

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

WASHINGTON UTILITIES AND)	DOCKET UE-061546 ¹
TRANSPORTATION)	
COMMISSION,)	ORDER 06
)	
Complainant,)	
)	
v.)	ORDER ADMONISHING PUBLIC
)	COUNSEL FOR FAILURE TO
PACIFICORP D/B/A PACIFIC)	APPEAR AT HEARING
POWER & LIGHT COMPANY,)	
)	
Respondent.)	
.....)	

MEMORANDUM

- 1 The Washington Utilities and Transportation Commission (Commission) conducted a public hearing in this proceeding 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, principally ratepayers, 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, whose statutory duty it is to represent the ratepayers’ interests, failed to appear at the hearing.²

- 2 By Order 05, entered on March 16, 2007, the Commission required 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

¹ 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.

² RCW 80.01.100 and RCW 80.04.510 provide: “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.”

promptness in representing his client, as required by the Rules of Professional Conduct.³ Order 05 includes detailed discussions of the law and facts that bear on this matter, which will not be repeated here.

3 Briefly, however, on January 24, 2007, the Commission conducted a prehearing conference before Administrative Law Judge Dennis J. Moss 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. Judge Moss stated on the record that the Commission, consistent with Public Counsel's request, 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.

4 As the date for the public hearing approached, the Commission made travel arrangements for those expected to attend. 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.⁴ The flight was scheduled for March 2, 2007, with departure at 1:45 p.m. from the Olympia airport.

5 On March 2, 2007, at approximately 1:00 p.m., Mr. ffitich called Commission Chairman Mark Sidran's Executive Assistant and informed her that he was involved in discussions with the parties in another case pending before the Commission and would not attend the public comment hearing in Walla Walla. Mr. ffitich 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,

³ 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." As we stated in Order 05, 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.

⁴ The Washington State Patrol Aviation Section estimated the cost of the chartered flight at \$2,113.00. Public Counsel's pro rata share, which he is expected to pay, is \$422.60.

were denied the benefit of having an Assistant Attorney General appear for and represent them as he is required to do by law and the Rules of Professional Conduct.

Public Counsel's Declaration.

- 6 Public Counsel filed his response to Order 05 on March 21, 2007, in the form of a Declaration. Mr. ffitich states in his Declaration that he was participating by telephone on the morning of March 2, 2007, in a settlement conference in another Commission docket in which he is counsel of record.⁵ The key operative paragraphs of Mr. ffitich's declaration are as follows:

At about 11 a.m. on March 2, I began driving to Olympia Airport in order to catch the Washington State Patrol charter flight to Walla Walla for the PacifiCorp rate case public hearing. I continued to participate in the Qwest AFOR settlement conference by phone as I drove to Olympia.

The settlement negotiations reached a critical stage late in the morning of March 2. Staff and Qwest stated during the call that they had reached agreement and were willing to enter into a settlement. Public Counsel was asked to identify terms which would enable it to join the settlement.

After the end of the settlement conference call, I consulted with Public Counsel staff and outside consultants by telephone, while continuing to drive to Olympia. I decided that Public Counsel should respond to the request by the settling parties to identify terms and that we should prepare and present a best and final offer. Because of the state of negotiations, the need to prepare for hearing, and the imminence of the prehearing deadlines on March 7, time was of the essence and it was my judgment that an offer needed to be presented by the close of business that Friday afternoon. No other Public Counsel staff was able to draft the settlement proposal.

Shortly before the appointed time for passengers to meet at the Olympia airport, I telephoned the Administrative Law Division, Staff Counsel Don Trotter, and Commission Executive Secretary Nancy Moen to inform them that I would not be able to attend the Walla Walla

⁵ This is the so-called Qwest AFOR (Alternative Form of Regulation) proceeding, Docket UT-061625.

hearing. I explained the reason in general terms without violating the settlement privilege. I was unable to speak directly to Administrative Law Judge (ALJ) Patricia Clark⁶ or the Commissioners but requested that they be informed of my absence.

By the time the need for a substitute became apparent, there was not adequate time for me to assign another employee to attend the Walla Walla hearing in the PacifiCorp rate case.

* * *

The competing demands of the PacifiCorp rate case and the Qwest AFOR case required me to choose between preparing a final offer in the Qwest case, or attending the public hearing in Walla Walla. My judgment was that continued participation in the Qwest AFOR negotiations was very important for the interests of Qwest customers given the broad issues at stake and the long term implications of the docket. The potential resolution of the case on favorable terms was a significant and material matter to be pursued if it could be achieved. As noted above, time was of the essence in the Qwest matter and negotiations were at a critical stage

While the Walla Walla public comment hearing convened by the Commission was an important opportunity for public input in the case, the chief purpose of the hearing was for the Commission to receive oral and written comment from members of public who are not parties to the proceeding. The decision to miss the hearing was a difficult decision as we highly value the opportunity to hear customer comments in person and be available to talk with attendees. I regret that we were not able to be present. However, I considered that the central purpose of the hearing, as well as the conduct of proceedings, would not be materially affected by Public Counsel's absence. Under the Commission rules and practice, counsel for the parties have only a minimal formal role at comment hearings and are not permitted to make evidentiary presentations. Public comments made at Walla Walla are available for review in the transcript and are part of the case record. Public Counsel staff could contact any persons in attendance who had questions for us. Additionally, all PacifiCorp customers, by means of the company's "bill stuffer" notice of the proposed increase, have been advised of Public Counsel's participation and provided with our contact

⁶ Judge Clark was designated to substitute for Judge Moss due to a conflict in his schedule.

information. I could not identify any actual prejudice to PacifiCorp customer interests in this case that would result from Public Counsel's failure to attend the hearing, nor have I subsequently learned of any.

Discussion.

7 As we note above, 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." Public Counsel's conduct in failing to appear under the circumstances he describes in his declaration does not satisfy this standard.

8 Public Counsel requested on January 17, 2007, that the public comment hearing in this proceeding be held in Walla Walla during the week of February 26. Mr. ffitich was notified of, and stated his satisfaction with the Commission's decision to schedule the hearing for the afternoon of March 2, 2007. Yet, he agreed with other parties on February 28, 2007, to schedule a settlement negotiation in another case on March 2, 2007, beginning at 9:30 a.m., just hours before the time his Commission-chartered flight to Walla Walla was scheduled to board.⁷

9 When Public Counsel agreed to participate in the settlement negotiation he should have made arrangements for backup in one or the other of the two dockets in which important business was scheduled for the same day in separate locations. It is apparent from the time frame set forth in his Declaration that Public Counsel knew or should have known that the settlement negotiation scheduled for March 2, 2007, was likely to be climactic. In short, if there was going to be a settlement in the Qwest AFOR docket it was likely to come together during the discussions on March 2, 2007, if at all.⁸ The Public Counsel Section of the Office of the Attorney General itself has

⁷ This is all the more notable because Public Counsel's office is located in Seattle, approximately a 75 minute drive from the Olympia airport.

⁸ Mr. ffitich's Declaration makes clear that he was participating in the Qwest settlement negotiations via telephone while driving in his car. It is unclear from his Declaration why he decided his physical presence in Seattle was necessary to continue his work on the Qwest matter. The flight to Walla Walla would only have disrupted Public Counsel's ability to communicate with other parties, his staff and consultants for approximately one hour in the early afternoon. The public comment hearing did not begin until 4:00 p.m. and required less than one hour. Public Counsel does not explain why, under these circumstances, he could not attend the public comment hearing, and still complete his other work via telephone.

two attorneys. Considering, more broadly, the large number of attorneys in the Office of the Attorney General, it is inconceivable that Public Counsel could not have arranged for backup in circumstances where the potential for conflict was known significantly in advance of the hearing in Walla Walla. Public Counsel's failure to control his workload and manage his professional responsibility to ensure that both matters could be handled competently is unacceptable.

10 Public Counsel says in his declaration that the demands of his role in the Commission hearings arranged principally to provide his "client" an opportunity to be heard are such that his absence from such a hearing is immaterial to its success and will not cause prejudice to his client. Taking this as Public Counsel's honest assessment that his role is insignificant in the context of a public comment hearing, it would seem a particularly simple matter for Public Counsel to have arranged for substitute counsel from the Attorney General's office, even at the proverbial "last minute." Yet, Public Counsel apparently did not attempt to make any arrangements for another Assistant Attorney General to be assigned to provide coverage at the hearing in Walla Walla. We take administrative notice in this connection that the Attorney General has offices in Kennewick, Washington, which is a little more than a one hour drive from Walla Walla. The public comment hearing was not scheduled to begin until 4:00 p.m., leaving several hours during which Public Counsel could have arranged for someone to appear in his stead even if we were to concede it reasonable to wait until the last possible moment. Public Counsel' failure to arrange for substitute counsel to appear at the public comment hearing is unacceptable.

11 Public Counsel should know that the standards of practice followed in Commission adjudicatory proceedings require counsel to seek leave of the tribunal to not be present at a hearing when they do not think their presence is required to protect or promote their client's interests.⁹ Public Counsel should have made a concerted effort

⁹ This is an adjudicative proceeding governed by chapter 34.05 RCW, the Administrative Procedure Act. RCW 34.05.440(2) provides: "If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding ... 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."

to contact Judge Clark or one of the Commissioners to seek leave to not appear in Walla Walla. Whether the Commission might have granted such a request is unclear. What is clear is that Public Counsel did not meet the standards of practice that we expect of attorneys who represent clients in Commission adjudicatory proceedings. Public Counsel's failure to seek leave to be absent from the public comment hearing is unacceptable.

- 12 In sum, Public Counsel's failure to appear is neither reasonable nor acceptable conduct under the circumstances described. We accordingly find that Public Counsel should be admonished on the record of this proceeding.

ORDER

- 13 THE COMMISSION ORDERS that Public Counsel is admonished for his unexcused failure to appear at the public comment hearing convened in Walla Walla, Washington on March 2, 2007, as discussed in the body of this Order.

DATED at Olympia, Washington, and effective April 3, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner