

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 SESCO, INC.)
4 Complainant,)
5 v.) DOCKET NO. UE-921065
6 PACIFIC POWER & LIGHT COMPANY,) Volume I
7 Respondent.) Pages 1-19
8 -----)

9 A hearing in the above matter was held on
10 December 18, 1992 at 9:34 a.m., at 1300 South
11 Evergreen Park Drive Southwest, Olympia, Washington,
12 before Administrative Law Judge HEATHER BALLASH.

13 The parties were present as follows:

14 SESCO, INC. by DAN MEEK, Attorney, 1935
15 Northeast Clackamas Street, Portland, Oregon 97232.

16 PACIFIC POWER & LIGHT COMPANY by JAMES F.
17 FELL, Attorney, 900 Southwest Fifth Avenue, #2300,
18 Portland, Oregon 97204.

19 PUBLIC COUNSEL by CHARLES F. ADAMS,
20 Assistant Attorney General, 900 Fourth Avenue, Suite
21 2000, Seattle, Washington 98164.

22 THE COMMISSION by DONALD T. TROTTER,
23 Assistant Attorney General, 1400 South Evergreen Park
24 Drive Southwest, P.O. Box 40128, Olympia, Washington
25 98504-0128.

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24 Lisa K. Nishikawa, CSR, RPR
25 Court Reporter

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I N D E X

WITNESS: DIRECT CROSS REDIRECT RECROSS EXAM
(None.)

EXHIBIT MARKED ADMITTED
(None.)

1 P R O C E E D I N G S

2 JUDGE BALLASH: Let's be on the record.
3 The hearing will please come to order. The Washington
4 Utilities and Transportation has set for hearing at
5 this time and place Docket Number UE-921065 which is
6 the complaint of SESCO, Inc. versus Pacific Power &
7 Light Company. Today's date is December 18, 1992.
8 The hearing is being held in the Commission's hearing
9 room in Olympia, Washington before Administrative Law
10 Judge Heather Ballash of the Office of Administrative
11 Hearings. At this time I will take the appearances of
12 the parties beginning with the complainant.

13 MR. MEEK: My name is Dan Meek, M E E K.
14 I'm here representing SESCO. That's all capitals,
15 S E S C O, Incorporated.

16 JUDGE BALLASH: Mr. Fell.

17 MR. FELL: My name is James Fell. I'm
18 representing Pacific Power & Light Company.

19 JUDGE BALLASH: And I forgot to ask you
20 both to state your business address for the record.
21 Mr. Meek.

22 MR. MEEK: My address is 1935 Northeast
23 Clackamas Street, C L A C K A M A S, Portland, Oregon,
24 97232.

25 JUDGE BALLASH: Mr. Fell.

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1 MR. FELL: Mine is 900 Southwest Fifth
2 Avenue, Suite 2300, Portland, Oregon 97204.

3 JUDGE BALLASH: Okay. And Commission
4 staff.

5 MR. TROTTER: For the Commission, Donald T.
6 Trotter, Assistant Attorney General. My address is
7 1400 South Evergreen Park Drive Southwest, PO Box
8 40128, Olympia, 98504-0128.

9 JUDGE BALLASH: And public counsel.

10 MR. ADAMS: Appearing as public counsel
11 Charles F. Adams, 900 Fourth Avenue, Suite 2000,
12 Seattle 98164.

13 JUDGE BALLASH: And is there anyone else in
14 the hearing room who wishes to make a motion to
15 intervene in this proceeding? Let the record reflect
16 that there was no response.

17 The notice of hearing indicated that there
18 would also be a prehearing conference today, and what
19 I suggest we do at this point is unless there's any
20 preliminary motions -- are there any preliminary
21 motions?

22 MR. MEEK: Just two, your Honor. One is I
23 would like to resolve who are the parties to this
24 proceeding since this proceeding was split off from a

25 different docket in which the other electric utilities

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1 in the state were parties and they have not appeared.

2 I would like it -- I would like them to be deleted

3 from the list of parties in this case.

4 JUDGE BALLASH: Any comments?

5 MR. TROTTER: I think that's appropriate if

6 they did not appear today.

7 JUDGE BALLASH: Based on the fact that the
8 Commission has severed this proceeding from the RFP, I
9 see no reason not to grant counsel's request. On that
10 basis this proceeding will be restricted to the
11 parties present today.

12 MR. MEEK: Thank you. The second motion
13 would be a motion for the hearing officer to declare
14 this -- to declare discovery available in this
15 proceeding pursuant to WAC 480-09-480, subsection
16 (1)(b) and (1)(c), since (1)(b) is for any proceeding that
17 the Commission declares to be of a precedential
18 nature. This being the first complaint by any bidder
19 against the utilities I believe for -- involving the
20 evaluation of a bid in a competitive bid process. And
21 under subsection (c) because this is a complaint
22 involving claims of discriminatory and/or
23 anticompetitive conduct. Our complaint alleges that
24 Pacific engaged in anticompetitive conduct in the

25 competitive bidding proceeding.

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1 JUDGE BALLASH: Any objections to the
2 motion, Mr. Fell?

3 MR. FELL: First of all, clarification,
4 please. Could I have the citation again? I have the
5 rules before me but I got 480-09 --

6 MR. MEEK: -- -480.

7 MR. FELL: And which were the subsections,
8 please?

9 MR. MEEK: Subsection (1)(b) and (1)(c).

10 MR. FELL: May I take a few moments to read
11 through this and see what the implications are?

12 JUDGE BALLASH: It's the basic Commission's
13 discovery rules. In any utility proceeding we usually
14 invoke them. If you still want that opportunity I can
15 grant it to you.

16 MR. FELL: Based on what Mr. Meek has said,
17 his reasons for it, I think I need to take a look at
18 it. He's claiming this is precedential, presumably as
19 to other utilities, and our understanding of what's
20 going on today is that this is a complaint between
21 SESCO and Pacific Power and precedential only in the
22 context of this case. Trying to apply the outcome of
23 this case to other utilities I think enlarges this
24 case considerably, so I'm concerned about that. Also

25 concerned that I do not believe there were antitrust

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1 claims in the complaint, and so I'm troubled by that
2 as well, so if we could take a minute I would like
3 to think about this.

4 JUDGE BALLASH: That may be something we
5 can address when we get into what are the issues of
6 the case. With respect to invoking the discovery
7 rules, I don't think you need to concern yourself with
8 invoking the discovery rules under those bases. We
9 will get to what are the bases of this case later in
10 the proceeding. I'm not going to accept his reasons
11 as the basis for granting the motion, if that helps
12 you at all.

13 MR. FELL: It does. For the record, I
14 would oppose a determination that this is a matter
15 precedential to other utilities or that it is a matter
16 of antitrust implications.

17 JUDGE BALLASH: The discovery rules are
18 simply to help the proceeding and I would grant it on
19 that basis and not for the reasons stated by counsel.
20 Before I do that, are there any other comments?

21 MR. ADAMS: Your Honor, perhaps I might
22 anticipate one. That was simply -- I have no
23 objection to the discovery rules being invoked. The
24 question might come up as to whether we need any kind

25 of protective order, not knowing what the nature of

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1 the various matters to be discovered are.

2 JUDGE BALLASH: I think if it becomes
3 necessary for a protective order that parties needing
4 it can make a motion at that time.

5 MR. ADAMS: That's fine.

6 MR. TROTTER: My only concern is that the
7 rule does refer to its use in only certain types of
8 proceedings, but I'm sure it would be done -- invoked
9 by stipulation of the parties and avoid having to make
10 a determination, but in terms of its precedential
11 nature, I guess any Commission proceeding is
12 precedential to some extent. I think it's a question
13 of degree. But I think if Pacific's counsel can take
14 a look at the rule and we can invoke it by stipulation
15 I don't see a problem with that.

16 JUDGE BALLASH: Do you want to take a
17 moment to look at the rule?

18 MR. FELL: Yes, please.

19 JUDGE BALLASH: Okay, we'll take a two-
20 minute recess.

21 (Recess.)

22 JUDGE BALLASH: Let's be back on the
23 record.

24 MR. FELL: Pacific Power does not have any

25 objection to standard discovery procedures. We

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1 consider the issues here rather limited. The bases
2 for objection relate to SESCO. We don't believe that
3 there is any demonstration that there has been a
4 discriminatory behavior or discriminatory selection.
5 We do not believe that the evaluation of other bids
6 relates to the reasons for rejection of the SESCO bid
7 and we do not believe that there is a need to conduct
8 discovery with respect to the other bidders, and we
9 are concerned about that and believe that this case
10 can be limited to the SESCO bid and the SESCO
11 evaluation and rejection. We think that's important
12 in that, first of all, it avoids a lot of confidential
13 commercial data. Also avoids considerable risk to the
14 other bidders, that the basis of their bids and the
15 methods of their cost calculations, other very
16 important commercial information we think is placed at
17 risk if it's involved in discovery even under a
18 protective order. We think frankly that if their
19 information is to be used in this proceedings at
20 all they should be notified of it. And we object but
21 I'm pretty sure they would want to get involved here
22 and object on their own behalf.

23 JUDGE BALLASH: I don't think that is an
24 issue we need to address today. If once we get into

25 discovery there is a request for information you

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1 believe is not appropriate to be supplied in this
2 hearing, we can deal with it at that point, the
3 parties can make a motion, we can resolve it.

4 With respect to invoking the general
5 discovery rules, I don't see any reason not to do
6 that in this proceedings.

7 MR. FELL: We do not object to that. We
8 may want to object to unnecessary discovery. We may
9 want to object to the use of depositions, for example,
10 but the data of the standard rules seem to contemplate
11 that we can object to that and we are in favor of
12 that.

13 JUDGE BALLASH: On that basis, the motion
14 to invoke the discovery rules will be granted. Are
15 there any other preliminary matters?

16 MR. MEEK: Your Honor, I had a question
17 that is related to discovery. I don't know if this is
18 the appropriate time to raise it. But in the
19 discovery rule 480-09-480, subsection (5)(b), it states
20 that depositions will be scheduled conference and the
21 conference will be convened in Olympia by an
22 administrative law judge. I think we'll probably want
23 to or try to agree to have the depositions -- any
24 depositions in Portland with perhaps an administrative

25 law judge available by phone for resolving disputes.

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1 I don't know if that's something that needs to be
2 raised at this time, however.

3 JUDGE BALLASH: It is so noted. We've made
4 arrangements like that before, and that is usually
5 when we've had depositions in Seattle with the ALJ
6 available by phone. As long as all the parties agree
7 to it I don't have any problem with it.

8 MR. MEEK: Thank you.

9 JUDGE BALLASH: Is there anything further?
10 Why don't we be off the record at this time and we can
11 discuss a possible hearing and discovery schedule and
12 start out with maybe a discussion of what the issues
13 are in this proceeding and how many days of hearing
14 we're going to need.

15 MR. FELL: Your Honor, if we're going to go
16 off the record to discuss that, then I suppose there
17 is one thing I would like to bring up on the record
18 before we start that. It's a little difficult to
19 bring it up before we discuss the nature of the
20 complaint and what's going on here, but we filed our
21 answer based on what we described there as the primary
22 reasons for rejection, which are cost-effectiveness
23 reasons.

24 Following the -- well, during the

25 evaluation we uncovered -- came upon one report of a

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1 -- an adverse report on performance of SESCO on
2 another project. We had in the evaluation process
3 asked SESCO whether they had any such reports, any
4 reports on other projects. Wasn't couched as to
5 whether they were adverse or favorable. And we didn't
6 receive any in response to that request. Since the
7 answer has been filed we have conducted some of our
8 own inquiries about performance on other projects.
9 They do have quite a record in other states in demand
10 site resource projects. We have found that in some of
11 those situations the reports have been quite adverse,
12 at least the preliminary materials that we've seen,
13 and we believe that it's appropriate to be more
14 explicit about that than our answer is right now.

15 Our answer right now does not put any
16 emphasis on that factor. We felt at the time of the
17 evaluation that the cost-effectiveness basis was
18 sufficient for rejection and so did not pursue this
19 issue further, but at this point we believe that it is
20 significant and something that should be
21 pursued, particularly when these reports were not
22 given to us at the time. They do represent
23 after-discovered information, but we think they are
24 quite relevant and we would like to amend our answer

25 so that we are explicit on that point.

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1 JUDGE BALLASH: Will you be filing an
2 amended answer?

3 MR. FELL: Yes, and we can file one very
4 soon. We can establish a schedule for that.

5 JUDGE BALLASH: Mr. Meek?

6 MR. MEEK: Your Honor, I would note that
7 the complete evaluation we have received from Pacific
8 Power & Light to date on the rejection of the two
9 SESCO proposals consists of two words: not
10 cost-effective. That's it. That's all that they've
11 ever said. If Pacific wishes -- wished to raise this
12 matter, I certainly think it should have raised this
13 earlier. There are -- SESCO has been active in
14 numerous projects in numerous other jurisdictions. I
15 assume that Mr. Fell is referring to the Western
16 Massachusetts Electric case, because a consultant that
17 currently works, I believe, for Pacific Power & Light
18 conducted an evaluation of SESCO's operations there.
19 That report went to the Massachusetts Commission and
20 is was fully resolved in, I believe, a rate case for
21 Massachusetts Electric, but I have no objection at all
22 to all available information coming out in the process
23 of this hearing. Whether or not it is acceptable for
24 Pacific to use its selective evaluation of a -- as Mr.

25 Fell said, preliminary materials that they have seen

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1 as a basis for rejecting the bid. I would question
2 what Mr. Fell himself has admitted it was not the
3 basis for rejecting the bid.

4 JUDGE BALLASH: Are you objecting then to
5 Mr. Fell's amending the complaint?

6 MR. MEEK: Yes, I would object to his
7 amending the complaint on that grounds. In general, I
8 have absolutely no qualms about receiving information
9 about the reputation of SESCO and the projects of
10 SESCO as they have been evaluated by other public
11 utility commissions. If that had been Pacific's
12 reason, however, they should have stated that in the
13 evaluation.

14 MR. FELL: Your Honor?

15 JUDGE BALLASH: Go ahead.

16 MR. FELL: The report that Mr. Meek has
17 described was the one that we had at the time and we
18 have since uncovered information regarding projects in
19 Minnesota, New Jersey, New York, as well as
20 Massachusetts, and we think that it is important to
21 amend the answer on this subject because SESCO is
22 asking for relief that goes to requiring us to
23 negotiate a contract with them, presumably a contract
24 with them, and we believe performance is a very

25 important factor in that context.

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1 They are also asking for relief regarding
2 rate making recovery which presumes that SESCO is a
3 proper contracting party under these circumstances,
4 and they may be. We have not had any bias with regard
5 to these matters but we believe and it's clear in
6 competitive procurement situations that performance is
7 a factor that deserves serious consideration, and we
8 believe it's appropriate to complete the discovery on
9 that subject particularly in view of the fact that
10 SESCO did not produce any of this during the
11 evaluation when it was requested.

12 MR. MEEK: Your Honor, I know of no such
13 request. No such request was directed to me. In any
14 event, Mr. Fell has misstated, as he does in his
15 answer, our request for relief. Our request for
16 relief does not seek to compel Pacific to sign a
17 contract with SESCO, it seeks only to require Pacific
18 to enter into the negotiations on the basis of the
19 SESCO proposals. So Mr. Fell's second affirmative
20 defense also misstates SESCO's request for relief when
21 it states that neither Washington statutes nor WAC
22 Chapter 480-107 contemplate that the Commission will
23 have the authority to order a utility to enter into a
24 contract with a particular supplier, and the complaint

25 does not seek that.

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1 JUDGE BALLASH: Comments from Commission
2 staff?

3 MR. TROTTER: It does seem that the -- that
4 -- we are at the beginning of this case. It does
5 seem to me that Pacific should be entitled to amend
6 their complaint, and if their allegation is that the
7 information was requested and not provided, it seems
8 highly relevant. If the facts turn out that that was
9 not the case, we can deal with it at that time. It
10 also does seem to be relevant to the remedy phase as
11 well, so it does seem to me at this early stage it
12 would make much sense to limit the case as to the
13 performance issue and they ought to be permitted to
14 amend the complaint, and if that raises a motion to
15 strike from the complainant, so be it, they can deal
16 with it at that time.

17 JUDGE BALLASH: Any comments, Mr. Adams?

18 MR. ADAMS: Perhaps just some practical
19 comments. It seems to me we are getting into what are
20 the issues of the case at this point and perhaps it
21 would be helpful to just defer that particular issue
22 until at least we've had a discussion of what the
23 parties see as the issues. If it's a non-issue it
24 doesn't seem to me it's particularly relevant to be

25 amended. If it's directly an issue then obviously the

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1 company should be entitled to amend their answer.

2 JUDGE BALLASH: Would you have a problem
3 with my deferring my ruling pending udiscussion of
4 the issues, Mr. Fell?

5 MR. FELL: I do not have a problem.

6 JUDGE BALLASH: I think I would like to do
7 that then. Is there anything further before we go off
8 the record?

9 MR. FELL: No, your Honor.

10 JUDGE BALLASH: Let's be off the record.

11 (Recess.)

12 JUDGE BALLASH: Let's be back on the
13 record. While we were off the record we discussed two
14 preliminary issues which I believe needed to be
15 addressed before the hearing can go forward. These
16 two issues were raised in the answer and I will
17 clarify exactly what the issues are in a letter to the
18 parties, but I would like to state for the record that
19 basically the first issue is the authority of the
20 Commission to order negotiation for purposes of
21 reaching a contract, and I'm assuming that the
22 allegations in the complaint are true.

23 The second issue is the authority of the
24 Commission to order a rate disallowance in advance of

25 a rate case, and that issue was raised in the third

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1 affirmative defense in the answer. And what I'm
2 asking the parties to do is brief these two issues
3 with reference to federal and state law. Initial
4 briefs from all parties will be due January 15, reply
5 briefs will be due January 25. Again those deadlines
6 are receipt dates at the Commission.

7 We went on to discuss a discovery schedule
8 pending the outcome of these two issues. The parties
9 agreed that the hearing will be on March 22nd and
10 23rd. Prefile of complainant's testimony will be
11 February 16th. Prefile of respondent's testimony will
12 be February 26th. And prefile of rebuttal testimony
13 and possible testimony from staff and public counsel
14 will be March 8th. Discovery deadlines would be all
15 depositions prior to prefiling of complainant's
16 testimony would be cut off by February 5th and that
17 will include data requests. Between the 16th and the
18 26th data requests may be sent to SESCO only with a
19 four calendar day reply period. Between the February
20 26th and March 8th data requests may only be directed
21 to respondent with, again, a four calendar day reply
22 period. From March 8th until the 19th data requests
23 may be directed to complainant, public counsel and
24 staff if they file prefiled testimony and that is

25 again -- that's between March 8th and the 15th with

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1 the four-day turnaround, so that the last answer
2 would be received by March 19th. The parties agreed
3 that it will be decided whether briefs are required at
4 the close of the hearing.

5 Also we discussed an amended complaint and
6 an amended answer. It was agreed an amended complaint
7 would be filed by January 8th and that a supplemental
8 answer plus any response to the amended complaint
9 would be filed by the respondent on January 19th.

10 Is that as you understood it, Mr. Meek?

11 MR. MEEK: Yes.

12 JUDGE BALLASH: Mr. Fell?

13 MR. FELL: Yes.

14 JUDGE BALLASH: Mr. Trotter?

15 MR. TROTTER: Yes.

16 JUDGE BALLASH: Mr. Adams?

17 MR. ADAMS: Yes.

18 JUDGE BALLASH: Any corrections to any of
19 the statements I made? Okay, if there's nothing
20 further, then we will stand in recess until the next
21 day of hearing. Let's be off the record.

22 (Hearing adjourned at 10:59 a.m.)

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