utility's LCP may alter (1) the utility's proposed resource acquisition block as well as (2) the basis for calculating avoided costs, it makes sense to have a less rigid timeline for RFP filing and approval.

B. The Ongoing Rulemaking Proceeding Strongly Suggests That The RFP Rules Are Unclear And Unworkable

The existence of an ongoing rulemaking proceeding to revise the RFP rules indicates a consensus among participants in the process that the current rules are unworkable. As suggested by PSE's comments in the rulemaking, events in the industry have overtaken the original purpose of the rule:

> "Since the Commission last examined the LCP and RFP rules, there has been a sea of change in the electric power industry. Then, the industry was struggling to come to grips with issues related to retail competition and anticipated reliance on purchases from wholesale markets and independent power producers or qualifying facilities under PURPA." (May 16 Comments of PSE at 1.)

Utilities are reluctant to use RFPs based on concerns that the process is not sufficiently flexible to keep pace with the realities of the competitive market, and fails to provide meaningful incentives concerning rate recovery. Significantly, a central issue in

the rulemaking process is an evaluation of whether RFP filings should be linked to specific "triggering events" rather than biennial LCP filing by utilities.

Faced with these uncertainties, PacifiCorp has endeavored to follow a prudent strategy of resource evaluation and acquisition. It prepared and filed its LCP and its avoided costs. Based upon results indicating a general supply sufficiency, it elected not to file a Commission-approved RFP, and instead to pursue selected acquisition of specifically tailored resources to meet its evolving supply needs.[1] PacifiCorp's intention was and remains to prudently meet and manage its resource needs in the most efficient manner. PacifiCorp is hopeful that the ongoing rulemaking process will result in changes to the RFP process that benefit all participants. In the interim, PacifiCorp requests that the Commission not penalize PacifiCorp's efforts to best meet its needs in light of the seemingly outdated rules and the ever-evolving market conditions.

C. Mitigation is Appropriate Given the Historically Inconsistent Interpretation and Application of The RFP Filing Requirement

In the fourteen years since Chapter 480-107 WAC was adopted, it has not been the regular practice of Washington utilities to file RFPs in connection with their LCPs. The decision by utilities not to utilize the RFP process for obtaining new resources is largely a product of the issues currently being addressed in the rulemaking proceeding. PacifiCorp is unaware of any prior instance of a utility being penalized for failing to make, or timely make, an RFP filing. Under these circumstances, it seems unfair for the

[1] For example, on June 6, 2003, PacifiCorp issued a formal RFP for supply-side resources to its East control area. On June 30, 2003, PacifiCorp issued a formal RFP for demand-side resources. PacifiCorp expects to issue an RFP in the near future for additional supply-side renewable resources. Copies of these RFPs and related documents are available on PacifiCorp's website at http://www.pacificorp.com.

Commission to adopt a new policy of strict enforcement, and retroactively penalize PacifiCorp for noncompliance.

Administrative agencies are required to provide a reasoned basis for departing from prior policies in a manner that penalizes persons who acted in reliance on such policies. As stated in *Vergeyle v. Employment Sec. Dept*., 28 Wash. App. 399, 623 P2d 736 (1981) *disapproved on other grounds in Davis v. Employment Sec. Dept*., 108 Wash. 2d 272, 737 P2d 1262 (1987), "[a]lthough stare decisis plays only a limited role in the administrative agency context, agencies should strive for equality of treatment." The court elaborated that:

> "There is a 'basic human claim that the law should provide like treatment under like circumstances.' Although agencies are not inflexibly bound by the rule of stare decisis, neither is their discretion unlimited. Thus, courts have imposed a 'duty of consistency toward similarly situated taxpayers', and have held that agencies may not 'treat similar situations in dissimilar ways.'" ..*Id. quoting Jones v. Califano*, 576 F.2d 12, 20 (2d Cir. 1978) (internal citations omitted.); *see also Stahl v. University of Washington*, 39 Wash App 50, 691 P2d 972 (1984) (interpreting *Vergeyle* as requiring consistency in statutory interpretation by administrative agencies).

Changes in agency policy or interpretation are most objectionable when, as here, a party is penalized for reliance on the prior policy or interpretation. As stated in one landmark administrative law case, the "judicial hackles" are heightened when "a financial penalty is assessed for action that might well have avoided if the agency's changed disposition had been made earlier known." *NLRB v. Majestic Weaving Co.*, 355 F2d 854 (2nd Cir 1966).

D. PacifiCorp Complied with the Essential Features of Chapter 480-107 WAC by Making an Avoided Cost Filing in Follow-Up to its LCP Filing, as

Required by PURPA, and By Frequently Issuing RFPs Throughout Its System.

As the Commission is aware, Chapter 480-107 WAC represents the Commission's implementation of the PURPA in Washington. Among other things, PURPA generally requires a utility to offer to purchase the output of Qualifying Facilities, or QFs, at the utility's then-current estimate of avoided costs. The regulations promulgated by the Federal Energy Regulatory Commission to implement PURPA, set forth at 18 C.F.R. Part 292, require, among other things, that electric utilities periodically file their avoided cost information with state commissions. *See* 18 C.F.R. § 292.302(b).

In Washington, this periodic filing requirement with respect to avoided costs was satisfied by requiring utilities to calculate their avoided costs in a manner "consistent with the utility's least-cost plan" (WAC 480-017-050), which is required every two years under WAC 480-100-238. PacifiCorp's August 14 filing makes clear that its calculation of avoided costs was consistent with its LCP, as submitted to the Commission on January 24, 2003 and accepted by the Commission on October 3, 2003. As stated in Attachment B (Description of Calculation of Avoided Costs) to the August 14 filing:

> The starting point for the avoided cost calculation is the loads and resource balance developed in conjunction with the Company's Integrated Resource Plan (IRP) filed in Washington in January 2003.

Moreover, as noted above, PacifiCorp frequently issues RFPs throughout its system to provide an opportunity for QF developers and others to submit project proposals for PacifiCorp's consideration. Such RFPs further provide an opportunity for PacifiCorp to gather pricing information from the market. This essential feature of competitive bidding – the reliance on market information as the basis for avoided costs

rather than "administratively determined" avoided costs – was the basis for adoption of Chapter 480-017 WAC in 1989, and is captured in the processes followed by PacifiCorp.

Thus, PacifiCorp complied with the essential features of Chapter 480-107 WAC and those elements of the rules that are necessary to comply with PURPA. Given this compliance, it seems unfair to impose upon PacifiCorp a penalty based upon seemingly unessential features of the rules.

CONCLUSION

For the reasons set forth above, PacifiCorp respectfully requests that the Commission exercise its discretion to mitigate or waive the penalty assessed in the November 26 order in this proceeding. Rather than strict interpretation and enforcement of the existing rules, it is urged that effort be directed toward the current rulemaking so that the rules can be modified to provide greater clarity, usefulness, and benefits to all stakeholders in that process.

DATED this 11th day of December, 2003.

Respectfully submitted,

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