

**BEFORE THE**  
**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

Consideration of whether to file a Notice	)	DOCKET NO. A-050802
of Proposed Rulemaking (CR-102) with	)	
the Code Reviser relating to possible	)	COMMENTS OF THE INDUSTRIAL
corrections and changes to rules in	)	CUSTOMERS OF NORTHWEST
Chapter 480-07 WAC, relating to	)	UTILITIES
Procedural Rules.	)	
_____	)	

The Industrial Customers of Northwest Utilities (“ICNU”) submits the following Comments to the Washington Utilities and Transportation Commission (“WUTC” or “Commission”) in the above-referenced Docket. ICNU’s comments address the issues and questions raised by the Commission in its December 9, 2005 Notice of Opportunity to Submit Comments.

ICNU urges the Commission to adopt new rules that will provide all parties an opportunity to participate in settlement discussions, and to ensure that non-settling parties have the procedural right to fully investigate the settlement, present evidence in opposition to the settlement, cross examine witnesses testifying in support of the settlement, and obtain a Commission order addressing all disputed issues of fact and law. ICNU believes that such revisions to the Commission’s procedural rules would improve the settlement process and provide parties opposed to a settlement the right to obtain a resolution of issues that led to their participation in the proceeding. As demonstrated by the settlement process in the recent Avista rate proceeding, the new

proposed rules will be easy to implement and should not be unduly burdensome on Staff or the Commission.

ICNU also supports additional changes to the Commission's procedural rules. ICNU supports providing additional clarity regarding the designation of highly confidential information because it could be useful to prevent efforts to abuse the designation; however, any changes to the current rules should not include unduly burdensome restrictions. ICNU also supports Public Counsel's proposed changes to the ex parte rule that would promote fairness in the Commission's adjudicatory proceedings.

### **COMMENTS**

**1. The Commission Should Amend the Procedural Rules to Ensure that All Parties Can Participate in Settlement Discussions Between Staff and a Utility**

ICNU, Public Counsel, the Northwest Energy Coalition, the Washington Electronic Business and Telecommunications Coalition, the Citizens' Alliance of Washington, the Energy Project, and the World Institute for a Sustainable Humanity have proposed an amendment to the existing procedural rules that would ensure that any party in a contested proceeding has the opportunity to attend any settlement discussions between Staff and the regulated utilities. The proposed rule is necessary to ensure that Staff and the regulated utilities cannot participate in closed settlement discussions that exclude other interested parties. The current rules inappropriately permit Staff to engage in secret settlement negotiations with regulated utilities, and to resolve issues or an entire proceeding without any notice to, or participation of, other parties.

ICNU believes the regulatory process will benefit from a more open and fair settlement process. Unless the scope of their intervention has been limited, all parties in Commission regulatory proceedings should have the opportunity to participate in the resolution of the issues in the proceeding. Failure to have an open settlement process effectively excludes parties from the critical discussions that may result in the resolution of key issues in the proceeding. Exclusion of parties can also lead to harmful and poorly crafted settlements that have not fully considered all the relevant issues or interests. Finally, allowing secret settlement creates an improper incentive for a utility to settle only with Staff given its unique role in the case.

The changes are also warranted because the Commission's regulatory process materially differs from other civil litigation. Although the Commission is similar to a civil court in that it makes factual and legal rulings in adjudicatory proceedings, the Commission also exercises legislative powers.<sup>1/</sup> The Commission's ultimate responsibility is not only to resolve factual and legal disputes, but to adopt fair, just and reasonable rates that balance the interests of ratepayers and utilities.<sup>2/</sup> In addition, unlike civil litigation in which the parties can often settle their disputes without the participation of the court, the Commission must approve all settlement agreements and cannot delegate its ratemaking authority. The Commission should make every effort to ensure that it operates in a fair and open process when fulfilling these judicial and legislative functions.

---

<sup>1/</sup> See People's Org. for Wash. Energy Resources v. WUTC, 104 Wn.2d 798, 808 (1985).

<sup>2/</sup> Id.

As drafted, the proposed requirement regarding settlement discussions would apply to only Staff because of Staff's legal and practical importance in contested proceedings. Although Staff is an independent party, Staff has a unique role in adjudicatory proceedings.<sup>3/</sup> Staff does not represent any particular party, but has the purpose of assisting the Commission in balancing the interests of ratepayers and utilities.<sup>4/</sup> If Staff discusses settlement with only the regulated utilities, then there is no party present in the discussions that represents the interests of customers. Combining Staff's essentially neutral position with a utility's biased position can result in a settlement that does not fairly balance the interest of customers and the utility.

Staff's role also differs from other parties, because its resources, including personnel and time, typically far exceed all other parties, except the regulated utilities. For example, Staff is normally the only other party to a proceeding that has the resources to put on a full revenue requirements case. Therefore, it is particularly important that Staff not be permitted to enter into secret deals that resolve critical issues in adjudicatory proceedings.

ICNU is open to considering expansion of the proposed rule to apply to additional parties, if sufficient explanation can be provided to demonstrate that the rule should be expanded. However, if the rule is expanded to apply to other parties, parties with the same or substantially similar positions should not be prevented from discussing common settlement positions.

---

<sup>3/</sup> See e.g. WUTC v. Avista, WUTC Docket Nos. UE-050482 and UG-050483, Order No. 01 (Prehearing Conference Order) at n.1 (May 20, 2005) (Staff is an independent party).

<sup>4/</sup> See RCW § 80.01.030; People's Org. for Wash. Energy Resources, 104 Wn.2d at 808.

## **2. The Proposed Settlement Rule Is Not Unduly Restrictive**

The proposed rule regarding Staff's participation in settlement discussions will allow the parties in adjudicatory proceedings to conduct free and open settlement discussions. The Commission has requested comment regarding whether settlement judges would be permitted to caucus with only a limited number of parties. In addition, concerns have been raised that the proposed rule will prevent Staff from seeking to settle with regulated utilities issues that no other party has an interest in. Such concerns are not warranted.

The proposed settlement rule does not, nor is it intended to, prevent the Commission's administrative law judges from communicating with the parties. ICNU would not be opposed to adding clarifying language if other parties believe it is necessary.

In addition, the proposed settlement rule does not prevent Staff or any other party from directly engaging in bi-lateral settlement negotiations, if the other parties in the proceeding consent to such discussions. In addition, Staff or the regulated utility can seek waiver of the proposed settlement rule in the extremely unlikely event that one party unreasonably withholds consent for Staff to participate in settlement discussions with a regulated utility on issues that only concern Staff and the utility.

## **3. The Oregon Settlement Rule Has Worked Well**

The change to the settlement rules proposed by ICNU, Public Counsel and the other intervenors was modeled upon the Oregon rule regarding settlements. The Oregon rule provides that "[a]ny party may attend any settlement conference in which the

Commission staff participates.”<sup>5/</sup> The Commission has requested that interested parties compare and contrast the Oregon rule, and identify each individual proceeding in which we have participated in the settlement process in the past two or three years. Attachment A to these comments includes each Oregon contested case proceeding that ICNU has participated in over the last three years that included settlement discussions.

The Oregon settlement rule has worked well and allowed all interested parties to participate in the settlement process. The Oregon rule has also not prevented Staff or any other party from entering into partial or non-unanimous settlements. For example, in PacifiCorp’s most recent Oregon general rate case, the Oregon Staff and PacifiCorp entered into four partial settlements, three of which ICNU joined. ICNU opposed one settlement between Staff and PacifiCorp; however, ICNU was provided the opportunity to participate in the settlement discussions, conduct discovery regarding the settlement, and cross examine the witnesses regarding the factual basis underlying the settlement. In addition, the Oregon Commission did not adopt the contested settlement without resolving the issues that led to ICNU’s opposition, but reviewed ICNU’s disputed issues before issuing its final ruling.<sup>6/</sup>

The Oregon settlement rule has also not prevented the Oregon Staff from fully participating in adjudicatory proceedings. The Oregon Staff can conduct full discovery, and contact the regulated utilities regarding discovery issues. After adequate notice has been provided, the Oregon Staff has also been allowed to conduct settlement

---

<sup>5/</sup> OAR § 860-014-0085(2).

<sup>6/</sup> Re PacifiCorp, OPUC Docket No. UE 170, Order No. 05-1050 (Sept. 28, 2005).

discussions with less than all the parties. ICNU is unaware of any situations in which an intervenor has prevented the Oregon Staff from participating in bi-lateral settlement discussions on issues that only interest the Oregon Staff. The rule proposed in Washington is substantially similar to the Oregon rule and would allow the Washington Staff to conduct discovery and resolve issues that do not concern other intervenors. If the Commission has further questions regarding the Oregon rule, ICNU urges the Commission to contact the Staff of the Oregon Commission to discuss the rule.

**4. The Commission Should Make Findings Regarding All Disputed Issues of Fact or Law**

ICNU recommends that the Commission amend its existing procedural rules to ensure that parties that contest a settlement have an opportunity to fully litigate and obtain a Commission ruling on all disputed issues of law and fact. Non-settling parties should also have the procedural right to fully investigate the issues that led to their participation in the proceeding.

Under the current rules, once any two parties have entered into a settlement, the Commission is not required to allow discovery, or issue an order that resolves any issues other than whether the settlement should be adopted.<sup>7/</sup> In addition, the Commission has adopted contested settlements in the past without issuing rulings on significant issues that have been raised by non-settling parties.<sup>8/</sup> The regulatory process is harmed when the Commission does not allow parties to fully litigate and obtain meaningful resolution of their disputed issues.

---

<sup>7/</sup> WAC §§ 480-07-740(2)(c), -480-07-750.

<sup>8/</sup> E.g. WUTC v. PacifiCorp, WUTC Docket No. UE-032065, Order No. 07 (Nov. 10, 2004).

Parties opposed to a non-unanimous settlement should have the right to conduct discovery regarding the proposed settlement and its supporting evidence. Under the current rules, discovery is available as a matter of right in certain circumstances, including any proceeding that the Commission finds may change the rates of a regulated utility.<sup>9/</sup> However, once two parties have entered into a settlement that purports to resolve all the issues, parties opposed to the settlement no longer have the right to conduct discovery.<sup>10/</sup> The proposed rule would essentially ensure that the parties' discovery rights are not extinguished because certain parties have entered into a settlement. There is no reason why parties opposed to a settlement should have their rights to conduct discovery curtailed merely because two or more parties seek to resolve the proceeding pursuant to a settlement.

The Commission should amend its procedural rules to ensure that it issues a final ruling on all disputed issues of law and fact. The Administrative Procedure Act requirement for an order addressing all material issues of fact or law has not been sufficient to meet the concerns of parties in contested case proceedings.<sup>11/</sup> For example, in PacifiCorp's last general rate case, the Commission approved a settlement that included a \$15.5 million rate increase. ICNU and Public Counsel jointly supported revenue requirement adjustments that would have resulted in an overall rate decrease for PacifiCorp; however, the Commission did not find these factual and legal issues sufficiently material as to issue rulings specifically addressing most of ICNU's and

---

<sup>9/</sup> WAC § 480-07-400(2)(b)(i).

<sup>10/</sup> WAC § 480-07-740(2)(c) ("The presiding officer may allow discovery on the proposed settlement in the presiding officer's discretion.").

<sup>11/</sup> See RCW § 34.05.461(3) (order must address all material issues of fact or law).



Public Counsel's adjustments. Instead the Commission approved the settlement under the vague and ill-defined end results test, and did not resolve all issues that led to ICNU's and Public Counsel's participation.<sup>12/</sup>

## **5. Changing the Proposed Rules Should Not Dramatically Alter Contested Case Proceedings**

Adoption of the changes proposed by ICNU, Public Counsel and the other intervenors should not result in a radical transformation in adjudicatory proceedings or significant increase in the Commission's workload. The Commission's recently completed proceeding regarding Avista's general rate case demonstrates that the Commission can easily accommodate the interests of non-settling parties.<sup>13/</sup> ICNU believes that the settlement process and final order in the Avista proceeding is consistent with the proposed changes to settlement discussions and how the Commission would be required to resolve the issues of non-settling parties.

In the Avista general rate case, all parties were allowed to participate in settlement discussions with Staff. After Staff and Avista entered into a settlement agreement, the non-settling parties were provided a fair opportunity to conduct discovery on Avista's original proposal and the settlement agreement, and a full evidentiary hearing on all disputed issues was held. Finally, in the Commission's final order, the

---

<sup>12/</sup> WUTC v. PacifiCorp, WUTC Docket No. UE-032065, Order No. 06 (Oct. 27, 2004).

<sup>13/</sup> The Commission has requested comment regarding the settlement process in the recent Avista and Verizon proceedings. Notice of Opportunity to Submit Comments at 1. ICNU did not participate in the Verizon proceeding and is not submitting comments regarding the settlement process in that proceeding.

Commission reviewed and resolved most of the non-settling parties' specific issues.<sup>14/</sup> Therefore, ICNU and Public Counsel were provided all the procedural rights in the Avista proceeding that they would be entitled to under the proposed changes to the settlement rules. Since questions about settlement procedures were raised in this docket and the last legislative session, Staff and the utilities have attempted to comply with many of the requirements of the proposed rule change. The rule change simply will ensure that these practices continue.

**6. The Commission Should Expand Its Ex Parte Rules**

Public Counsel has proposed a reasonable expansion of the ex parte rules to require the Commission to report all communications with regulated utilities regarding issues that are adjudicated by the Commission, including communications that occurred prior the regulated utility's filing. Public Counsel's rule expansion would not bar such communications, but only require the regulated utility to report the communication and provide all parties an opportunity to respond. The change to the ex parte rules would protect the fairness of the Commission's proceedings by assuring that the Commission's decisions are not influenced by off-the-record-communications between decision-makers and others that occur prior to the filing of a contested proceeding.

**7. The Highly Confidentiality Designation Should Not Be Utilized to Limit the Participation of Parties in Commission Proceedings**

The Commission has solicited comments on its procedural rules regarding confidential and highly confidential documents. The current rules allow a party to

---

<sup>14/</sup> Re WUTC v. Avista, WUTC Docket Nos. UE-050482 and UG-050483, Order No. 05 (Dec. 21, 2005).

designate information as “highly confidential,” but do not include specific standards regarding access to such materials or the types of documents that can be protected. At this time, ICNU does not have any proposed changes to the rules regarding confidential and highly confidential documents. However, if any party proposes such changes and/or language, ICNU believes it would be appropriate to allow all interested parties an additional opportunity to comment.

ICNU is generally opposed to the Commission utilizing employment restrictions when authorizing access to confidential or highly confidential material in routine rate proceedings. Employment restrictions can limit the available consultants or attorneys who can gain access to the confidential material, and effectively allow the party that designates the material as confidential to prevent another party from hiring their consultants. The Commission should not allow the regulated utilities to utilize the confidentiality rules to limit the participation of intervenors. In addition, ICNU is also opposed to any efforts by the regulated utilities to restrict access to confidential information to the utility’s offices or a “safe house.” Such restrictions effectively prevent parties from utilizing the information to prepare their cases, and impose significant hardships on parties with attorneys or consultants whose principal place of business is not in the location of the utilities’ designated safe houses.

## **CONCLUSION**

ICNU appreciates the opportunity to comment on the proposed changes to the Commission’s procedural rules. ICNU believes the proposed changes to the procedural rules will significantly improve the settlement process and should not be

unduly burdensome. The Commission's recent Avista proceeding and final order demonstrate that there is no harm to Staff in requiring an open settlement process, and that the Commission can ensure that the parties have an opportunity to investigate a proposed settlement and obtain resolution of their issues.

DATED this 17th day of January, 2006.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Irion A. Sanger

Irion A. Sanger

333 S.W. Taylor, Suite 400

Portland, Oregon 97204

(503) 241-7242 phone

(503) 241-8100 facsimile

mail@dvclaw.com

Of Attorneys for Industrial

Customers of Northwest Utilities