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VIA ELECTRONIC FILING

Mark L. Johnson
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
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RE: Docket A-180513—Pacific Power & Light Company's Comments on Chapter 480-04 WAC, Public Access to Records

In response to the Notice of Opportunity to Submit Written Comments issued by the Washington Utilities and Transportation Commission (Commission) on June 8, 2018, Pacific Power & Light Company (Pacific Power), a division of PacifiCorp, submits the following written comments on the draft rules for Chapter 480-04 WAC.

WAC 480-04-020(2) (Definition of "public record"): The draft rules propose a definition of "public record" that is similar to, but differs from, the statutory definition provided in RCW 42.56.010(3). It is not clear what the structural and wording changes in the proposed rules are intended to accomplish. To avoid confusion, Pacific Power recommends revising the regulatory definition to parallel the statutory definition:

> "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by the Commission regardless of physical form or characteristics.

WAC 480-04-020(4) (Definition of "Washington Utilities and Transportation Commission"): The proposed definition of the Commission's authorities is unnecessary and incomplete. Specifically, the definition states that the Commission was established "to regulate in the public interest the rates, services, facilities, and practices of persons … in the business of supplying any utility service…." It is true that the Commission's enabling statutes identify the "public interest" as *one* of the standards by which the Commission should evaluate certain utility practices. But it is also true that the "public interest" standard does not apply to *every* activity over which the Commission has regulatory authority.[1] As such, the proposed characterization of the Commission's statutory purpose is both overstated and under-inclusive because it ignores or is silent to other statutory standards applicable to Commission regulatory oversight. Characterizing the Commission's authorities is not necessary in this particular definition, as the Commission's enabling legislation speaks for itself. Pacific Power proposes the following amendment to the proposed definition:

[1] *See, e.g.,* RCW 80.12.020(1) (Sale, lease, assignment, or other disposition of utility property subject to a "net benefit to customers" standard).

> "Washington Utilities and Transportation Commission," also referred to in this chapter as "the commission," is the agency established in Titles 80 and 81 RCW to regulate ~~in the public interest~~ the rates, services, facilities, and practices of persons engaging in this state in the business of supplying any utility service or commodity, or of the transportation of persons or property, to the public for compensation.

This definition sufficiently describes the Commission's authority and avoids the need for a more cumbersome definition that describes the full scope of the Commission's authorities and statutory standards.

WAC 480-04-095(5)(b) (Information designated as confidential):
Subsection (ii)(A) obligates the public records officer to provide written notice of the request for confidential information to the provider of the confidential information. Pacific Power is concerned about this notice mechanism.

First, the proposed rule does not identify any specific method of notice. Given the short 10-day statutory deadline for obtaining a court order, Pacific Power recommends language clarifying that the public records officer must make notice "by certified mail or other verifiable method of delivery." This provides the party who initially provided the protected information, the public records officer, and the person seeking the confidential information with a verifiable time stamp for when the 10-day statutory period begins to run. Such certainty will help to minimize disputes.

Second, the proposed rules should clarify that the 10-day period begins upon delivery of notice to the party who initially provided the protected information. Once again, the statutory 10-day deadline provides parties with an exceedingly short window to seek a court order compelling protection of their confidential information. To ensure due process rights are not impinged, and to avoid unneeded disputes, the rules should clarify that the time period begins to run on the day the delivery was made (or in the alternative, after a reasonable time for transmission and receipt, as verifiable by the delivery method per the comment above. *See, e.g., Robel v. Highline Pub. Schools Dist. 401*, 65 Wn.2d 477, 483-84 (1965); *Kuch v. Dep't of Ecology*, PCHB No. 92-218 (Apr. 28, 1994).

Third, the proposed rules state that the confidential information will be provided to the requester "unless within 10 days the commission is *served* with a court order prohibiting that disclosure…." (emphasis added). This adds a requirement not in the statute: that the party who initially provided the confidential information must serve the Commission with a court order. RCW 80.04.095 and RCW 81.77.210 simply requires a person to *obtain* a court order protecting the records as confidential within 10 days of notice. In effect, the proposed rule would require the party to obtain the court order in a time frame shorter than the 10-day statutory period and to provide actual service on the 10th day from notice. It is impermissible for rules to shorten statutory timelines in this manner. Thus, the requirement for service of the order by the 10th day should be stricken from the proposed rules and revised to mirror the statute.

Fourth, and related to our last point, proposed subsection (ii)(B) imposes an artificially strict obligation on the public records officer to produce confidential information. The proposed rule effectively obligates the public records officer to produce the confidential information on the 10th day if the Commission has not been served with a court order by the 10th day. This sets up an impossibility—the party seeking to protect the information has until the 10th day to secure a court order, but the public records officer would have to produce the information to the requester on that same 10th day. Under this construct, either the party seeking to protect the information will not be provided the full ten days to secure a court order, or the hearing officer will fail to comply with its obligation to provide the information on the 10th day.

Furthermore, neither RCW 80.04.095 nor RCW 81.77.210 requires the production of the confidential information on the 10th day if a court order is not obtained. The plain statutory language imposes no deadline on actual production, and simply states that confidential information "shall not be subject to inspection and copying [unless] within ten days … the person has obtained a superior court order protecting the records as confidential."

The proposed rules should treat the timeframes for production of confidential and non-confidential information similarly. If a court order prohibiting disclosure has not been obtained by the 10th day from notice, the public records officer should provide the requested information (or make it available for inspection) consistent with the processes outlined in proposed WAC 480-04-095(6) (Providing responsive records).

Thank you for the opportunity to comment on these proposed rules. Pacific Power looks forward to working with staff and other stakeholders to finalize these rule amendments.

Sincerely,

/s/

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