

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

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| WASHINGTON UTILITIES AND | ) | DOCKET UE-061546 <sup>1</sup>          |
| TRANSPORTATION           | ) |  |
| COMMISSION,              | ) | ORDER 05                               |
|                          | ) |  |
| Complainant,             | ) |  |
|                          | ) | ORDER REQUIRING PUBLIC                 |
| v.                       | ) | COUNSEL TO SHOW CAUSE                  |
|                          | ) | WHY PUBLIC COUNSEL SHOULD              |
| PACIFICORP D/B/A PACIFIC | ) | NOT BE ADMONISHED FOR                  |
| POWER & LIGHT COMPANY,   | ) | FAILURE TO APPEAR AT                   |
|                          | ) | HEARING                                |
| Respondent.              | ) | <b>(To be filed by March 21, 2007)</b> |
|                          | ) |  |
| .....                    | ) |  |

**MEMORANDUM**

1 The Washington Utilities and Transportation Commission (Commission) conducted a public hearing in Walla Walla, Washington, on March 2, 2007, as requested by the Public Counsel Section of the Washington Office of the Attorney General, represented by Assistant Attorney General Simon ffitich (Public Counsel). The purpose of the hearing was to take comment from members of the public concerning a proposed increase in the rates PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp) charges its customers for electric service provided in Washington. Public Counsel failed to appear. By this Order, the Commission requires Public Counsel to show cause why he should not be admonished for violating RCW 80.01.100 and RCW 80.04.510, and for his consequent failure to act with reasonable diligence and promptness in representing his client, as required by the Rules of Professional Conduct.

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<sup>1</sup> By Order 04, entered on February 9, 2007, the Commission consolidated into this proceeding Docket UE-060817, an accounting petition filed by PacifiCorp concerning the capitalization of certain transition costs associated with the company’s acquisition by MidAmerican Holdings Company.

**Applicable Statutes and Rules.**

2 RCW 80.01.100 states in pertinent part: “It shall be the duty of the attorney general to represent and appear for the people of the state of Washington and the Commission in all actions and proceedings involving any question under this title.” This exact language is repeated in RCW 80.04.510. Simon ffitich, Assistant Attorney General with the Public Counsel Section of the Washington Office of the Attorney General, Seattle, Washington, represents people of the state of Washington in this proceeding.

3 This is an adjudicative proceeding governed by chapter 34.05 RCW, the Administrative Procedure Act (APA). RCW 34.05.440(2) provides:

If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, other than failing to timely request an adjudicative proceeding as set out in subsection (1) of this section, the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.

The Commission’s corresponding procedural rule, WAC 480-07-450, states in pertinent part: “The commission may dismiss a party or find a party in default for failure to appear at the time and place set for hearing.”

4 The APA preserves authority not counter to its express requirements.<sup>2</sup> In furtherance of that authority, the Commission promulgated WAC 480-07-345, Appearance and Practice before the Commission. This rule provides two bases to limit appearance and practice. One is failure to show the requisite skill.<sup>3</sup> The other is the Commission’s determination that a party’s representative has failed to conform to the Rules of Professional Conduct.<sup>4</sup>

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<sup>2</sup> RCW 34.05. “Nothing in this chapter may be held to . . . limit or repeal additional requirements . . . otherwise recognized by law.”

<sup>3</sup> WAC 480-07-345. . . . “The presiding officer may refuse to allow a person who does not have the requisite degree of legal training, experience, or skill to appear in a representative capacity.”

<sup>4</sup> WAC 480-07-345. . . . (3) Unethical conduct is not permitted. Persons appearing in proceedings before the commission in a representative capacity must conform to the standards of ethical conduct required of attorneys before the courts of Washington. Representatives are required to be familiar with, and conform to, the requirements of the rules of professional conduct that are part of the Washington court rules. If any representative fails to conform to those standards, the commission may exclude the person from the

5 Rules of Professional Conduct (RPC) 1.3 states: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Comment [2] to the rule states: “A lawyer’s work load must be controlled so that each matter can be handled competently.” Failure by counsel to appear at the time and place set for hearing, particularly a hearing requested by absent counsel for the benefit of his client, appears to violate RPC 1.3.

## II. Pertinent Facts and Circumstances.

6 Docket UE-061546 is a general rate proceeding concerning revised tariff sheets filed by PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp) on October 3, 2006. PacifiCorp seeks to increase its rates to its electric customers in Washington by approximately \$23.2 million or 10.2 percent. The Commission suspended operation of the tariffs by Order 01, entered on October 10, 2006, and set the matter for hearing.

7 The Commission conducted a prehearing conference on October 17, 2006, before presiding Administrative Law Judge (ALJ) Dennis J. Moss. Assistant Attorney General Simon ffitch, Public Counsel, entered his appearance for the people of the state of Washington and participated in the prehearing conference via teleconference.

8 During discussions concerning a procedural schedule proposed by Public Counsel and other parties, Mr. ffitch requested assurance that the presiding ALJ understood Public Counsel would report back to the presiding ALJ with a proposed date for a public hearing at which comments could be taken from Public Counsel’s statutory client, the people of Washington state.<sup>5</sup> ALJ Moss responded: “My notes here say Public Counsel will recommend a date by November 17th.”<sup>6</sup>

9 Mr. ffitch responded: “That’s correct, and we will consult with the company and the Energy Project and anybody else who is interested and with Commission staff on that.”<sup>7</sup>

10 On January 17, 2007, Mr. ffitch sent an e-mail to ALJ Moss’s support staff stating:

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proceeding, may report the ethical violation to any appropriate licensing authority, and may refuse to permit the person to appear before it in a representative capacity in any future proceeding.

<sup>5</sup> This means, as a practical matter, PacifiCorp’s residential and small commercial customers.

<sup>6</sup> Transcript 27:18-19.

<sup>7</sup> Transcript 27:20-23.

Public Counsel and PacifiCorp have conferred regarding setting a public comment hearing in this matter. We jointly recommend that the hearing be held in Walla Walla in the week of February 26. Could you please explore with the judge whether this is acceptable to the Commission and workable with schedules?

- 11 Also on January 17, 2007, PacifiCorp, the Energy Project, and Staff filed a proposed settlement of the rate proceeding and requested a prehearing conference to establish a procedural schedule for its consideration. Public Counsel joined ICNU in a letter filed January 22, 2007, stating their intentions to oppose the settlement and the request by the settling parties to change the procedural schedule.
- 12 On January 24, 2007, Mr. ffitch sent an e-mail to ALJ Moss's support staff, with copy to ALJ Moss, stating:

In advance of today's prehearing conference, which focuses on scheduling, I am just checking to see if you have any update on our joint PC/PacifiCorp request for a Walla Walla public comment hearing the week of February 26.

If you have some information, we could go ahead and address this at today's pre-hearing.

- 13 Later on January 24, 2007, the Commission conducted a prehearing conference to consider both the settling parties' request for a change to the procedural schedule and Public Counsel's request concerning setting a date and location for a public hearing. ALJ Moss announced from the Bench that the Commission, as requested by Public Counsel, would set a public hearing in Walla Walla on March 2, 2007, at 4:00 p.m. at a location to be determined following investigation of available facilities.<sup>8</sup>
- 14 On January 26, 2007, ALJ Moss's support staff sent an e-mail to Public Counsel, as follows:

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<sup>8</sup> Although not pertinent here, we note for the sake of completeness that the Commission declined the settling parties' request to change the procedural schedule. The settling parties later withdrew their agreement from consideration.

I have a location reserved for the public hearing on March 2 at 4:00 p.m., in the PacifiCorp matter, Docket UE-061546. The location is as follows:

Walla Walla Community College  
Conference Rooms B & C  
500 Tausick Way  
Walla Walla, WA 99362-9267

I understand the college is located right next to the airport, so should be fairly easy to find.

Please let me know if you have questions.

Mr. ffitch responded by return e-mail with his assessment that the arrangements “sound good.”

- 15 The Company immediately began notifying its customers via bill inserts of the date, time and location of the public comment hearing. The Commission issued a formal notice of the public comment hearing on February 1, 2007.
- 16 Having established and given notice of a date, time and location for the public comment hearing, all in accordance with Public Counsel’s requests, the Commission turned its attention to travel arrangements. The logistics involved in conducting a public comment hearing in Walla Walla are difficult. Walla Walla is distant from the Commission’s office in Olympia and Public Counsel’s office in Seattle. There are limited opportunities for travel via commercial carrier. Using the available commercial options would have required overnight stays and associated per diem expenses for Commissioners, several Commission employees, and other incidental expenses. The Commission analyzed these costs relative to those of a charter flight arranged with the Washington State Patrol which, albeit expensive, would eliminate much of the incidental costs of commercial travel. Considering a passenger manifest that included Commissioners, Commission Staff *and Public Counsel*, use of a Washington State Patrol charter flight proved to be slightly more cost effective than commercial travel. The Commission, therefore, chartered the Washington State Patrol aircraft and reserved a seat on the aircraft for Public Counsel. The flight was scheduled for March 2, 2007, with departure at 1:45 p.m.

- 17 On March 2, 2007, at approximately 1:00 p.m., Mr. ffitch called Commission Chairman Mark Sidran's Executive Assistant and informed her that he was involved in discussions concerning another case pending before the Commission and had elected not to attend the public comment hearing in Walla Walla. Mr. ffitch did not arrange for another Assistant Attorney General to appear in his stead. Thus, the members of the public who attended the hearing to give their statements to the Commission and, in some cases, who would have been directed by the Commission to confer with Public Counsel concerning questions they had about this proceeding, were denied the benefit of having the Attorney General appear for and represent them as he is required to do by law and the Rules of Professional Conduct.
- 18 The Commission, considering the facts and law discussed in this Order, finds good and sufficient reason to require Public Counsel to show cause why he should not be admonished on the record of this proceeding for violating his statutory duty under RCW 80.01.100 and 80.04.510, and RPC 1.3.

**ORDER**

- 19 THE COMMISSION ORDERS Public Counsel to file with the Commission no later than the close of business on March 21, 2007, his sworn statement showing cause why the Commission should not admonish him on the record of this proceeding for his failure to appear, as discussed in the body of this Order.

DATED at Olympia, Washington, and effective March 16, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner