BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of a Rulemaking to Consider Possible Corrections and Changes in Rules In Chapter 480-07 WAC, Relating to Procedural Rules.	)))))))	DOCKET NO. A-050802

Comments of the NW Energy Coalition

Submitted by Senior Policy Associate Danielle Dixon

May 4, 2006

The NW Energy Coalition has focused its comments in this rulemaking on issues related to settlement procedures. Most recently, we submitted comments to the Commission on January 17, 2006 (included below for the CR-102 official record) in response to questions posed by the Commissioners and Administrative Law Judges. As stated in those comments, we believe that formal rules are necessary to ensure all parties are notified of and allowed to participate in settlement discussions that occur between UTC staff and a company in an adjudicated proceeding.

On March 2, the Commission issued a supplemental narrative regarding settlement rules proposed by Public Counsel, the NW Energy Coalition, and other consumer advocates ("Discussion of Comments Concerning Procedural Rules Governing Settlement Procedural Rules Tune-up – Docket A-050802"). That narrative concludes that the Commission's settlement practices are "working satisfactorily under the current rules" and "comments by those opposed to the amendments show that they could have

significant negative impacts on settlement practices in Commission proceedings." We disagree. While settlement discussions in proceedings over the past year seem to have improved significantly in encompassing all parties, that is no guarantee that this trend will continue.

We appreciate the Commission's proposal in its narrative to amend WAC 480-07-700 (alternative dispute resolution) to include the setting of settlement dates in the procedural schedule for an adjudicatory proceeding. This is a step in the right direction, and will codify in the rules what has been occurring in recent practice. We note, however, that the CR-102 does not appear to reflect this proposed amendment (i.e., 480-07-700 is not included in the CR-102).

We continue to believe that the settlement rules can be amended to provide more protection for all parties in an adjudicated proceeding without leading to the adverse consequences discussed in the narrative. To that end, we support the compromise language proposed by Public Counsel in its comments on this CR-102 (see Section II.B. of Public Counsel's comments). We also strongly support continued discussion of these issues so that they can be resolved in a manner acceptable to all parties. While several opportunities have been provided for parties to offer comments regarding settlement rules, none have focused on working with the parties (through mediation or otherwise) to find common ground and compromise. We believe such an approach could result in a satisfactory solution of these issues.

We appreciate the opportunity to provide these comments.

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January 17, 2005

The NW Energy Coalition appreciates the opportunity to respond to the Washington Utilities and Transportation Commission's (Commission) December 9, 2005 *Notice of Opportunity to Submit Comments*. Our comments focus on the first eight questions, which pertain to potential settlement rules. The Coalition has engaged in discussion and debate about proposed settlement rules in Commission workshops and in the Legislature. We strongly believe that formal rules rather than informal changes in practice will provide the most benefit to the Commission and parties by providing long-term certainty and a consistent framework for participation in settlement proceedings.

1. **Please comment whether the commission should consider adopting the amendments to WAC 480-07-730 and WAC 480-07-740 proposed by Public Counsel and others. The rule proposals are posted to the commission's website: http://www.wutc.wa.gov/050802.**

   The Commission should adopt the amendments to the settlement rules proposed by the NW Energy Coalition, Public Counsel, Industrial Customers of

Northwest Utilities, WeBTEC, Citizens Utility Alliance, the Energy Project, and A World Institute for a Sustainable Humanity.

It is important to note that the rule proposed to the Commission differs in several respects from the language originally proposed in House Bill 1800 (2005 legislative session). Changes reflect the proponents' efforts to address concerns raised by other parties and clarify expectations. For example, the proposed new section in WAC 480-07-730 requires notice of settlement conferences to be provided five rather than ten days in advance. In addition, Staff is tasked with providing this notice and the administrative law judge no longer plays a role. Further, the proposal defines "settlement negotiations" to specifically exclude requests for information in addition to clarification in aid of discovery. The amendment to WAC 480-07-740 no longer contains explicit language preventing the Commission from dismissing nonsettling parties from a case or restricting their participation in a proceeding.

Ultimately, the Coalition as one of the proponents of these rules is interested in ensuring a fair process (in reality and public perception) with clear expectations that are understood and followed by all parties.

2. Please evaluate the settlement process followed in the Avista proceeding (Docket Nos. UT-050482 & UG-050483) and recent Verizon proceedings (Docket Nos. UT-050814 & UT-040788). If you believe flaws existed in the process in those dockets please a) specify what the flaws were and b) whether, why, and what rule amendments are needed to correct them.

The Coalition did not participate in either of these proceedings so cannot comment directly on those processes.

The Coalition has been involved in a variety of rate cases, merger proceedings and other adjudicated proceedings before the Commission for well over a decade – many of those proceedings have included settlement discussions and partial or full final settlement agreements. In addition, several of the Coalition's member organizations have participated in proceedings before the Commission and have informed the Coalition about those processes. Through the years, we have been directly engaged in open collaborative settlement discussions, and have experienced significant frustration when Commission Staff and a company resolve key issues on their own without input from other parties.

3. Based on your actual experience, please compare and contrast Oregon's rules and practice governing voluntary settlements (OAR 860-014-0085) with the commission's rules and practice. Please identify by company, docket number, and date, any individual proceedings in Oregon in which you have been a participant in the settlement process during the past two or three years.

Senior Policy Associate Steve Weiss represents the Coalition in Oregon PUC proceedings. Every docket to which he has been a party in recent years has had settlement discussions; many, if not most, of those have resulted in partial (endorsed only by some parties, and/or including only some issues) settlements and quite a few in global settlements with all parties on all issues. Dockets have

included rate cases, rulemakings, policy dockets, integrated resource plans and utility purchase dockets.

OAR 860-014-0085 is the basis for Oregon's procedures. Every docket includes the possibility for settlement. Dates of settlement discussions are determined during the pre-hearing conference along with all other dates (for testimony, replies, etc.). In contrast, settlement discussions at the Commission arise on an ad hoc basis – in terms of the timing of those discussions (in at least one recent case actually preceding the first prehearing conference) as well as who initiates the conversation.

In Oregon, all parties in the docket are notified of settlement discussions in which the staff is included, and all may attend. Such a requirement does not currently exist in Washington. In settlement discussions in both states, no party may disclose the content of those discussions, nor may the positions of any party in settlement discussions be cited by other parties in testimony.

Similar to Washington, once a settlement is reached in Oregon, the parties to the settlement submit joint testimony in its support. Other parties in Oregon then have the opportunity to rebut that testimony. By putting the settlement into testimony, its content is memorialized. Then once adopted by the Commission it becomes part of the final Order.

Recent dockets (with settlement discussions) in Oregon in which the Coalition has participated include UE 126 (2001 – Portland General Electric decoupling), UG 143 (2001 Northwest Natural decoupling), UM 1209 (2004 - Purchase of PacifiCorp by Mid-American), UM 1056 (Ongoing – Integrated

Resource Plan requirements), UM1182 (Ongoing - Competitive bidding rules), and PacifiCorp and Portland General Electric integrated resource plans.

The Coalition also actively participates in proceedings of the Bonneville Power Administration (BPA). For comparison purposes, BPA also incorporates settlement discussions into its official calendar for all its rate proceedings. Mr. Weiss has represented the Coalition in every BPA rate case for the past dozen years or so, and participated in settlement discussions. When BPA staff attends, meetings must be noticed and open to all official parties. In the most recent completed rate case (WP-02), BPA staff and many utilities agreed to a partial stipulation that was incorporated into those parties' (including BPA staff's) final testimony. The Coalition submitted testimony opposing that settlement. Settlement discussions are ongoing in the current (WP-07) rate case as well.

4. Please state whether the amendment to WAC 480-07-730 proposed by Public Counsel and others, if adopted, should apply only to commission staff or to all parties.

The proposed rule intentionally focused on discussions between a company in an adjudicated proceeding and regulatory staff at the Commission. Staff has significant resources to dedicate in an adjudicated proceeding, and by virtue of its role as the regulator, Staff also has more sway with the regulated company (at least in perception if not always in reality). In addition, the Commission seems best positioned to affect interactions between Staff and a regulated company in settlement discussions as the Commission ultimately oversees its Staff, as opposed to other parties to a proceeding.

5. Please describe how the nature of the commission's proceedings differs materially from other civil litigation insofar as settlements and the settlement process is concerned, and how any differences should be reflected in the settlement rules or practice.

While I represent the Coalition in adjudicated and other proceedings before the Commission, I am not an attorney and thus do not have the background necessary to respond to this question.

6. Would it be improper under the proposed amendment to WAC 480-07-730 for a settlement judge to caucus with one or more, but not all, parties to resolve issues between two or more parties? Should rules restrict parties' ability to caucus with one or more other parties, but not all, during a scheduled settlement conference?

The proposed rule pertaining to settlement discussions intends to focus on the role of regulatory staff at the Commission. The intent is not to restrict a settlement judge from discussing issues with one or more parties in hopes of resolving disputes. For example, in the 2002 Puget Sound Energy rate case, often praised as an example of how an open settlement process works effectively to everyone's benefit, the parties requested Judge Wallis help mediate in the collaborative focused on creation of a power cost adjustment. The Coalition is open to further clarifying the language in the proposed rule to focus specifically on regulatory staff, or to explicitly exclude application to settlement judges.

Similarly, parties should be allowed to caucus with one another during a scheduled settlement conference, and this also already occurs in practice. For

example, during the 2004 Puget Sound Energy rate case, all of the parties except PSE together discussed proposals raised by the Company to determine whether additional settlement discussions would be productive.

7. Concerning the proposed amendments to WAC 480-07-740, do the requirements in RCW 34.05.461(3) meet the concerns of the proponents for an order addressing all material issues of fact or law? If not, please discuss why the statute does not address the concerns.

The current requirements do not fully meet the concerns of the proponents. The purpose of the proposed rule is to clarify the rights of parties when a non-unanimous settlement is filed.

8. Is discovery under the proposed amendment to WAC 480-07-740 intended to be an absolute right? Would an absolute right allow abuse of the process and irrelevant discovery? Why should parties opposing a settlement have discovery rights greater than those afforded under the discovery rules during other stages of a proceeding (*i.e.*, why should the commission's discretion to control discovery, considering the needs of the case be constrained, when a settlement is filed)?

Discovery is not proposed as an absolute right. One could imagine a proceeding in which no party has the right to discovery. However, the proposed rule clarifies that parties who do not enter a settlement agreement retain their rights and not have those removed simply because other parties have agreed to a joint position on one or more issues. The rights of parties who do not enter partial

settlement agreements should be neither expanded nor limited beyond the discovery rights afforded to all parties as part of the adjudicated proceeding.