

VIA ELECTRONIC FILING

April 24, 2006

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: Docket No. A-060357
Rulemaking to Consider Rules Implementing SHB 2426, Delegation of Certain
Commission Decisions**

Dear Ms. Washburn:

In response to the Commission's March 17, 2006 Notice of Opportunity to File Written Comments, PacifiCorp dba Pacific Power & Light Company ("PacifiCorp") hereby submits written comments on the proposed development of rules to implement the portion of SHB 2426 regarding delegation of certain Commission decisions. Our comments will generally follow the outline of questions posed by the Commission in its Notice.

Matters Amenable to Delegation

Section 2 of SHB 2426 states that "[t]he commission may, *by rule or order*, delegate to designated assistants any of the powers and duties vested in or imposed upon the commission by law except matters governed by chapter 34.05 RCW." (*Emphasis added.*) Achieving this delegation through an order rather than through a rule would provide greater flexibility, and would be simpler in that it would avoid the need, at the outset, to devote considerable effort in attempting to define all such possible delegated matters. Any additional matters to be delegated could simply be identified in supplemental delegation orders. If this delegation is achieved through a rule, on the other hand, considerable effort would have to be devoted at the outset to itemizing the categories of matters that can be delegated, given the process that would be necessary to later amend a rule to modify the definition of delegated items.

The categories of decision that could be delegated are the types identified by the Commission earlier in its "2006 WUTC Agency Request Legislation." With respect to matters with which PacifiCorp is familiar, these would include:

- Establishing compliance with RCW 80.08.040 regarding the issuance of stocks, bonds, notes or other evidences of indebtedness.
- Grants of extensions of time to file reports required by statute or Commission rule.

These are routine matters that are typically processed by the Commission on its consent agenda, without controversy or discussion. It is PacifiCorp's understanding that delegating the authority to act on these matters would not change the review process currently in place; delegation would change only the procedure that is followed after that review is concluded, by permitting the executive secretary or other designated senior staff person to sign the order. It is probably not necessary to define the process for entering a delegated order by rule; as in the case of identifying the delegated matters, this process can be defined, if necessary, by order, which would provide more flexibility and ease of administration.

Process for Providing Notice

The statute requires the Commission "by rule to implement a process by which notice shall be provided of matters designated for delegation." Following that notice, if any commissioner or affected person so requests, "[a]ny such matter shall be heard or reviewed by commissioners." *SHB 2426, § 2*. As stated in the Notice, this process is intended "to ensure that interested persons have an appropriate opportunity to receive a Commission rather than a delegated decision."

Once a matter has been identified as subject to delegation, the Commission's list of received filings should provide adequate notice to the parties of this classification. The Commission's website should also include a listing of matters that have been classified as eligible for delegation. The filing party should also receive prompt written notification that the matter has been designated for delegation.

The rule should clearly provide that matters contested by the parties will not be delegated. In the event an action involves a controversy, the affected parties are entitled to have it resolved by the commissioners. "Contest" should be defined broadly, so that interested parties are not denied the right to have the matter considered by the commissioners rather than delegated. The rule should identify the minimum actions an affected party must take to contest a matter, and thus render it non-delegable. These actions could include filing a letter of protest, or completing a form prescribed by the Commission.

According to the Notice, "[t]he law permits the Commission to provide a decision without delegation, or to review decisions that have been delegated." The distinction cited in the Notice is apparently grounded in the language in the statute referring to the matter being "heard or reviewed by commissioners." *SHB 2426, § 2*. The preferable process would be for the Commission to provide a decision in contested matters without delegation, rather than following a review process. Interested parties presenting a controversy for resolution should have that matter resolved, or "heard," by the commissioners. In contrast, a "review" process, by its very nature, will involve a standard of review in which the commissioners' review will not be *de novo*. As a practical matter, the delegated decision will be accorded considerable deference by the commissioners, and the right to have the matter "heard" by the commissioners will have been diluted.

Process for Probable Cause Determinations

SHB 2426 amends RCW 80.01.060 to authorize administrative law judges to “make findings of probable cause and issue complaints in the name of the commission.” *SHB 2426, § 5(1)*. The purpose of this amendment, as PacifiCorp understands it, is to ensure that a judge who has made a probable cause determination would not preside at the hearing. This is an improvement over the previous process, in which the Commissioners would make both the probable cause determination and sit as judges in hearing the evidence and ultimately deciding the disposition of the complaint.


A rule is probably not necessary to identify the process for making probable cause determinations, as this is an internal matter that may be determined without a rule. At the same time, a rule should memorialize the identified objective of this amendment, *i.e.*, that the administrative law judge reviewing the evidence and making the probable cause determination will not subsequently decide the disposition of the complaint. The probable cause determination should be supported by a decision that identifies the evidence relied upon and findings made in reaching the determination. There does not seem to be a basis for distinguishing between the process for determinations of probable cause to issue a complaint and determinations for penalty assessments.

Conclusion

PacifiCorp appreciates the opportunity to provide these preliminary comments, and looks forward to participating in the Commission’s May 11 workshop and any formal rulemaking that the Commission may commence in this docket. Please direct any questions regarding these comments to Shay LaBray at (503) 813-6176.

Very truly yours,

PacifiCorp

By  for
Andrea Kelly
Vice President, Regulation