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October 26, 2005

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. UE-030423
Chapter 480-107 WAC Rulemaking

Dear Ms. Washburn:

In response to the Commission's October 7 Notice of Opportunity to File Written Comments, PacifiCorp dba Pacific Power & Light Company ("PacifiCorp") hereby submits written comments on the Commission's proposed changes to Chapter 480-107 WAC, the current competitive bidding rules.

The Notice indicates that the most recent draft of the proposed rules ("Proposed Rules") was filed with the Code Reviser on October 5. With this action by the Commission, the final part of the rulemaking process is formally commenced. At this point in the process, it is difficult to incorporate any material revisions to the Proposed Rules.¹ PacifiCorp respectfully submits that this action is premature with respect to the Proposed Rules, and that further discussion and another round of informal comments would be appropriate.

PacifiCorp has participated throughout the informal rulemaking process in this proceeding, commencing with initial comments on May 16, 2003, a workshop in June 2003, a further round of comments on May 15, 2005, and participation in a second workshop at the Commission on

¹ Under RCW 34.05.340(1), a substantial variance from a proposed rule described in a published notice can be accommodated by a supplemental notice with the code reviser and a reopening of the proceedings for public comment on the proposed variance, or the agency may withdraw the proposed rule and commence a new rule-making proceeding to adopt a substantially different rule.

June 9, 2005. The informal stages of this rulemaking process attracted considerable participation by a large number of interested parties, and included a spirited and open exchange of a wide range of opinions during the most recent workshop, at which all three commissioners were present. In our view, the Proposed Rules do not take advantage of the opportunity to accomplish a long-overdue overhaul of Chapter 480-107 WAC, and do not reflect the considerable effort devoted by interested parties in this proceeding toward taking a fresh look at these rules in light of the dramatic changes in the energy industry that have occurred since the rules were originally adopted in 1989.

These comments will highlight a number of issues that warrant further consideration. Given the fundamental nature of the comments and the inability to make material revisions to the Proposed Rules at this stage of the process, PacifiCorp is not proposing specific wording changes to the Proposed Rules. Rather, PacifiCorp urges that an additional round of informal comments be permitted – and perhaps another workshop – before proposed rules are finalized for formal submission to the Code Reviser. Several participants have provided significant comments and proposed suggestions in the informal rulemaking process that do not seem to be addressed in the Staff memorandum at the September 28, 2005 Open Meeting or in the Proposed Rules. PacifiCorp therefore encourages the Commission to review the comments to date, and allow an additional opportunity to comment informally on the rules, or through an additional workshop that would enable comments to be explored further with the Commission and its Staff. In this regard, PacifiCorp is joining with several other interested parties in a separate letter filed today in this docket reiterating this suggestion.

Post-RFP Approval Process. In its May 13, 2005 comments, PacifiCorp proposed that the Commission consider a subsequent process whereby a utility could obtain regulatory approval before committing significant expenditures to developing or acquiring new resources. Such a process would *not* be a part of the RFP process, but would be identified in advance as a procedure that could be followed when developing or acquiring resources. This resource review process, which is currently in place in another jurisdiction in which PacifiCorp operates,² could be an optional procedure in Washington that would be available to utilities seeking greater certainty of cost recovery when developing or acquiring resources. Such a resource review process would also provide an opportunity for stakeholders and regulators to submit their views at a timely stage in the course of activities associated with developing or acquiring new resources, rather than after the resource is developed or acquired and rate recovery is being sought. Puget Sound Energy (“PSE”) also proposed a resource review process through an “Ex Ante Prudence Review Process” in its May 2005 comments in Docket No. UE-030311 and at the workshop held in June 2005 in this proceeding. As a follow-up to those discussions, PSE submitted draft language for a proposed rule in a filing of supplemental comments in this

² Utah Senate Bill (S.B.) 26, codified at Utah Code Chapter 54-17, “Energy Resource Procurement Act.”

proceeding.³ The Commission Staff memorandum of September 28, 2005 makes no mention of this issue, and the Proposed Rules contain no provisions addressing or commenting on this process. This is an appropriate forum for consideration of improvements to the resource acquisition process, and it would be unfortunate if the opportunity to discuss this proposal, through comments or an additional workshop, is lost through the process.

Avoided Costs. The proposed requirement under the Proposed Rules to file avoided costs annually is without foundation. As the Commission is aware, Chapter 480-107 WAC represents the Commission's implementation of PURPA in Washington. Among other things, the FERC regulations implementing PURPA generally require the utility to "not less often than every *two years*" file certain data regarding its estimated avoided costs. *See* 18 C.F.R. § 292.302(b). The Proposed Rules adopt an inflexible and confusing approach to determining avoided costs by requiring that avoided costs be "based directly on the project proposals received pursuant to [an] RFP." *Proposed WAC 480-107-055*. An inconsistent definition of avoided cost is found in proposed WAC 480-107-007, which states that avoided cost "is the minimum project proposal that meets the criteria specified in the request for proposal." Incorporating such an inflexible process into the Proposed Rules disregards the development of the wholesale electricity markets over the fifteen years since the original rule was adopted. It should be permissible to take industry information into account in determining avoided costs, rather than turning the clock back to 1989 when such information was neither available nor reliable and competitive bidding was the vehicle of choice *at the time* for calculating avoided costs. The confusion is compounded by inclusion of two new avoided cost terms – "long-term avoided costs" and "short-term avoided costs" – that are unrelated to the PURPA requirements and seem to be unnecessary. Finally, a further definition of avoided costs is found in proposed WAC 480-107-055(7), which refers to "the lowest bid among the project proposals with an acceptable evaluation." When all these competing concepts and definitions are taken into account, it is virtually impossible for a utility to determine whether it is acting in compliance with the Proposed Rules.

Flexibility Regarding Use of RFPs. As a multi-state utility, a critical issue for PacifiCorp is preserving the ability to achieve compliance with various state requirements concerning the resource acquisition process. In our May 2005 comments, we requested that any requirements imposed in this proceeding should provide sufficient flexibility to avoid conflict with requirements imposed by other jurisdictions. We further urged the Commission to preserve the elements of the existing rule which provide that the RFP process is optional, *i.e.*, following a Commission-approved RFP process should be *one*, but not the *exclusive*, means for a utility to acquire resources. The Proposed Rules move in the opposite direction, by making it clear that a utility must submit an RFP within ninety days of an integrated resource plan ("IRP") (proposed WAC 480-107-015(2)(a)), and allowing an exemption from this requirement only if such IRP

³ Letter dated July 1, 2005 from Karl Karzmar of PSE.

“demonstrates that the utility does not need additional capacity within three years.” *Proposed WAC 480-001(2)*. To eliminate any doubt about this inflexibility, the Proposed Rules *add* requirements that “prior written authorization” is necessary before exceptions are granted, and deviations from the rule “will be subject to penalties as provided by law.” *Proposed WAC 480-107-002(3)*. As the Proposed Rules are currently formulated, PacifiCorp is incapable of complying with them and still achieving compliance with similar requirements in its other jurisdictions.

Appointment of Independent Evaluator. Proposed Rule WAC 480-107-035(6) requires that a competing bidder bear the costs of an independent evaluator in the circumstance where a utility subsidiary or affiliate participates in an RFP. It seems odd that the bidder that is potentially disadvantaged by the utility’s decision to permit its affiliates to participate is forced to bear the costs of remedying the process. Such a provision would seem contrary to the encouragement of a competitive process and in fact would create a barrier to market participation. At the same time, Proposed Rule WAC 480-107-135 contains extensive discussion of the process that must be followed by the utility before its subsidiaries or affiliates may participate in the case of an RFP for conservation resources.⁴ It would seem that these requirements could be satisfied by the appointment of an independent evaluator, but the two provisions (WAC 480-107-035(6) and WAC 480-107-135) are seemingly inconsistent with one another, inasmuch as the former provision appears to require the competing bidder to bear the costs of the utility’s ability to achieve compliance with the latter provision.

All-Source vs. Single-Source Bids. It is unclear from the Proposed Rules whether all RFPs under the rules must be all-source bids. Proposed WAC 480-107-065 states that “[a]ny conservation supplier may participate in the bidding process,” and proposed WAC 480-107-015(2)(b) requires a utility to solicit bids for “electric power *and* electrical savings within thirty days of a commission order approving the RFP.” On the other hand, the definition of RFP in proposed WAC 480-107-007 refers to a solicitation of bids for “delivering electric capacity, energy, or capacity and energy, *or* conservation.”

Remedy for Rejection of All Bids. Proposed WAC 480-107-035 permits the utility to reject all project proposals, and the remedy is to review the appropriateness of that action “in the utility’s next general rate case.” On the other hand, proposed WAC 480-107-075 allows a rejected bidder to “petition the commission for reviewing the utility’s decision not to enter into a final contract.” These remedies would seem to be inconsistent, and create an ambiguity that does not exist under the current rules.

⁴ This process must also be followed if a utility generating subsidiary participates as well, under proposed WAC 480-107-015(1)(b).

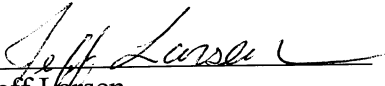
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Conclusion

PacifiCorp appreciates the opportunity to submit these written comments. As noted above, given the issues identified in these comments and PacifiCorp's remaining concerns, PacifiCorp urges that an additional round of informal comments be permitted – and perhaps another workshop – before proposed rules are formally submitted to the Code Reviser. Please direct any questions regarding these comments to either Melissa Seymour at (503) 813-6177 or Stacey Kusters at (503) 813-5351.

Very truly yours,

PacifiCorp

By 
Jeff Larsen
Managing Director, Regulatory Policy