

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

WASHINGTON UTILITIES AND	)	DOCKET UE-090205
TRANSPORTATION COMMISSION,	)	
	)	
Complainant,	)	ORDER 08
	)	
v.	)	
	)	ORDER CLARIFYING CONTENT
PACIFICORP D/B/A PACIFIC	)	OF TESTIMONY IN SUPPORT OF
POWER & LIGHT COMPANY,	)	SETTLEMENT
	)	
Respondent.	)	
	)	
.....	)	

1     **PROCEDURAL HISTORY.** On February 9, 2009, PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp or Company) filed with the Washington Utilities and Transportation Commission (Commission) revisions to its currently effective Tariff WN U-74. The stated effective date of the tariff revisions is March 11, 2009. The proposed revisions would implement a general rate increase of \$38.5 million, or 15.1 percent.

2     On August 25, 2009, all parties filed a Settlement Stipulation (Settlement) resolving all disputed issues in this case. In conjunction with the Settlement, the parties indicated that they would be filing testimony in support of the Settlement on September 2 and 3, 2009. On September 3, 2009, the parties advised the Commission that due to unforeseen circumstances, they would be unable to file testimony until September 10, 2009. On September 9, 2009, the Commission’s regulatory staff (Commission Staff or Staff)<sup>1</sup> filed a motion for prehearing conference to help the parties understand the appropriate evidence to file in support of the Settlement and

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<sup>1</sup> In formal proceedings, such as this, the Commission’s regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to he proceeding. There is an “*ex parte* wall” separating the Commissioners, the presiding ALJ, and the Commissioners’ policy and accounting advisors from all parties, including regulatory staff. *RCW 34.05.455*.

advising the Commission that Staff could not file testimony until this issue is resolved. On September 10, 2009, the Industrial Customers of Northwest Utilities (ICNU) filed a response to Staff's motion. On September 11, 2009, Staff filed a reply.

3 **MOTION FOR PREHEARING CONFERENCE.** Staff requests that the Commission convene a prehearing conference to clarify the content of testimony that parties should file in support of the Settlement. Staff states that the Settlement requires each party to cooperate in presenting evidence in support of the Settlement. Staff notes that despite detailed discussions among the parties, including the participation of a settlement Administrative Law Judge (ALJ), Ann Rendahl, the parties are at an impasse regarding what evidence on revenue requirements and rate design/rate spread is required.

4 Staff believes that the Commission requires each party to describe the evidence and issues they examined and the efforts they expended to test the Company's direct case without disclosing each party's conclusions or rulings. Staff asserts that this position is consistent with the recent guidance provided in the Puget Sound Energy general rate case although this belief is not unanimous.<sup>2</sup> Therefore, the issue to be resolved is whether the Commission requires not only the foregoing, but also requires each party to identify specific errors or omissions in the Company's case, set forth alternative analysis, or litigation positions.

5 Staff states that it cannot file testimony until this issue is resolved because to do so would breach the Settlement's pledge of cooperation in the preparation of testimony. Therefore, Staff requests a prehearing conference be convened as soon as practical to hear from the parties and provide parties assistance on this issue.

6 In response, ICNU supports Staff's request for a prehearing conference to resolve the issue of the appropriate content of settlement testimony. ICNU states that its goal is to provide a full record of process and negotiation for the Commission's consideration. ICNU also proposes that the settlement testimony include the analysis performed by ICNU's experts including the initial disagreements between the parties,

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<sup>2</sup> *Washington Utilities & Transportation Commission v. Puget Sound Energy*, Dockets UE-090704 and UG-090705 at TR. 27.

the process of analysis, and the reasons why the Settlement addresses ICNU's concerns. ICNU argues that its approach to settlement testimony incorporates the guidance recently provided in the Puget Sound Energy general rate case and includes the analysis of its experts.<sup>3</sup>

7 In reply, Staff notes that the Commission's rules do not require adoption of ICNU's approach. Staff also argues that the Settlement in this case and the recent guidance in the Puget Sound Energy general rate case support Staff's position.<sup>4</sup> In addition, Staff contends that ICNU's approach would foster adversity between the parties.

8 **COMMISSION DISCUSSION AND DECISION.**<sup>5</sup> Staff and ICNU have done a commendable job of framing the issue for resolution in their pleadings. The Commission concludes that it would conserve Commission and party time and resources if this issue is addressed as expeditiously as possible so that all parties can file their testimony in support of the Settlement. Accordingly, the Commission addresses the substantive issue posed in the motion in this Order and clarifies the Commission's expectations regarding the appropriate content of testimony in support of a settlement without convening a prehearing conference.

9 Under WAC 480-07-750(1), the Commission may "approve settlements when doing so is lawful, when the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the commission."<sup>6</sup> According to WAC 480-07-740(2), the settling parties must file supporting documentation sufficient to demonstrate to the Commission that the settlement is consistent with law and the public interest and appropriate for adoption. Supporting documentation should include a narrative outlining the scope of the settlement, and its principal aspects, a statement from the parties why the

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<sup>3</sup> See n. 1.

<sup>4</sup> *Id.*

<sup>5</sup> This decision was drafted after consultation with Commissioners regarding both the procedural approach to address the outstanding issue and the substantive content of issue resolution.

<sup>6</sup> WAC 480-07-750(1).

settlement satisfies their interests and the public interest, and a summary of legal points that bear on the settlement.<sup>7</sup> Supporting documentation may be in the form of supporting prefiled testimony as is the convention in settlements addressing issues in a general rate case. Each party must present a witness to testify in support of the settlement to answer questions concerning the settlement's details and its costs and benefits.<sup>8</sup>

10 For example, testimony accompanying a settlement needs to be more than a simple recitation that a settlement “is consistent with the public interest.” Framed and informed by the evidence on file when agreement is reached, supportive testimony needs to fully describe and explain the settlement's terms and conditions and *why* each party believes that those terms and conditions satisfy their individual interests and the public interest. Bald assertions of fact would not satisfy the requirements stated above.<sup>9</sup>

11 In its motion, Staff asserts that it interprets parties' obligations in testimony in support of settlements to require each party to “describe the evidence and issues they examined and the efforts they expended to test the Company's direct case.”<sup>10</sup> However, Staff argues that parties' obligations in settlement testimony do not extend to identifying specific errors or omissions in the Company's case, providing alternative analysis, or litigation positions. Staff contends that this approach is consistent with the guidance provided in the pending Puget Sound Energy general rate case.<sup>11</sup>

12 On the other hand, ICNU argues that settlement testimony should also include a full record of process and negotiations including the initial disputes between the parties, their analysis of the issues, and why the settlement satisfactorily resolves all issues.

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<sup>7</sup> WAC 480-07-740(2)(a).

<sup>8</sup> WAC 480-07-740(2)(c).

<sup>9</sup> For example, a party should not simply state the negotiated rate of return, but should mention the type of analysis performed to reach that number.

<sup>10</sup> Staff Motion for Prehearing Conference, at 2, ¶ 3.

<sup>11</sup> *See* n. 1.

- 13 The Commission finds that Staff's interpretation of our expectation of the content of testimony in support of settlements is correct. Our rules do not require that testimony filed in support of a settlement go so far as to divulge a party's final litigation positions or the process and details of settlement negotiations. Such disclosures would, no doubt, have a chilling effect on the settlement process. For this reason, the Commission concludes that ICNU's interpretation of the appropriate content for settlement testimony goes too far.
- 14 As to ICNU's other points, we fully expect a party's testimony to address the issues identified in the settlement. However, we do not believe it necessary to provide details as to the precise analysis conducted by the party in reaching its conclusions. If useful to its presentation, a party could include a short summary of the analytical tools used to address an issue, but this would not be necessary unless the party's methods or analysis were unconventional in one form or another. Nor is it necessary to specifically address the errors and omissions in the Company's initial filings.<sup>12</sup> The Commission can assume that the parties held positions different from those held by the Company on the issues joined by the agreement. We see no need to openly criticize another parties' testimony in the process of presenting a full party settlement. Finally, should the Commission require additional information to fully understand a settlement's terms, conditions or consequences, it may request such information before, during or after the settlement hearing.
- 15 In summary, it is laudable that the parties were able to reach a settlement of all disputed issues that adequately addresses all their concerns and maintain support for that settlement despite a dispute regarding the appropriate content of the testimony in support of that agreement. At this juncture, the Commission concludes that parties should focus on preparing testimony *supporting* the Settlement<sup>13</sup> and with the clarification provided in this Order, the Commission is optimistic that the parties will be able to do so.

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<sup>12</sup> This topic was recently addressed in the context of the Puget Sound Energy general rate case wherein the Commission, through ALJ Dennis Moss, confirmed the Commission's position on this issue. (For a full citation to the Puget Sound Energy general rate case, *see* n. 1).

- 16 While the Commission finds it unnecessary to convene a prehearing conference to address this issue at this time, this ruling clarifying the Commission's expectations for the content of testimony supporting a settlement does not preclude a party from reiterating a request for prehearing conference should any ambiguity remain.

Dated at Olympia, Washington, and effective September 15, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

PATRICIA CLARK,  
Administrative Law Judge

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<sup>13</sup> WAC 480-07-740(2). Testimony citing specific errors or omissions, litigation positions, and alternative analysis is more akin to "traditional" responsive testimony and is inconsistent with the purpose of this rule which is simply to support the terms and conditions of a settlement..