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April 30, 2003

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Re: Rulemaking Docket No. A-010648
WAC 480-09 – Procedure
WAC 480-04 - Public Access to Information and Records

Dear Ms. Washburn:

In response to the Commission's April 4 Notice and Opportunity to File Written Comments, PacifiCorp dba Pacific Power & Light Company ("PacifiCorp") hereby submits written comments on the Commission's proposed changes to Chapter 480-09 WAC and Chapter 480-04 WAC.

The Commission's Notice invites comments with respect to three areas:

1. Rules organization (logical grouping/order; use of subheadings)

2. Clear language (consistent style and grammar)

3. Possible substantive changes (new rules, substantive changes to existing rules)

The comments include general observations about topic 1 -- rules organization -- followed by an itemization of specific sections where PacifiCorp offers suggested revisions or additions to the rules for reasons of clear language or possible substantive changes.

Rules Organization

As stated in the Commission's Notice, proposed Chapter 480-07 reflects a complete reorganization and revision of the existing rules. The result is a much-improved chapter that is organized logically and in a manner that is much easier to navigate. In addition, the subheadings provide a helpful roadmap through the rules, and are helpful in explaining the "relocation" of the existing rules. PacifiCorp appreciates the efforts of Judge Moss and the Commission for undertaking this significant task, which should provide immediate and durable benefits and efficiencies in the Commission's administrative process.

Comments on Specific Proposed Rules

480-07-130(1) Computation of Time. Defining "day" to mean a calendar day is generally acceptable for extended periods of time, such as twenty days for filing an answer (480-07-370(1)(c)(iv)) or thirty days for the Commission to act on a petition for a declaratory order (480-07-930). For shorter periods of time, however, "day" should be defined to exclude weekend days and holidays. PacifiCorp recommends adding the following language at the end of 480-07-130(1):

> When the period of time prescribed or allowed is ten (10) days or less, intermediate Saturdays, Sundays and legal holidays shall be excluded in the calculation.

In the absence of such a provision, a data request filed on late Friday afternoon prior to a three-day holiday weekend, for example, would require any objection to be filed by the following Wednesday (under proposed 480-07-405(6)(a)), which is only the second full business day after the request is served. "Days" should not be defined as calendar days in such circumstances, as it results in deadlines that are not reasonable and will simply result in numerous—and burdensome—individual requests for extensions.

480-07-150(2) Service. The proposed rule incorporates a provision that requires parties to designate one person to receive service of documents. PacifiCorp supports this revision as a needed improvement in light of its recent experience, where parties have suggested that numerous representatives identified on a service list *each* require service of filings.

480-07-305(1) Commencement of Adjudicative Proceeding. Because this provision triggers the application of the *ex parte* rule under 480-07-310(1), the language must be precise as to when the adjudicative proceeding begins. In order to tighten up this provision, PacifiCorp recommends the following as the second sentence of 480-07-305(1):

> An adjudicative proceeding begins when the Commission or presiding officer issues a formal notice ~~notifies a party~~ that a prehearing conference, hearing or other stage of an adjudicative proceeding will be conducted.

480-07-340 Classification of parties. Proposed 480-07-340(2)(g) includes a reference to Commission Staff and Public Counsel under "protestants," which suggests a presumption that

Staff and Public Counsel will always take a position "in protest to oppose an application." To remedy this improper presumption, the last two sentences of 480-07-340(2)(g) should be moved to become the last two sentences of 480-07-340(1).

480-07-355 Intervention. This provision should be tightened up to *require* a written petition to intervene to be filed at least three business days before the initial hearing or prehearing conference. Any proposed intervention offered after that date could still be considered, but would have to meet the standards as a late-filed intervention, and be required to show just cause as to why the petition could not have been filed in a timely manner. Applicants should not be required to speculate about what parties will show up at the prehearing conference and seek intervention, and an element of "surprise" should be avoided on this issue for the same reasons that cross-examination exhibits are required to be distributed in advance of the hearings. It is not a productive use of hearing time for spontaneous argument to be offered for unexpected interventions offered for the first time at a prehearing conference or at the initial hearing. The proposed revisions to implement this suggestion are as follows:

> (a) Who may intervene; when petitions must be filed. Any person (other than the original parties to any proceeding before the commission, commission staff, and public counsel) who desires to appear and participate as a party shall~~should~~ file a written petition for leave to intervene at least three business days before the initial hearing date or prehearing conference date, whichever occurs first. ~~A person may petition orally for leave to intervene at the time of the initial hearing or prehearing conference, unless the commission requires written petitions to intervene in a notice prior to the first hearing or prehearing date.~~ The commission may extend the period for filing timely petitions to intervene.
>
> (b) Late filed petitions to intervene. Any petition to intervene made after the time prescribed in WAC 480-07-355(1)(a) ~~first hearing or prehearing date~~ is a "late-filed petition to intervene." The commission will grant a late-filed petition to intervene only on a showing of good cause, including a satisfactory explanation of why the person did not timely file a petition.

480-07-380(4) Date certain-indefinite discontinuance disfavored. Dismissal without notice for failure to provide a status report every thirty days could lead to manifest injustice by prejudicing a party's substantive rights for minor procedural failings. The Commission should provide notice and an opportunity for the party to cure the defect. The proposed revisions to implement this suggestion are as follows:

> **(4) Date certain—Indefinite continuance is disfavored.** The commission will grant continuances only to a specified date unless the movant demonstrates good cause for an indefinite continuance. A party seeking an indefinite continuance must demonstrate why establishing a specific date is not feasible. A party that requests an indefinite continuance must file a statement with the commission each thirty days after the request

is granted describing the status of the proceeding and why it is still infeasible to establish a specific date, or must request a specific date. Failure to file the statement required in this subsection results in a default and is grounds for dismissal of the proceeding ~~without further notice~~. Written notice of dismissal shall be provided at least five days before dismissal and the party requesting the indefinite continuance shall be afforded the opportunity to cure the default. Dismissal of the proceeding under this section shall be without prejudice. The commission may rescind an indefinite continuance at any time and establish a schedule for the remaining aspects of the hearing.

480-07-400 Discovery. Subsection (1)(c)(iii) requires a party relying on a cost study to rerun it upon another party's request. Whether the party relying on the cost study should be required to rerun a model is a decision that should be made on a case-by-case basis, and such party should not be required to rerun its study where the requesting party has the ability to rerun the study itself (such as where a copy of the model has been provided to the requesting party and the requesting party has the capability of rerunning the study on such model). The proposed revisions to implement this suggestion are as follows:

(iii) Data request. A party's written request that calls for another party to produce data in connection with an adjudicative proceeding is a "data request." The request may be in writing or may be made orally at a conference or hearing. Generally, data requests seek documents, an analysis, compilation or summary of documents into a requested format, a narrative response explaining a policy, position, or a document, or the admission of a fact asserted by the requesting party. If a party relies on a cost study, it is expected that the party will, on request and demonstration of need, rerun the study based on different assumptions, subject to the standards in subsection (5) of this section. A party shall not be required to rerun the cost study if the requesting party has the ability to rerun the cost study itself. The commission will not order a party to respond to a data request that seeks production of a new cost study unless there is a compelling need for such production.

480-07-405(6) Objections; consequence of failure to object. Subsection (a) requires that a party objecting to a data request "in lieu of providing a full response" submit its objection "no later than five days before a response is due, or at such other time as may be ordered." If this objection is not interposed in a timely manner, the party waives the right to object and must provide a full response. The Commission should retain its existing practice requiring objections to data requests to be presented to the requesting party no later than the time responses are due. Accelerating the time for making objections to five days is not reasonable in most cases, as the responding party often is unable to determine within five days the objectionable nature of a data request. The proposed rule change may encourage unnecessary and premature objections that are interposed solely to avoid the consequence of waiving the objection entirely. The proposed revisions to implement this suggestion are as follows:

~~(a) Objection in lieu of full response.~~ A party who wishes to object to a data request ~~in lieu of providing a full response~~ must present the objection to the requesting party in writing~~, and separate from any partial response,~~ no later than ~~five days before~~ the time the response is due, or at such other time as may be ordered. A party that fails to interpose a timely objection to providing a full response to a data request waives any right to object and must provide a full response.

~~(b) Objection when full response is provided. A party that provides a full response to a data request, but wishes to memorialize an objection, may state the objection in writing at the time the response is provided.~~ A party that fails to make an objection when responding to data requests does not lose the opportunity to raise an objection at hearing if another party seeks to introduce the party's response to a data request.

480-07-405(7) Responses. Subsection (b) relates to timing, and requires responses within ten days after the request is received. As noted above, PacifiCorp proposes a modification to "Computation of time" in 480-07-130(1) to clarify that "days" in this context would be business days. If this proposed change to 480-07-130(1) is not accepted, the Commission's current provision—"weekends and holidays will be excluded in calculating these time limits" in WAC 480-09-480(6)(a)(v)—should be retained in 480-07-405(7)(b).

480-07-410(5) Correcting/supplementing deposition testimony. This rule should allow a witness the opportunity to review, correct and sign the deposition transcript. Consistent with Rule 30 of the Superior Court Rules, a witness should be given thirty days after receipt of the transcript to review and determine the accuracy of the transcript and make necessary changes, and such changes should not necessarily be limited to correction of "transcription errors." It is inconsistent to follow the Rules of Civil Procedure with respect to the availability and use of depositions, yet depart from the Civil Rules in the important respect of allowing the witness to correct the transcript in a manner that allows it to be accepted as sworn testimony. The proposed revisions to implement this suggestion are as follows:

(a) Correction. ~~A party may file a motion to correct a transcription error in a deposition transcript within ten days after the deposition transcript is delivered.~~ The transcript of the deposition testimony shall be made available to the witness for examination and the witness shall be provided an opportunity to make any changes in form or substance which the witness desires to make, together with a statement of the reasons given by the witness for making them. In the event the witness testifies in the commission proceeding, the witness shall be subject to cross-examination by any party regarding such changes and the basis therefor. If for any reason the witness does not testify in the commission proceedings, such changes to the deposition transcript shall not be included unless the deposing party has an opportunity to conduct a further deposition of such witness regarding such changes and the basis therefor, and the further opportunity to include the additional deposition transcript.

480-07-420 Protective orders. In comments submitted in this proceeding dated July 25, 2001, PacifiCorp stated the following with respect to protective orders:

> [T]he existing practice as to the issuance of protective orders should be codified in a new procedural rule. Such a rule would include not only the procedures and requirements associated with the issuance of the standard form of protective order by the Commission, but could include as well the procedures and requirements applicable to common modifications to this form of protective order. For example, several Commission proceedings have involved the use of "top secret" or "highly confidential" information for which protections greater than afforded by the standard form of protective order are necessary. A body of decisions has developed regarding the handling of such "highly confidential" information that could be reflected in a procedural rule. The process of obtaining a modified protective order could be enhanced if the applicable procedures and requirements are incorporated into a rule rather than scatter about in various Commission decisions.

Proposed 480-07-420 contains a discussion of the availability of the standard form of protective orders (480-07-420(1)) and the possibility of amending the standard form upon the motion of a party (480-07-420(2)). PacifiCorp reiterates its suggestion that it would be administratively efficient to capture and incorporate into a rule the body of precedent regarding modifications to the standard form to accommodate "highly confidential" information. 480-07-420(2) should be expanded to reflect this body of Commission precedent to guide future proceedings.

480-07-460 Hearing-Predistribution of exhibits and prefiled testimony. The final sentence of 480-07-460(1) (before subsection (a)) should be modified by adding the following clause: "Except for exhibits intended solely for impeachment." Evidentiary hearings presume that there is a value to cross-examination. One of the purposes of cross-examination is sometimes to impeach the witness. Impeachment is impaired if witnesses are routinely afforded the opportunity to review contradictory documents prior to their examination. The proposed rule as drafted undermines the use of cross-examination for impeachment purposes.

480-07-470(6) Order of Presentation. The proposed new rule makes significant changes to the rights of the party having the burden of proof. Among other things, the new rule excludes the language from the existing rule (WAC 480-09-735) allowing the party with the burden of proof to respond to "any new material received from others" at the close of the proceeding. The existing rule recognizes the fundamental principle that the party bearing the burden of proof has the final say; the proposed new rule does not, and should either be rejected in favor of the existing rule, or modified to recognize this tenet. Although the rule states that evidence will "ordinarily" be received in the prescribed order, in practice the applicant typically presents its direct *and* rebuttal case at the outset, with other parties following. The principle must be preserved that in doing so, the applicant (or the party bearing the burden of proof) does not waive the right to present rebuttal testimony to "any new material" that may be presented by other

parties in their testimony. If this principle is not preserved, the party bearing the burden of proof can be expected to demand adherence to the "ordinary" order of presentation, which allows that party to present its direct case first, and close with its rebuttal. Reverting to this order of presentation is not efficient, but would be necessary in order for the party with the burden of proof to have the final say, a long-standing principle that is not captured in the new rule. Similarly, the new rule states that "surrebuttal testimony" may be allowed. In other words, parties will be allowed to rebut the rebuttal testimony of the party bearing the burden of proof. This, too, is unacceptable, unless the party bearing the burden of proof has an opportunity to present testimony responding to that surrebuttal testimony, or "sur-surrebuttal" testimony (the term commonly used in Oregon proceedings for the final round of testimony offered by the party bearing the burden of proof). The new rule should be rejected in favor of the language in the existing rule (WAC 480-09-735), or modified as suggested above.

480-07-470(11) Hearing guidelines. Subsection 11 discusses cross-examination and reflects several substantive changes to the existing rule. First, the limiting of cross-examination to one round may be acceptable, depending upon the showing of "good cause" that is required to conduct additional rounds. "Good cause" should be defined in a manner that allows additional cross-examination if, subsequent to the first round, other subject areas are explored with the witness. It is common in Commission proceedings for the bench to ask questions that may go far beyond the scope of the "first round" of cross-examination, and parties should be given an opportunity to explore these additional areas. This seems to be the current custom in Commission proceedings, and this rule change should not effect a limitation on the availability of cross-examination. Second, the proposed rule requires questions involving detailed calculations to be provided to the witness "at least two business days prior to the date the witness is expected to testify," which goes beyond the "in advance" language of the current rule. This new requirement seems onerous, and imposes a burden on the cross-examining attorney that likely outweighs any benefits arising from a more streamlined hearing process. The language of the existing rule on this point should be retained. Finally, the procedures relating to responses that are given "subject to check" are proposed to be formalized as well, with the filing of an affidavit by the witness. Notwithstanding these greater requirements, the time period for doing so is proposed to be shortened. While the requirement of an affidavit may be appropriate given that the witness is commenting on sworn testimony, the shortening of the period for fulfilling this requirement seems unnecessary. The language from the existing rule on this point should be retained, which reasonably allows the witness to have the benefit of the transcript before preparing the submittal. The proposed revisions to implement this suggestion are as follows:

> Counsel and other party representatives should be prepared to provide time estimates for cross-examination of witnesses. The presiding officer will limit cross-examination to one round unless good cause exists for allowing additional questions. <u>"Good cause" is shown if subsequent cross-examination of the witness by other parties or questions from the bench explore subject areas that go beyond those in a party's initial round of cross-</u>

examination. Witnesses must not be asked to perform detailed calculations or extract detailed data while on the stand. Any such questions must be provided to the witness in advance~~at least two business days prior to the date the witness is expected to testify~~, must ask the witness to provide the answer for the record later in the hearing session, or must provide an answer and ask the witness to accept it "subject to check." When a witness accepts information "subject to check," the witness must perform the "check" as soon as possible. A response given subject to check will be considered accurate unless the witness disputes it by filing an affidavit, stating reasons, within ten ~~five business~~ days following ~~the witness's testimony~~ receipt of the transcript or prior to the closing of the record, whichever occurs first.

480-07-510 General rate cases. Section 3(f) imposes as a new requirement that workpapers be included which contain "[i]nformation about every transaction with an affiliated interest or subsidiary that directly affects or indirectly affects the proposed rates," including "a full description of the relationship, terms and amounts of the transaction, the length of time the relationship has been ongoing, and an income statement and balance sheet for every affiliated entity." This is a burdensome and unnecessary new requirement, given that the Commission is conducting a separate rulemaking proceeding that proposes to gather the same sort of information with respect to transactions between a utility and its affiliates or subsidiaries. (Docket No. A-021178.) PacifiCorp has taken the position in that proceeding that, as to transactions with subsidiaries that are *not* affiliates, the Commission could rely on its general ratemaking authority to gather information about such transactions (rather than attempt to include such transactions under the affiliated interest statute). The inclusion of Section 3(f) in the proposed new rule is consistent with that suggestion (although it is overbroad and burdensome to the extent it requires an "income statement and balance sheet for every affiliated entity). But including Section 3(f) is completely unnecessary so long as the Commission continues its efforts in the other proceeding to impose new rules to gather the *same* information with respect to transactions with subsidiaries. As currently proposed, the requirements are redundant and provide no benefits that justify the additional administrative burdens imposed on the utility. Proposed section 3(f) should be eliminated, or adjusted in scope depending upon the outcome of Docket No. A-021178.

480-07-730 Settlement. In its July 25, 2001 comments in this proceeding, PacifiCorp included the following discussion:

> The process in adjudicative proceedings would be vastly improved through use of early settlement conferences among the parties. In Oregon, for example, the Commission Staff typically convenes a settlement conference about 3 months after a general rate case is filed (or after sufficient discovery has occurred to enable Staff to develop preliminary views of the case). At this conference, Staff distributes its "issues list" of possible adjustments, and preliminary estimates of the amount of each recommended adjustment.

> This issues list forms the basis for the settlement discussions, which may occur over a 2-3 day period. These settlement conferences, which are open to other parties in addition to Staff and the Company, promote an early dialogue among the parties regarding the issues, and allow productive discussion of the issues prior to the filing of opposing testimony and the "hardening" of litigation positions. Based on these discussions, adjustments lacking merit may be withdrawn or, conversely, valid adjustments may be accepted by the Company and included in a stipulation. In PacifiCorp's experience, these initial conferences help narrow the issues and have the added benefit of potentially enabling the early resolution of all or part of an adjudicative matter.

PacifiCorp reiterates these comments. A new section should be added to the discussion of settlements in Subpart D to provide the outlines of such a process and, at a minimum, formalize its availability to the parties. Preferably, a settlement conference would be routinely provided as part of the scheduling in major rate proceedings.

480-07-835 Clarification of final order. The proposed rules create a distinction between a "motion for clarification" and a "petition for reconsideration" based on whether the requested relief seeks to "change an outcome with respect to one or more issues resolved by a final order." 480-07-835(2). Although it is an improvement to distinguish between these forms of relief, in practice it may not be so easy to implement that distinction. Depending upon how an order is clarified, it may have an impact on an "outcome" and a party should not be prejudiced by the misclassification of a motion as "clarification" versus "reconsideration. To address this issue, the following language should be added at the end of 480-07-835(2):

> The Commission in its discretion, or upon good cause shown, may treat a request for clarification filed under this section as a petition for reconsideration under 480-07-850 if the requesting party in good faith believed that the requested clarification did not change an outcome or challenge a finding of fact or conclusion of law.

The Need for a Workshop

The Notice also seeks input on whether parties believe that a workshop is needed rather than relying only on the parties' written comments. In PacifiCorp's view, a workshop would be beneficial to allow a discussion among the parties of the various suggested revisions or additions to the proposed rules. In some cases, there may be disparate viewpoints with respect to suggested changes to the proposed rules, and an opportunity to exchange and debate the various points of view would be helpful. It would also be efficient to express these competing views at that time, rather than wait to express them in formal comments once the draft rules are proposed for adoption by the Commission. Finally, a workshop would allow an exchange of views that might not otherwise occur on the numerous and significant revisions that are incorporated in the complete reworking of Chapter 480-09 WAC. Without the benefit of legislative marks to indicate these numerous and significant revisions, parties may be unaware of many of the

substantive changes that are incorporated in the proposed rules. Other parties' comments will likely highlight these changes, and a workshop would allow a more complete discussion by interested parties of all the changes.

Conclusion

PacifiCorp appreciates the opportunity to provide written comments and recognizes the significance of the task the Commission has undertaken in this proceeding. PacifiCorp looks forward to working with Judge Moss, Commission Staff and other interested parties in further discussions regarding the procedural rules. Please direct any questions to either the undersigned at (503) 813-6092 or Jeff Payne at (503) 813-6032.

Very truly yours,

PacifiCorp

By _____
Christy Omohundro
Director, Regulation

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