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April 24, 2023

SENT VIA WUTC WEB PORTAL

Amanda Maxwell
Executive Director and Secretary
Washington Utilities and Transportation Commission
621 Woodland Square Loop SE
Lacey, WA 98503

Re: *Washington Utilities and Transportation Commission v. PacifiCorp d/b/a Pacific Power & Light Company*, Docket UE-210829,
Response of Public Counsel Objecting to Intended Assignment of Presiding
Administrative Law Judge

Dear Director Maxwell:

The Public Counsel Unit of the Washington State Attorney General's Office ("Public Counsel") respectfully submits this response to the April 17, 2023, Notice of Intended Assignment of Presiding Administrative Law Judge¹ (Notice) in the above referenced Docket. The Notice states that the Washington Utilities and Transportation Commission's (UTC or Commission) intends to assign Administrative Law Judge (ALJ) Andrew O'Connell as the presiding judge in this Docket, and provides parties the opportunity to object to the assignment, given the recent promotion of ALJ O'Connell's spouse Elizabeth O'Connell to Deputy Director of Energy in the Regulatory Services Division. As discussed further below, Public Counsel objects to the assignment and declines to waive the conflict of interest arising from the spousal relationship between the intended ALJ and a high-level manager of the UTC Staff.

Washington's Administrative Procedure Act (APA) at RCW 34.05.425(3) provides that "[a]ny individual serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is disqualified." Additionally, the Washington's Code of Judicial Conduct

¹ Notice of Intended Assignment of Presiding Administrative Law Judge, Docket UE-210829 (issued Apr. 17, 2023).

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provides further guidance.² The Code provides in Comment [1] to Rule 2.1 that “judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification.”³ Rule 3.1 provides that “when engaging in extrajudicial activities, a judge shall not . . . participate in activities that will interfere with the proper performance of the judge’s judicial duties,” “participate in activities that will lead to frequent disqualification of the judge,” or “participate in activities that would undermine the judge’s independence, integrity, or impartiality.”⁴

The American Bar Association’s (ABA) Model Code of Judicial Conduct, Rule 2.11 “Disqualification” provides further guidance as follows:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

- (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
- (b) acting as a lawyer in the proceeding;
- (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
- (d) likely to be a material witness in the proceeding.⁵

The Washington APA, Washington Code of Judicial Conduct, and ABA Model Code of Judicial Conduct all contemplate the potential for impartiality that may arise from a close relationship between an individual serving in a judicial capacity with a litigant in a proceeding over which the individual presides. According to these sources, such a conflict should be avoided and is a basis for disqualification for the judicial officer.

² Admin. Off. of Cts., Washington State Code of Judicial Conduct, Application, § I. Applicability of this Code, Comments [1] and [2] at 5 (available at <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Code%20of%20Judicial%20Conduct%20Task%20Force%20Committee/CodeOfJudicialConduct.pdf>) (last accessed Apr. 24, 2023).

³ *Id.* at Rule 2.1, Comment [1] at 14.

⁴ *Id.* at Rule 3.1(A)–(C) at 28.

⁵ Am. Bar Assn., ABA Model Code of Judicial Conduct, Rule 2.11 (available at https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_11disqualification/).

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The UTC Staff is an active party in the PacifiCorp Clean Energy Implementation Plan (CEIP) Docket UE-210829. As the Deputy Director, Energy, Ms. O’Connell oversees the Energy Regulation, Energy Regulation Rates and Tariffs, and Conservation and Energy Planning sections. Staff members are in Ms. O’Connell’s chain of command as they are within the Energy Section of Regulatory Services. It does not appear that there are any peer level managers other than the Director of Regulatory Services to step into Ms. O’Connell’s supervisory role for any adjudication that may involve the same or similar issues present in this Docket.

All CEIP dockets are handled by the Energy Section of the Regulatory Services Division, which is described on the Commission’s website as follows:

The purpose of the Regulatory Services Division is to conduct economic regulation of investor-owned utilities, solid waste collection companies, household goods movers, private passenger ferries, excursion boats, and bus companies. Activities include: reviewing company filings; petitions and applications; inspecting plant and equipment; auditing budgets and reports; making recommendations to the commission on specific filings; and presenting testimony and exhibits in formal hearings. This division has four sections: Energy, Telecommunications, Water and Transportation, and Conservation and Energy Planning.⁶

Thus, one may infer from this description that as Deputy Director of Energy, Ms. O’Connell does not supervise work in the other non-energy sections of Regulatory Services. Thus, the non-energy cases from other Sections of Regulatory Services would not involve a conflict of interest if assigned to ALJ O’Connell.

ALJ O’Connell’s potential assignment in this case raises a conflict of interest for future cases as well. CEIPs are required filings for electric investor-owned utilities (IOUs) every four years pursuant to Washington’s Clean Energy Transition Act (CETA) and provide highly detailed information regarding energy resources that tie into cost recovery filings, including general rate cases (GRC), accounting petitions, and other tariff revision filings.⁷ ALJ O’Connell has regularly served as the ALJ in GRCs and other adjudications involving the large IOUs. Yet, the Notice states only that “Ms. O’Connell will not be assigned to the Company’s Revised CEIP, and she will not be involved in any discussion of the merits of this proceeding.”

The conflict of interest presented here is not one that may effectively be resolved through screening processes. The structural relationship here is between a high-level manager of a UTC division from which significant adjudicatory work is presented and where her spouse may be assigned as the presiding officer. This arrangement sets up regular conflicts of interest to arise frequently.

⁶ Utils. & Transp. Comm’n, *Commission Structure, UTC Division, Regulatory Services*, <https://www.utc.wa.gov/about-us/about-commission/commission-structure> (last accessed Apr. 24, 2023).

⁷ RCW 19.405.060(1); WAC 480-100-640(1).

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Furthermore, as mentioned above, CEIPs are pervasive and broad ranging filings that tie into cost recovery issues. There is considerable other work being done before the Commission by the IOUs that relates to the information in the CEIPs. Therefore, it is not enough that Ms. O'Connell would be screened from this PacifiCorp CEIP or any discussions related to it, because there may be other dockets that involve the same or related information involving not only PacifiCorp, but other electric IOUs grappling with similar issues. The Notice does not adequately explain how the UTC would handle these related conflicts of interest.

Accordingly, Public Counsel does not waive the conflict of interest and objects to the intended assignment of ALJ O'Connell because of his spousal relationship with the Deputy Director of Energy Ms. O'Connell. Ms. O'Connell serves in the high-level management position that supervises all of the staff members working not only on this case, but all of the adjudicatory work in the Energy Section that eventually will go before an ALJ and the Commission.

Sincerely,

/s/ *Ann Paisner*

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ANHP/CM

Enclosure

cc: Master Service List (via E-mail)
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