825 N.E. Multnomah St.
Portland, OR 97232

PACIFICORP
PACIFIC POWER UTAH POWER

VIA ELECTRONIC MAIL
<records@wutc.wa.gov>

January 17, 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-050802
Rulemaking to Consider Possible Corrections and Changes in Rules in Chapter 480-07 WAC, Relating to Procedural Rules

Dear Ms. Washburn:

In response to the Commission's December 29, 2005 Notice of Opportunity to File Written Comments, PacifiCorp dba Pacific Power & Light Company ("PacifiCorp") hereby submits written comments on correcting, changing, and/or clarifying the rules in Chapter 480-07 WAC relating to procedural rules. PacifiCorp will address the numbered questions set forth in the December 29, 2005 Notice, as to which PacifiCorp has any experience or comments.

1. Adoption of the Amendments to WAC 480-07-730 and WAC 480-07-740 Proposed by Public Counsel and Others.

The Commission *should not* adopt the proposed amendments to the existing settlement rules.

A prescriptive rule, such as proposed WAC 480-07-730, is not warranted to ensure an opportunity for all parties to participate in settlement discussions. This issue has been largely addressed through the Commission's practice in recent contested cases of including settlement conferences as part of the procedural schedule. By inclusion in the formal schedule, all parties will have adequate notice of the settlement discussions and an opportunity to participate, if desired. The unique role that Staff performs in Commission proceedings should not be used as the basis for subjecting Staff to particular restrictions before commencing settlement discussions with any party. Staff certainly has a principal role in Commission proceedings, due in part to its ability to present a complete case on all the issues rather than the more limited scope of intervenors' involvement. At the same time, it is precisely because of this principal role that

Staff should not be unduly constrained by prescriptive notice requirements before commencing any discussions regarding resolution of any issues in a rate case.

PacifiCorp also urges the rejection of the proposed amendments to WAC 480-07-740. The presiding officer and Commissioners should have flexibility to determine on a case-by-case basis the amount of additional process that should be provided with respect to a partial or multiparty settlement. For example, if a settlement is reached in a particular case after the discovery process is complete, there may be very little need, if any, to conduct additional discovery on the terms of the settlement. In such a situation, the discovery efforts are generally aimed at uncovering the analysis performed by each party to determine the basis for the settlement, which is information generally not discoverable due to the protections under Rule 408 of the rules of evidence.

3. Experience under Oregon's Rules and Practice Governing Voluntary Settlements.

PacifiCorp has operated under the OPUC's rules governing voluntary settlements, OAR 860-014-0085(2) and (3), in virtually all of PacifiCorp's contested cases in Oregon during the past several years. Under those rules, Staff must provide reasonable prior notice of any settlement conference in which it intends to participate. OAR 860-014-0085(3). Any party may attend any settlement conference in which Staff participates. OAR 860-014-0085(2). PacifiCorp has taken the position under this rule that in such noticed settlement conferences, Staff cannot have separate discussions involving parties other than the utility unless the utility consents to those discussions. In PacifiCorp's experience, it will typically consent to those separate discussions once the all-party settlement conference has occurred and the participating parties have identified their settlement positions.

Since the Washington Commission began including settlement conferences in the procedural schedule in each contested case, it has been PacifiCorp's experience that the process followed in Washington has been very similar to the Oregon process. Inclusion of a settlement conference in the procedural schedule provides parties with the required notice of the conference and an opportunity to participate. Following that all-party settlement conference where the settlement positions are identified, the parties are free to have additional discussions on individual issues. Under the process followed in both Oregon and Washington, PacifiCorp has been able to achieve multi-party settlements both with and without Staff joining in such settlements. In PacifiCorp's current Washington general rate case, Docket No. UE-050684, for example, PacifiCorp achieved a settlement of net power cost issues with the Industrial Customers of Northwest Utilities. This settlement was achieved following the initial all-party settlement conference, and was achieved without Staff participation. In the same proceeding, the Company pursued follow-up settlement discussions with Staff on an issue in which no other party offered testimony, temperature normalization. While those discussions have not yet produced a stipulation, it is essential that Staff have the flexibility to pursue such discussions, particularly on issues in which other parties

have not taken a position. As noted in Item 1 above, Staff's position in a case is unique to the extent that Staff offers a complete revenue requirement case, and this uniqueness requires that Staff have the flexibility to pursue settlement of the wide range of issues on which Staff offers testimony without burdensome notice requirements.

4. Whether the Proposed Amendment to WAC 480-07-730, If Adopted, Should Apply Only to Commission Staff or to All Parties.

If the Commission were to adopt the proposed amendment to WAC 480-07-730 requiring advance notice of settlement negotiations that are to take place between a regulated company and Commission Staff, the restriction should be extended as to negotiations between the Commission Staff and *any* party to the case (not just the regulated company). The regulated company should not be prohibited from having one-on-one negotiations with Commission Staff while other parties are allowed to do so. On the other hand, if the proposed amendment were adopted, the Commission should not extend the advance notice requirement as to negotiations between any of the parties to an adjudicative proceeding other than Commission Staff.

5. Difference in Nature of the Commission's Proceedings Versus Other Civil Litigation.

Commission proceedings can be very different from civil litigation because of the number of participants in Commission proceedings with very different, and often narrow, interests. Commission proceedings are also different from civil litigation in that in most civil cases (other than in class actions), the decisionmaker is generally not obligated to inquire into the reasonableness of the settlement, *i.e.*, the terms agreed upon by the settling parties are typically not measured against some public interest standard, and the settling parties are accorded substantial discretion to fashion a settlement that meets their interests. By contrast, the Commission has the statutory duty to ensure that the rates of regulated companies are fair, just, reasonable and sufficient, and must apply a public interest standard in deciding whether to adopt a settlement. WAC 480-07-750(1).

Another difference arises with respect to the power of intervening parties to veto settlements. In civil litigation, all parties affected by an issue generally must agree to a settlement or there is no settlement. A single objecting party can insist that the matter proceed to decision. In contrast, intervening parties have more limited rights in most Commission cases, as made clear by a recent Court of Appeals decision. According to *Washington State Attorney General's Office v. WUTC*, 128 Wn. App. 818, 116 P.3d 1064 (2005), at ¶ 42, for intervenors "the only due process right is in nonarbitrary rates." Intervening parties thus should not have the right in Commission proceedings to veto settlements.

6. Propriety Under the Proposed Amendment to WAC 480-07-730 for a Settlement Judge to Caucus with One or More, but Not All, Parties.

Settlement judges should be permitted to caucus with one or more parties to a proceeding without the need to involve *all* parties.

7. Adequacy of the Requirements in RCW 34.05.461(3) in Meeting the Concerns Regarding an Order Addressing All Material Issues of Fact or Law.

The provisions of the Washington Administrative Procedures Act are sufficient to meet the concerns of non-settling parties without any need to revise WAC 480-07-740. RCW 34.05.461(3) requires "a statement of findings and conclusions, and the reasons and basis therefor, on all the *material* issues of fact, law, or discretion presented on the record...." (Emphasis added). The Commission should not be required to address "all *disputed* issues of fact, law or discretion" in its final orders. The materiality standard in the APA should be given meaning, which gives the Commission the ability to address in each case and for each settlement the issues that are material to the outcome of the case.

8. Whether Discovery Under the Proposed Amendment to WAC 480-07-740 Is an Absolute Right.

The language of the proposed revision to WAC 480-07-740 *could* be construed to confer an absolute right because it would add to the list of "[r]ights of opponents of a proposed settlement" the "right to conduct discovery." Moreover, the reference in the current rule to the presiding officer's discretion would be eliminated. In PacifiCorp's view, this interpretation should be precluded by preserving the current formulation of potential discovery in WAC 480-07-740. The presiding officer should retain the authority to limit the scope of any discovery.

9. Change in the Description of the "Highly Confidential" Designation in WAC 480-07-423(1)(b).

The description of "highly confidential" does not need to be modified. The current definition provides a sufficient distinction between "confidential" and "highly confidential" to make clear that the risks and concerns at issue – *i.e.*, a highly significant risk of competitive harm – must be significant to rise to the level of obtaining the "highly confidential" designation.

10. Circumstances Justifying Use Restrictions for Persons Given Access to Documents Designated "Confidential" or "Highly Confidential."

"Use restrictions" should apply in the case of all confidential or highly confidential information that is made available in Commission proceedings. Persons who obtain access to such materials

are able to do so only because of their participation in a Commission proceeding where such materials are filed or produced in response to data requests. The use of such materials should be for purposes of participating in that proceeding only. The current standard form of protective order contains such a limitation, and there is no need to include such a provision in Commission rules.

11. Circumstances Justifying Employment Restrictions for Persons Given Access to Documents Designated "Confidential" or "Highly Confidential."

The use of employment restrictions for persons given access to confidential or highly confidential information should be considered on a case-by-case basis. Although PacifiCorp has not had this issue arise in recent proceedings in Washington, it is a legitimate issue for the parties required to disclose the information, as the counsel and consultants who would have access to highly confidential material in a Commission proceeding are typically engaged by more than one client. While the "use" restriction limits the use of such information for purposes of that particular proceeding only, as a practical matter, a person gaining knowledge of such information is not able to "wall" it off from use in other proceedings or for other purposes.

12 and 13. Proposed Language for WAC 480-07-160 and WAC 480-07-423 Describing Identification of Confidential or Highly Confidential Information and Describing Procedure for Filing Confidential or Highly Confidential Information with the Commission.

WAC 480-07-423 currently states that "[d]esignation of documents as highly confidential is not permitted under the commission's standard form of protective order, and may only occur if the commission so orders." At the same time, WAC 480-07-423(1)(b) states that a party wishing to designate information as highly confidential "must first file a motion for an amendment to the standard protective order...." The rules should be clarified to remove any suggestion that there is a prohibition on such designations until the Commission actually issues a "highly confidential" form of protective order, as such a prohibition would unnecessarily delay making available such highly confidential information to the parties.

14. Public Counsel's August 26, 2005 Proposal to Amend WAC 480-07-310(b) Concerning Ex Parte Communications.

No basis has been shown for revising the current *ex parte* rule. As Public Counsel itself notes in its comments, "the Commission has an exemplary record of dealing with matters of *ex parte* communications and commends the Commission's sensitivity to matters that might create an impression of impropriety as well as impropriety in fact."

Public Counsel's proposed revisions to the *ex parte* rule go far beyond the stated concern, which relates to representatives of regulated companies meeting with Commissioners immediately before a filing to discuss issues and policies "when the company intends to make a related filing in fairly short order with the Commission." The actual language proposed by Public Counsel, however, offers an ambiguous standard that is not limited in scope or in time. It would be difficult for both the Commissioners and regulated companies to interpret and implement the standard offered by Public Counsel. The consequence would be a chilling effect on the routine communications that need to occur in order to keep the Commissioners and their advisors informed on an ongoing basis about a wide variety of issues related to the companies they regulate.

15. Any Observations or Concerns About Any of the Commission's Procedural Rules and Proposed Changes to Address Concerns.

PacifiCorp has no additional comments other than as identified in its August 26, 2005 comments in this docket.

Conclusion

PacifiCorp appreciates the opportunity to provide these preliminary comments, and looks forward to participating in 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 _____
Jeff Larsen
Managing Director, Regulatory Affairs