

July 25, 2001

Ms. Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

**Re: Docket No. A-010648
Initial Comments on Rulemaking – Chapter 480-09 WAC – Procedural Rules**

Dear Ms. Washburn:

As provided in the June 1, 2001 Notice regarding the above-referenced docket, PacifiCorp submits the following initial written comments on the Commission's procedural rules. These are general comments regarding the suggested areas in the procedural rules in which PacifiCorp recommends attention be directed.

The June 1 notice refers to three general areas in which written comments are invited:

- Rules organization (logical grouping/order; use of subheadings)
- Clear language (consistent style and grammar)
- Possible substantive changes (new rules, substantive changes to existing rules)

With respect to substantive changes in particular, the Preproposal Statement of Inquiry ("CR-101 Statement") refers to possible new or amended rules "to improve the handling of confidential documents" and "discovery in adjudicative proceedings." PacifiCorp's comments will address these points in turn below.

Organization of the Rules

PacifiCorp agrees that a reorganization of the procedural rules would be helpful to increase their utility and ease of reference. As currently written, some rules lack proper headings while other rules have become unwieldy and overencompassing. Many rules could benefit from the creation of subheadings or being separated into multiple sections. In addition, Chapter 480-09 should be reorganized into separate parts. For example, rules related to service, filing and timing could be grouped together under one part. Rules regarding format of pleadings and motions could be grouped in another part. The rules regarding hearings could also be grouped into one part, as

could rules regarding discovery and rules regarding orders. PacifiCorp suggests that the format found in the Washington Superior Court Civil Rules would provide a good reference point for guiding the reorganization of the rules. For purposes of this proceeding, the Commission should consider forming a working group that could undertake this task and report back with a recommended reorganization of the chapter.

Editorial Revisions to the Rules

PacifiCorp agrees that as part of this rulemaking, the rules should be reviewed with the objective of improving their readability and maintaining consistent style and grammar throughout. Overall the procedural rules are understandable, but a review of and revision to the rules would undoubtedly improve clarity and conciseness. As in the case of the reorganization of the chapter, this task should probably be handled through a working group arrangement.

Suggested Substantive Rule Changes

1. Handling of Confidential Documents

The CR-101 Statement refers to possible new or amended rules “to improve the handling of confidential documents.” PacifiCorp agrees that this subject should be addressed in this rulemaking. In particular, the existing practice as to the issuance of protective orders should be codified in a new procedural rule. Such a rule would include not only the procedures and requirements associated with the issuance of a standard form of protective order by the Commission, but could include as well the procedures and requirements applicable to common modifications to this form of protective order. For example, several Commission proceedings have involved the use of “top secret” or “highly confidential” information for which protections greater than afforded by the standard form of protective order are necessary. A body of decisions has developed regarding the handling of such “highly confidential” information that could be reflected in a procedural rule. The process of obtaining a modified protective order could be enhanced if the applicable procedures and requirements are incorporated into a rule rather than scattered about in various Commission decisions.

2. Improving the Discovery Process

The CR-101 Statement refers to possible new or amended rules “to improve the handling of . . . discovery in adjudicative proceedings.” PacifiCorp agrees that this subject should be addressed in this rulemaking. In particular, PacifiCorp suggests that the Commission adopt a rule that expressly allows and encourages the use of “technical conferences” to conduct discovery pertaining to complex issues. Under such a process, the presiding Administrative Law Judge would convene a meeting on a particular complex issue (e.g., power costs in the case of an electric utility), and the parties’ expert witnesses in that area would convene to discuss that issue informally among themselves. Whether or not counsel is present would be at the discretion of each party. Such a format would encourage an efficient exchange of information on complex issues that do not lend themselves well to discovery through the formal data request process. Of course, that formal process serves another useful purpose in providing an authentication and

foundation function for data produced by an adverse party, so in many instances the information gathered during a technical conference would be followed up with confirming data requests. Overall, however, the technical conference process is likely to be a much more efficient and productive method of discovery.

The new or amended rule necessary to implement this process would likely be included as part of WAC 480-09-480. Of course, it can be argued that nothing in the existing rule prevents such a process from occurring, and therefore no revision or addition is necessary. In PacifiCorp's view, however, the parties will need to be provided strong encouragement to initiate this new process, and such encouragement can be provided only through codification of the suggestion through rules. In the absence of such a step, it will likely be "business as usual," and we will have missed an opportunity in this proceeding to achieve a meaningful improvement in the adjudicative hearing process.

3. Encouraging Early Settlement Conferences

The process in adjudicative proceedings would be vastly improved through use of early settlement conferences among the parties. In Oregon, for example, the Commission Staff typically convenes a settlement conference about 3 months after a general rate case is filed (or after sufficient discovery has occurred to enable Staff to develop preliminary views of the case). At this conference, Staff distributes its "issues list" of possible adjustments, and preliminary estimates of the amount of each recommended adjustment. This issues list forms the basis for the settlement discussions, which may occur over a 2-3 day period. These settlement conferences, which are open to other parties in addition to Staff and the Company, promote an early dialogue among the parties regarding the issues, and allow productive discussion of the issues prior to the filing of opposing testimony and the "hardening" of litigation positions. Based on these discussions, adjustments lacking merit may be withdrawn or, conversely, valid adjustments may be accepted by the Company and included in a stipulation. In PacifiCorp's experience, these initial conferences help narrow the issues and have the added benefit of potentially enabling the early resolution of all or part of an adjudicative matter.

PacifiCorp envisions that this process could be implemented through a new rule or revision to the existing rule regarding settlement conferences (WAC 480-09-466). Of course, as in the preceding section, it can be argued that nothing in the Commission's existing rules prevents such a process from occurring, and therefore no revision or addition is necessary. In this instance, however, a strong signal from the Commission will be necessary if a new process is to be initiated. In the absence of encouraging such an initiative through a rule amendment, the existing process of contentious, "end-loaded" rate cases – with the matters in dispute being revealed for the first time with the filing of opposing testimony over 5 months after the case is filed – will likely continue. This is the single most important area in which the Commission's adjudicative hearing process can be improved, and this proceeding provides an excellent forum to examine possible improvements.

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4. Codification of Existing Practice regarding Hearing Procedures

The hearing guidelines at WAC 480-09-736 should probably be amended to reflect the Commission's procedures regarding pre-distribution of cross-examination exhibits prior to hearings. In adjudicative proceedings before the Commission in the last few years, the presiding administrative law judge has typically convened a prehearing conference one week prior to the commencement of hearings for the purpose of pre-distribution of cross-examination exhibits. This procedure should be considered as a formal revision to WAC 480-09-736. Including this issue as part of this proposed rulemaking would serve two functions. First, the Commission may want to consider whether or not the pre-distribution requirement should apply to *all* cross-examination exhibits, and the comments could address this issue. For example, complex or technical exhibits and data request responses sponsored by the witness should be pre-distributed to facilitate the administrative process and allow the witness to familiarize himself/herself with the documents prior to the hearing. At the same time, however, other documents going to the credibility of the witness arguably need not be pre-distributed, and could be "exempted" from the pre-distribution requirement. Second, the pre-distribution requirement should be formalized in the procedural rules so that it is taken into account in developing the schedule for adjudicative proceedings. The existing pre-distribution requirement, as a practical matter, compresses the time available to complete discovery on the rebuttal testimony, as data request responses to be used as cross-examination exhibits must be identified a week prior to the hearings. Case schedules therefore need to be moved forward to accommodate the pre-distribution requirement.

PacifiCorp appreciates the opportunity to provide these comments regarding suggested revisions to the Commission's procedural rules. We look forward to participating in the remaining process, including the coming workshops.

Sincerely,

Bruce Hellebuyck,
Director Regulatory Policy

cc: James M. Van Nostrand
Kendall J. Fisher