BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFICORP d/b/a PACIFIC POWER & LIGHT COMPANY, Respondent.	Docket No. UE-250224 PACIFICORP'S SUPPLEMENTAL BRIEF IN RESPONSE TO PUBLIC COUNSEL'S MOTION TO COMPEL DISCOVERY

I. Introduction

1. PacifiCorp dba Pacific Power & Light Company (PacifiCorp or Company) files this Supplemental Brief in Response to Public Counsel's Motion to Compel Discovery (Motion). This brief explains that the negotiations conducted by the Framework Issues Workgroup (FIW) are covered by the Washington Utilities and Transportation Commission's (Commission) alternative dispute resolution (ADR) rule.[1]

2. The Commission-approved 2020 Protocol required further negotiation by the FIW of unresolved cost allocation issues. Those negotiations fell under the broad purview of the Commission's ADR rule, which applies to "any mechanism" to resolve disputes, including negotiations agreed to by participants "at any time without commission oversight."[2] Public Counsel chose not to participate in the FIW, but it now demands production of information that was exchanged exclusively as part of the FIW negotiations. Because information exchanged exclusively within the context of settlement

[1] WAC 480-07-700.
[2] WAC 480-07-700.

negotiations is privileged from disclosure under WAC 480-07-700(6)(b), Public Counsel's Motion must be denied. Granting the Motion would be contrary to the plain language of the ADR rule and Washington state policy strongly encouraging settlements.[3]

II. Argument

A. The Commission's ADR rule is broad and applies to the FIW negotiations.

3. "Public policy and [the Commission's rules] favor settlement."[4] The Commission "supports parties' informal efforts to resolve disputes without the need for contested hearings."[5] The Commission adopted an ADR rule that is broad and applies to "***any*** mechanism to resolve disagreements, in whole or in part, without contested hearings."[6] The rule includes a "nonexclusive" list of forms of ADR covered by the rule.[7] That nonexclusive list includes "voluntary negotiations," whereby "[p]arties to a dispute that is within the commission's jurisdiction may agree to negotiate with any other parties at any time without commission oversight."[8]

4. Here, there is no doubt that the FIW was engaged in ***negotiations*** covered by the ADR rule. First, the FIW was established by the terms of the 2020 Protocol specifically to "continue ***negotiations*** of the Framework Issues[.]"[9] The explicit statement in the 2020 Protocol that the FIW was engaged in "***negotiations***" contrasts with other workgroups

[3] *See* RCW 34.05.060 ("[I]nformal settlement of matters that may make unnecessary more elaborate proceedings under this chapter is strongly encouraged.").
[4] *Wash. Utils. & Trans. Comm'n v. Cascade Natural Gas Corp.*, Docket No. UG-060256, Order 07 at 4, ¶ 13 (Oct. 7, 2007) (citing RCW 34.05.060 and WAC 480-07-700).
[5] WAC 480-07-700.
[6] WAC 480-07-700 (emphasis added).
[7] WAC 480-07-700(4).
[8] WAC 480-07-700(4)(a).
[9] 2020 Protocol, Section 8.2.1; Docket UE-191024, Exh. EL-3.

created by the 2020 Protocol, like the Multi-State Process (MSP) Workgroup, which "discusses" rather than "negotiates" allocation issues.[10]

5. Second, the Commission expressly recognized that the purpose of the FIW was to engage in ***negotiations*** on cost allocation issues. When approving the 2020 Protocol the Commission acknowledged there were "Framework Issues that are in need of ***negotiation*** and resolution . . . [and the] 2020 Protocol creates a framework for collaboration to resolve many cost allocation issues among PacifiCorp's service areas."[11] The Commission further explained that any negotiated settlement arising out of the FIW ultimately would require Commission approval, thereby confirming that the FIW was engaged in negotiations over disputes within the Commission's jurisdiction.[12]

6. Third, the parties to the FIW understood they were engaging in ***negotiations***. Staff's testimony in support of the 2020 Protocol and the Washington Inter-Jurisdictional Allocation Methodology (WIJAM) explained that both were the result of "a ***negotiation*** between Staff, the Company, [the Packaging Corporation of America (PCA)], and Public Counsel to examine the existing allocations of rates to Washington by PacifiCorp" and that ongoing "***negotiations***" were required because the 2020 Protocol did not definitely resolve all issues.[13]

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[10] 2020 Protocol – Appendix A at 5 ("'MSP Workgroup' means a group of regulators, the Company, and other interested stakeholders that convenes to discuss the assignment or allocation of PacifiCorp revenues, costs, and investments among the States.").
[11] *Wash. Utils. & Trans. Comm'n v. PacifiCorp d/b/a Pac. Power & Light Co.*, Docket Nos. UE-191024 *et al.*, Final Order 09/07/12 at ¶ 105 (Dec. 14, 2020) (emphasis added).
[12] *Id.* ("PacifiCorp and the Parties are required to seek Commission approval to implement any future cost allocation methodologies developed through the 2020 Protocol[.]").
[13] Docket Nos. UE-191024 *et al.*, Ball, TR at 125:3-6 (Aug. 24, 2020) (emphasis added); *see also* Ball, TR at 127:9-15 ("If, however, we get to 2024 and the – all the states have agreed on something and Washington's been a part of those ***negotiations*** and we've agreed to something as well, we would come to this Commission with a new allocation methodology that incorporates what components of the WIJAM needed to be incorporated and what pieces don't.") (emphasis added); Ball, TR at 171:7-11 ("If, however,

7. The fact the FIW was engaged in ***negotiations*** was further confirmed when PacifiCorp required parties to sign a non-disclosure agreement (NDA) in order to participate in the workgroup, ensuring the confidentiality of the settlement negotiations, and when PacifiCorp labeled materials provided to the FIW, including the materials requested by Public Counsel, as "Confidential Settlement Negotiations." At no time during the FIW negotiations did a participant dispute the fact that the FIW was engaged in confidential settlement ***negotiations.***

8. Public Counsel claims that the ADR rule is limited to negotiations held pursuant to "*Commission-adjudicated*" proceedings, suggesting that because the FIW was negotiating outside of a currently pending proceeding its negotiations were not covered by the rule.[14] This argument is directly contrary to the broad language in the ADR rule, which applies to "any mechanism to resolve disagreements" and specifically applies to voluntary negotiations occurring "at any time without commission oversight."[15] Public Counsel's argument also ignores the context for the FIW negotiations, which were required by the Commission-approved 2020 Protocol.

B. The modeling information requested by Public Counsel is protected from disclosure by the ADR rule.

9. The Commission's ADR rule prohibits disclosure of "[i]nformation exchanged

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we have ***negotiated*** through in -- through that 2020 protocol something to do with those plants, for instance, transferring those plants to another state, the depreciation reserve is absolutely part of that ***negotiation***.") (emphasis added); Ball, TR at 175:5-11 ("I just wanted to add that this is an issue that a lot of -- that the other states in the 2020 protocol are very concerned with and Washington also is -- ***Washington Staff is party to that protocol and those negotiations*** we're also very concerned with. I fully anticipated absolutely being one of the terms that is ***negotiated*** as a part of the new 2020 protocol[.]") (emphasis added).

[14] Motion at 5, ¶ 10 (emphasis in original).

[15] *See* WAC 480-07-700(4)(a) (voluntary negotiations); WAC 480-07-700(4)(b) (Commission-directed negotiations).

exclusively within the context of settlement negotiations[.]"[16] The plain language of this rule—that the information "***will be*** treated as confidential" and "***will be*** privileged against disclosure"—confirms that the protection is mandatory, not permissive.[17] Pursuant to this rule, Public Counsel previously emphasized the need for confidential settlement negotiations when Puget Sound Energy (PSE) sought to share settlement materials with its Equity Advisory Group in PSE's Clean Energy Implementation Plan docket.[18] In that case, Public Counsel objected to sharing settlement materials with non-parties, which Public Counsel argued could undermine the confidentiality of settlement discussions.[19] In response, the Commission affirmed its rule that information exchanged in settlement negotiations is privileged from disclosure.[20]

10. Here, the modeling results requested by Public Counsel were developed exclusively for the settlement negotiations conducted by the FIW and were not intended to be shared with non-participants, like Public Counsel. The modeling results were neither independently available before the FIW nor information PacifiCorp would have produced in the normal course of business that is otherwise discoverable. In particular,

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[16] WAC 480-07-700(6)(b).

[17] When adopting the current version of the ADR rule in 2018 the Commission affirmed its commitment to preventing disclosure of settlement negotiations to non-participants by making confidentiality mandatory, rather than subject to the parties' agreement. Under the old rule, the default was no protection; rather, parties were permitted to "agree that information exchanged exclusively within the context of settlement negotiations will be treated as confidential, subject to the requirements of RCW 5.60.070." WAC 480-07-700(4)(c) (2017) ("Parties ***may*** agree that information exchanged exclusively within the context of settlement negotiations will be treated as confidential, subject to the requirements of RCW 5.60.070.") (emphasis added). *See also Scannell v. Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435, 438 (1982) ("Where a provision contains both the words 'shall' and 'may,' it is presumed that the lawmaker intended to distinguish between them, 'shall' being construed as mandatory and 'may' as permissive."); *Rudolph v. Empirical Research Sys.*, 107 Wn. App. 861, 866, 28 P.3d 813, 816 (2021) (We interpret court rules by reference to rules of statutory construction… In drafting CR 26(i), our Supreme Court selected the words 'will not' and 'shall.' These words are mandatory, as opposed to 'may' which is permissive.").

[18] *In the Matter of Puget Sound Energy, Clean Energy Implementation Plan Pursuant to WAC 480-100-640*, Docket No. UE-210795, Order 04 at 8, ¶ 37 (June 1, 2022).

[19] *Id.*

[20] Docket No. UE-210795, Order 04 at 8, ¶ 38.

these models were not used in the Company's PCORC calculations. The Company performed the modeling and exchanged the results with parties to the FIW ***only because*** parties to the FIW requested PacifiCorp do so to support settlement discussions. Accordingly, the modeling results produced by PacifiCorp were "exchanged exclusively within the context" of the FIW negotiations and are protected from disclosure by WAC 480-07-700(6)(b).

11. While the Alliance of Western Energy Consumers (AWEC) does not seem to dispute the fact that the FIW engaged in confidential settlement negotiations subject to the Commission's ADR rule, AWEC argues that the modeling requested by Public Counsel is discoverable in this case because it is "data" rather than "participant positions or proposals that would typically be considered settlement discussions."[21] Contrary to AWEC's assertion, the plain language of WAC 480-07-700(6)(b) is not so narrow. The rule against disclosure explicitly applies to "[i]nformation exchanged exclusively" within the context of settlement negotiations and is not limited to only participant positions or proposals.[22] Had the Commission intended to apply WAC 480-07-700(6)(b) more narrowly to only positions or offers of settlement, it could have done so.[23]

12. AWEC also argues that "just because some data may have first been utilized" by the FIW, it does not automatically make that information privileged against discovery.[24] This argument misconstrues the information sought by Public Counsel. The modeling results requested by Public Counsel were produced by PacifiCorp ***exclusively*** for the FIW

[21] AWEC Response to Public Counsel's Motion to Compel PacifiCorp Answers to Discovery at 2, ¶ 3 (June 30, 2025) [hereinafter, "AWEC Response"].
[22] WAC 480-07-700(6)(b) (emphasis added).
[23] *See, e.g.,* WAC 480-07-700(6)(a) (discussing "offers of settlement" being non-admissible).
[24] AWEC Response at 2, ¶ 4.

as part of the group's settlement negotiations. During the FIW's negotiations, parties asked PacifiCorp to prepare modeling regarding alternatives and provide the results to parties to inform their positions during negotiations. PacifiCorp agreed to conduct the modeling subject to an NDA, which established a clear understanding that the modeling results (i.e., the "data" AWEC describes) were confidential and being provided exclusively within the FIW's settlement negotiations. But for the confidential settlement negotiations, none of the information requested by Public Counsel would have been produced by PacifiCorp. Requiring PacifiCorp to produce information prepared exclusively for settlement negotiations to a party that chose not to participate in those settlement negotiations is contrary not only to the plain meaning of the Commission's ADR rule but also contrary to the strong state policy favoring settlement.

13. Finally, while the ADR rule prohibits disclosure "to the extent permitted by law[,]" no party has argued that PacifiCorp is required by law to disclose confidential settlement information to a non-participant like Public Counsel.

III. Conclusion

14. For the foregoing reasons, the Company respectfully asks that the Commission deny Public Counsel's Motion.

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Adam Lowney
Katherine McDowell
McDowell Rackner Gibson PC
419 SW 11th Ave., Suite 400
Portland, OR 97205
Telephone: (503) 595-3922
Email: adam@mrg-law.com
katherine@mrg-law.com

Ajay Kumar
Chief Regulatory Counsel
PacifiCorp
825 NE Multnomah Street, Suite 2000
Portland, OR 97232
Telephone: (503) 813-5161
Email: ajay.kumar@pacificorp.com

Attorneys for PacifiCorp, d/b/a Pacific Power & Light Company