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March 19, 2007

VIA ELECTRONIC FILING

PUC Filing Center
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

Re: Docket AR 511

Enclosed for filing in the above-referenced docket are PacifiCorp's Comments. A copy of this filing has been served on all parties to this proceeding as indicated on the attached certificate of service.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Katherine A. McDowell', written over a horizontal line.

Katherine A. McDowell

Enclosures

cc: Service List

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **AR 511**

4 In the Matter of Rulemaking to Adopt and
5 Amend Division 011 Rules.

COMMENTS OF PACIFICORP

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7 PacifiCorp respectfully requests that the Commission amend its proposed rule on
8 Confidential Information, OAR 860-011-0800, to expressly accord confidential treatment to
9 settlement communications in Commission settlement conferences. PacifiCorp raised this
10 issue previously in the November 2006 workshop in this docket and in the Commission's
11 recent process review workshop. These comments propose a rule amendment consistent
12 with these earlier discussions.

13 PacifiCorp suggests the following language for such an amendment to proposed
14 OAR 860-011-0800:

15 (3) Settlement offers and settlement negotiations in
16 Commission settlement conferences convened under OAR
17 860-014-0085 are exempt from disclosure under the Public
18 Records Law to the extent provided in ORS 192.410 to
19 192.505. If a party to a Commission settlement conference
20 submits settlement material on the condition of confidentiality,
21 the Commission will protect this information from public
22 disclosure to the extent provided in ORS 192.502(4).

23 PacifiCorp's proposed amendment is supported by the following points and
24 authorities:

25 1. Unlike many commissions, the Oregon Commission's rules do not expressly
26 provide for the confidentiality of settlement offers and settlement negotiations. See, e.g., 18
27 CFR 385.602(e)(2) (settlement proposals and discussions at FERC are not subject to public
28 release or discovery).

1 2. Oregon has a strong public policy favoring settlement. *Flynn v. PGE*, 1989
2 WL 112802 (D Or 1989) (strong public policy favoring settlement dictates adherence to
3 confidentiality agreements regarding settlement). The Commission has recognized and
4 endorsed this public policy. *See In re PGE and PacifiCorp*, Order No. 92-557, 133 PUR4th
5 145 (1992) (acknowledging public policy favoring the compromise and settlement of
6 disputes).

7 This policy is embodied in the Commission's evidentiary rule making settlement
8 offers inadmissible in Commission hearings. OAR 860-014-0045. The Commission has
9 also previously recognized the value of maintaining the confidentiality of settlement
10 communications in Commission interconnection mediations. OAR 860-016-0015. These
11 policies support the rule amendment proposed by PacifiCorp.

12 3. The Commission may provide confidential treatment for settlement
13 communications consistent with Oregon's Public Records Law. The Commission has this
14 authority under ORS 192.502(4), Confidential Submissions, which exempts:

15 "Information submitted to a public body in confidence and not
16 otherwise required by law to be submitted, where such
17 information should reasonably be considered confidential, the
18 public body has obliged itself in good faith not to disclose the
information, and when the public interest would suffer from
disclosure."

19 4. If the Confidential Submissions exemption is properly adopted by the
20 Commission, the five conditions of this exemption can be met with respect to confidential
21 settlement materials. *See Attorney General's Public Records and Meeting Manual* 69
22 (2005).

23 The first requirement is that the information must be submitted on the condition that it
24 will be kept confidential. This condition can be met if the Commission adopts PacifiCorp's
25 proposed rule which makes confidential treatment of settlement materials under

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1 ORS 192.504(2) contingent upon a party submitting them with the express expectation of
2 confidentiality.

3 The second requirement is that the party submitting the materials does so voluntarily,
4 without a legal obligation. This condition is met because participation in Commission
5 settlement conferences is entirely voluntary. See OAR 860-014-0085 (referring to
6 settlements resulting from Commission settlement conferences as "voluntary settlements.")

7 The third requirement is that the information itself must be of a nature that
8 reasonably should be kept confidential. Settlement communications are generally kept
9 confidential because disclosure of settlement communications can impede settlements and
10 result in inadvertent disclosure of settlement information to a court or commission.
11 Commission settlement conferences address a wide range of subjects, including confidential
12 issues regarding contract terms, labor and employment issues, financial projections and the
13 like. Confidential treatment of settlement communications facilitates the incorporation of
14 sensitive issues in settlement.

15 The fourth requirement is that the public body must show that it has obligated itself in
16 good faith not to disclose the information. The most straightforward way to satisfy this
17 requirement is for the Commission to adopt a rule committing to nondisclosure of material
18 that otherwise satisfies ORS 192.504(2). PacifiCorp's proposed rule amendment is narrowly
19 tailored to invoke the Confidential Submissions exemption with respect to settlement
20 communications to satisfy this condition.

21 The fifth requirement is that disclosure of the information must cause harm to the
22 public interest. Disclosure of settlement communications can harm the public interest by
23 undermining the settlement process. The Commission has a particular interest in promoting
24 settlement because litigation may be ill-suited to resolve Commission cases, which are often
25 policy-oriented, complex and multi-party.

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1 5. Because of the specific requirements of the Confidential Submissions
2 exemption, parties to a Commission settlement conference cannot claim this exemption
3 without the Commission expressly invoking the exemption in advance of the submission of
4 settlement materials. The clearest way for the Commission to do so is by amendment to the
5 Commission's administrative rules. If the Commission makes this exemption applicable to
6 the Commission settlement process, then parties to a settlement can invoke it as
7 appropriate, subject to the Commission's ability to monitor its use under the general
8 provisions of the proposed rules in AR 511 on confidentiality and public records.

9 6. The Confidential Submissions exemption has been applied in a variety of
10 contexts and is not limited to "whistle blower" information. *See Premier Technology v. State*
11 *of Oregon*, 136 Or App 124, 901 P2d 883 (1995) (exempting state's background
12 investigations on plaintiff's competitors); Public Records Order, September 12, 1988, cited in
13 footnote 195 of *Attorney General's Public Records and Meeting Manual* (exempting
14 responses to workers' compensation survey).

15 Indeed, the exemption has been previously applied to the work of an advisory
16 committee charged with making recommendations for workers' compensation reform,
17 because of the "public interest in encouraging parties with competing interests to work
18 together towards reaching compromise," a similar public interest to that implicated in this
19 context. *See* Public Records Order, July 1, 1991, described at page 73 and cited in footnote
20 202 of *Attorney General's Public Records and Meeting Manual*.

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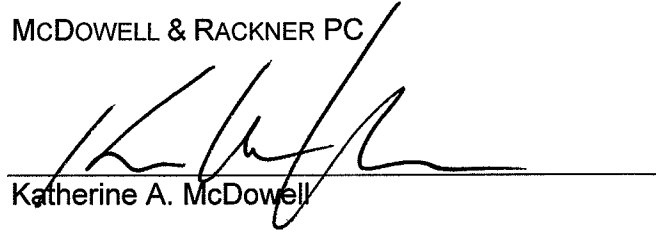
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1 For all of these reasons, PacifiCorp respectfully requests that the Commission
2 amend its proposed rule on confidentiality to cover settlement communications in
3 Commission settlement conferences.

4 DATED: March 19, 2007.

5 MCDOWELL & RACKNER PC

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8 Katherine A. McDowell

9 Attorneys for PacifiCorp
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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in Docket AR 511 on the following named person(s) on the date indicated below by email and first-class mail addressed to said person(s) at his or her last-known address(es) indicated below.

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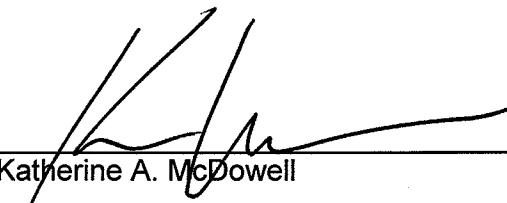
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DATED: March 19, 2007.



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