

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PACIFICORP d/b/a PACIFIC POWER &
LIGHT COMPANY,

Respondent.

DOCKET UE-230172

COMMISSION STAFF'S MOTION
TO COMPEL DISCOVERY

I. INTRODUCTION

I Staff of the Washington Utilities and Transportation Commission (Commission) submits this Motion to Compel Discovery pursuant to WAC 480-07-425(1). Commission staff (Staff) moves to compel responses to Staff data requests 152 and 154 through 157 sent to PacifiCorp (PacifiCorp or Company). In response to these data requests, the Company objected that the data requests “seek[] rebuttal testimony before the schedule established by the Washington Utilities and Transportation Commission in Order 03”¹ Staff’s response to that objection is that the data requests do not seek rebuttal testimony, the requests seek relevant information that is well within the scope of this proceeding and the Commission’s discovery rules. Counsel for Staff met and conferred with counsel for the Company on October 3, 2023 in an effort to resolve this issue in accordance with WAC 480-07-425(1)(a). However, no agreement regarding the above referenced requests was reached and Staff now seeks to compel responses. Staff’s motion is supported by The Energy Project, Sierra Club, the Northwest Energy Coalition, and Walmart.

¹ See generally Attachment 1.

II. RELIEF REQUESTED

2 Staff respectfully requests the Commission issue an order compelling PacifiCorp to fully answer these data requests.

III. STATEMENT OF FACTS

3 On September 22, 2023, Staff issued data requests 150-157 to PacifiCorp. On October 2, 2023, Staff received responses from PacifiCorp. See Attachment 1. Staff did not receive any communication from the Company regarding these data requests between the time the data requests were issued and the time the Company provided a response. The Company did not, for example, seek clarification under WAC 480-07-405(5). The Company provided a response to one of these questions, Staff data request 151. For all other data requests in this set, it made the following objection:

PacifiCorp objects to this data request as it seeks rebuttal testimony before the schedule established by the Washington Utilities and Transportation Commission in Order 03, issued in this docket on May 24, 2023.²

4 On October 3, 2023, counsel for Staff reached out to counsel representing the Company to make a good faith effort to reach an informal resolution to this discovery dispute, as required under WAC 480-07-425(1)(a). This unfortunately did not result in a complete resolution.³ However, the Company did agree to provide supplemental responses

² For the objection to Staff data request 155, the Company added the following to the end of the objection: “PacifiCorp further objects as this request is seeking analysis that has not been performed by the Company.” Staff addresses this additional objection below.

³ On the morning of October 3, 2023, counsel for Staff called counsel representing the Company and let them know Staff’s disagreements with the objections the Company raised in response to Staff data requests, and that this communication was an attempt to resolve the dispute informally under Commission rules. WAC 480-07-425(1)(a). Counsel for the company responded that the Company would need time to consider the matter internally and get back to Staff. Staff responded that it would be filing a motion to compel in 24 hours if the data requests were not answered given the need for this information prior to filing cross answering testimony. Counsel for the Company responded that this was likely not enough time to get back to Staff on the issue. Counsel for Staff responded that, should the Company provide appropriate supplemental responses to the data requests in question after the motion to compel was filed, Staff would withdraw the motion. That afternoon counsel for Staff had another call with counsel for the Company at their request. The discovery dispute was discussed again but unfortunately the parties were unable to come to an informal resolution on all relevant data

to Staff data requests 150 and 153. Supplemental responses were sent that afternoon and Staff found them acceptable. Staff therefore brings this motion compel responses to Staff DRs 152 and 154 through 157.

IV. LEGAL STANDARD

5 Commission discovery rules are found in WAC 480-07-400 through -425. The Commission ordered that the parties may conduct discovery pursuant to these rules in Order 01 of this docket.⁴ Under WAC 480-07-400(1)(c)(iii) a data request is defined as:

A party's written request that calls for another party to produce data in connection with an adjudicative proceeding is a data request. Generally, data requests seek one or more of the following: Existing documents; an analysis, compilation, or summary of existing documents into a requested format; a narrative response describing a party's policy, practice, or position; or the admission of a fact asserted by the requesting party. If a party relies on a cost study, model, or proprietary formula or methodology, the party must be willing, on request, to rerun or recalculate the study, model, formula, or methodology based on different inputs and assumptions, subject to the standards in subsection (3) of this section. The commission otherwise will not order a party to respond to a data request that would require creation of new data or documents unless there is a compelling need for such information.

6 Evidentiary objections at a Commission adjudicatory hearing are subject to WAC 480-07-495(1), which states:

All relevant evidence is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. The presiding officer will consider, but is not required to follow, the rules of evidence governing general civil proceedings in nonjury trials before Washington superior courts when ruling on the admissibility of evidence.⁵

7 However, during discovery “[a] party may not object to discovery on grounds that the information sought will be inadmissible at the hearing, if that information

requests. Counsel for Staff reiterated at the afternoon meeting that Staff would be willing to withdraw this motion if the Company provided adequate supplemental responses.

⁴ Docket UE-230172, Order 01 at 6, ¶ 28 (May 2, 2023), *see also* WAC 480-07-400(2)(b).

⁵ *See also*, RCW 34.05.452(2).

appears reasonably calculated to lead to discovery of admissible evidence.”⁶

Therefore, the Commission may compel a party to respond to a data request even if the response itself would be inadmissible at the hearing. Given that admissibility at the hearing itself is subject to considerable discretion on the part of the presiding officer, the scope of discovery in general rate case proceedings is quite broad. The presiding officer’s discretion is bounded mostly by relevance and “constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state.”⁷

VI. ARGUMENT

8 The objection raised to Staff DRs 152 and 154 through 157 is not a proper objection under Commission discovery rules. None of the data requests in this set “seek rebuttal testimony,” either explicitly or implicitly. They are standard data requests that seek relevant information regarding the contested net power cost issues in this case. To state the obvious, a party is not excused from answering data requests simply because that party intends to answer the question in future testimony. Nothing in commission rules permits a party to refuse to answer a data request on the basis that they intend to address the question in testimony later. Such a rule would impede the discovery process.

9 The objection that Staff’s data requests “seeks rebuttal testimony” simply has no basis in commission rule, superior court rules of evidence, or any other discovery law in Washington. The Company did not claim that these data requests were irrelevant, sought privileged information, or were in any other way improper as described in WAC 480-07-400(3). Nor did they raise an evidentiary objection that would be recognized under the rules

⁶ WAC 480-07-400(3).

⁷ RCW 34.05.452(2).

of evidence governing general civil proceedings in nonjury trials before Washington superior courts when ruling on the admissibility of evidence.⁸

10 Even if the objection raised by the Company were assessed strictly under the rules of evidence for civil proceedings, this would not be a proper objection. To make an analogy, it would be inappropriate for a party in a nonjury civil proceeding to object to an interrogatory by stating that they intend to address the question during their direct testimony at trial.

11 Second, the claim made in the objection is simply untrue. None of the data requests ask PacifiCorp to provide rebuttal testimony or to summarize what their position will be in rebuttal testimony. For example, Staff data request 152 asks whether the Company agrees with a position put forward by Public Counsel in response testimony that an asymmetry of information exists between the parties related to net power costs. Such a question is squarely within the plain language of the definition of a data request, which includes seeking “a narrative response describing a party's policy, practice *or position*; or the admission of a fact asserted by the requesting party.”⁹

12 Finally, even setting aside commission rule and the facts, a Commission order sustaining the Company’s objection would set a discovery policy that would freeze the discovery process and reduce the opportunity for parties to resolve uncontested issues prior to evidentiary hearings. The Company’s position is essentially that a party need not answer a data request if it intends to answer the same question or provide the information sought in future testimony. Were the Commission to sustain this type of objection, the discovery process in general rate cases would freeze, and parties would simply address issues in cross answering and rebuttal testimony. This would restrict the availability of information prior to

⁸ WAC 480-07-495(1).

⁹ WAC 480-07-400(1)(c)(iii). Emphasis added.

the rebuttal/cross answering testimony filing due date, ultimately resulting in more contested or unresolved issues that would need to be addressed at the evidentiary hearing. Data request responses frequently necessitate follow-up data requests based on a party's response. If that process were put on pause because the answer to the initial data request would or could be provided in future testimony, the Commission would be presented with a much weaker record at the evidentiary hearing, and likely more issues would remain contested.

A. PacifiCorp's Second Objection to Staff DR 155

13 Finally, the Company also objects to Staff DR 155 on the additional basis that the request "is seeking analysis that has not been performed by the Company." Staff DR 155 is as follows:

Power Costs - If PacifiCorp agrees that the Jim Bridger plant is not subject to the final Ozone Transport Rule and/or admits that it would be more reasonable to forecast Rate Year 1 NPC based on Aurora model data for April 2024-March 2025 (or some other period), please provide revised versions of all affected exhibits and work papers, also including changes and updates considered in PacifiCorp Response to UTC Staff Data Request No. 135, 1st Revised, Attachment 135-2 (e.g., 230172-PAC-RJM-Aurora2024NPCMasterBaseWA1_WUTC 135b1). In PacifiCorp's responses to the following questions, please utilize these revised exhibits and work papers as a baseline for any quantitative responses.

14 Staff DR 155 is a proper request under the plain language of WAC 480-07-400(1)(c)(iii), which states that "[i]f a party relies on a cost study, model, or proprietary formula or methodology, the party must be willing, on request, to rerun or recalculate the study, model, formula, or methodology based on different inputs and assumptions, subject to the standards in subsection (3) of this section." Commission discovery rules do not prohibit parties from "seeking analysis that has not been performed by the Company" under these circumstances. In fact, they explicitly allow that which Staff has requested here: a

recalculation of its model based on new assumptions. The Company has no basis for an objection to such a request.

VII. CONCLUSION

15 Staff requests that the Commission order PacifiCorp to fully respond to the data requests mentioned above. The parties made a good faith effort to resolve this dispute informally, and Staff appreciated the Company's willingness to quickly supplement two of the data requests in question. However, there remains a clear disagreement between the parties regarding the types of objections to data requests that are appropriate under Commission rules. Staff believes that beyond resolving the immediate dispute, clarity on the question will benefit all parties moving forward.

DATED this 4th day of October 2023.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General

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ATTACHMENT 1



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October 2, 2023

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RE: **WA UE-230172**
WUTC Data Request (150-157)

Please find enclosed PacifiCorp's Responses to WUTC Data Requests 150-157.

If you have any questions, please call me at 503-813-5410.

Sincerely,

 /s/
Ariel Son
Regulatory Affairs Manager

C.c.: Service List

UE-230172 / PacifiCorp
October 2, 2023
WUTC Data Request 150

WUTC Data Request 150

Power Costs - Please state whether PacifiCorp's forecast costs expect that after participation in the EDAM begins, its expenses for planning activities, trading personnel, and other current expenses related to market purchases and sales will increase, remain the same, or decrease? (Exh. RLE-1CT at 5, Exh. BGM-1CT at 71).

Response to WUTC Data Request 150

PacifiCorp objects to this data request as it seeks rebuttal testimony before the schedule established by the Washington Utilities and Transportation Commission in Order 03, issued in this docket on May 24, 2023.

PREPARER: Counsel

SPONSOR: Counsel

WUTC Data Request 151

Power Costs - Please explain PacifiCorp's understanding of the purpose of the deadbands in the PCAM and explain why it is reasonable to eliminate the use of deadbands as proposed by witness Painter.

Response to WUTC Data Request 151

PacifiCorp's understanding of the purpose of the deadbands in the power cost adjustment mechanism (PCAM) is twofold: to ensure a fair distribution of risk between customers and the Company for power cost variability, and to incentivize the Company to effectively manage or reduce power costs. As explained by Washington Utilities and Transportation Commission (WUTC) staff in prior dockets, the inclusion of deadbands and sharing bands in the mechanism necessitates a well-forecasted baseline for it to function properly.¹ If the baseline is consistently forecasted too high, customers will end up overpaying for power costs, while the Company will receive a net benefit due to the existence of the deadband and vice versa.²

Accordingly, it is reasonable to eliminate the deadbands because net power costs (NPC) forecasts have become less accurate in part due to policy-driven shifts from fossil fuel generation to renewable generation. Inaccurate NPC forecasts can result in unbalanced outcomes for customers given this existence of deadbands as shown in the direct testimony of Company witness, Jack Painter, Exhibit JP-1T, specifically Table 1 and Figure 1 on page 8. Additionally, the Company has announced its intention to join the extended day ahead market (EDAM), which will provide customers with state-of-the-art economic dispatch that further decreases NPC. Given that the Company will then no longer have direct control over both the day-ahead and real-time economic dispatch of a majority of its resources and the proven risk of unbalanced outcomes for customers, it is reasonable to eliminate the PCAM deadbands.

Further explanations, which both expand upon this data request and provide response/rebuttal to WUTC staff and intervenor positions, will be filed in accordance with the schedule established by the WUTC in Order 03, issued in this docket on May 24, 2023.

PREPARER: Jack Painter

SPONSOR: Jack Painter

¹ *WUTC v. Avista Corp.*, Docket UE-170485, Gomez Exh. DCG-1CT, Pages 4:5–8:6 (October 27, 2017).

² *Id.*

WUTC Data Request 152

Power Costs - Please state whether PacifiCorp agrees that there is an information asymmetry between itself and intervening parties as described in Exh. RLE-1CT at 8-9.

- (a) If not, please explain the basis for PacifiCorp's belief that all parties have equal access to information and opportunity to understand that information?
- (b) If PacifiCorp agrees there is an information asymmetry, then assuming some form cost sharing for NPC variance is retained for PacifiCorp, is it reasonable to maintain asymmetry in the design of sharing bands for NPC?

Response to WUTC Data Request 152

PacifiCorp objects to this data request as it seeks rebuttal testimony before the schedule established by the Washington Utilities and Transportation Commission in Order 03, issued in this docket on May 24, 2023.

PREPARER: Counsel

SPONSOR: Counsel

UE-230172 / PacifiCorp
October 2, 2023
WUTC Data Request 153

WUTC Data Request 153

Power Costs - Does PacifiCorp agree that the Jim Bridger plant is not subject to the final Ozone Transport Rule? (Exh. BGM-1CT at 46)?

Response to WUTC Data Request 153

PacifiCorp objects to this data request as it seeks rebuttal testimony before the schedule established by the Washington Utilities and Transportation Commission in Order 03, issued in this docket on May 24, 2023.

PREPARER: Counsel

SPONSOR: Counsel

UE-230172 / PacifiCorp
October 2, 2023
WUTC Data Request 154

WUTC Data Request 154

Power Costs - Please explain why it is reasonable to forecast Rate Year 1 NPC based on Aurora model data for calendar year 2024. In your response, please address the forecast January – April outage of Jim Bridger 1 and 2.

- (a) Since the suspension date for Rate Year 1 is March 19, 2024, is it reasonable to assume that RY1 rates will go into effect on April 1, 2024 given the time required for PacifiCorp to file compliant tariffs and for the Commission to review them?

Response to WUTC Data Request 154

PacifiCorp objects to this data request as it seeks rebuttal testimony before the schedule established by the Washington Utilities and Transportation Commission in Order 03, issued in this docket on May 24, 2023.

PREPARER: Counsel

SPONSOR: Counsel

UE-230172 / PacifiCorp
October 2, 2023
WUTC Data Request 155

WUTC Data Request 155

Power Costs - If PacifiCorp agrees that the Jim Bridger plant is not subject to the final Ozone Transport Rule and/or admits that it would be more reasonable to forecast Rate Year 1 NPC based on Aurora model data for April 2024-March 2025 (or some other period), please provide revised versions of all affected exhibits and work papers, also including changes and updates considered in PacifiCorp Response to UTC Staff Data Request No. 135, 1st Revised, Attachment 135-2 (e.g., 230172-PAC-RJM-Aurora2024NPCMasterBaseWA1_WUTC 135b1).

In PacifiCorp's responses to the following questions, please utilize these revised exhibits and work papers as a baseline for any quantitative responses.

Response to WUTC Data Request 155

PacifiCorp objects to this data request as it seeks rebuttal testimony before the schedule established by the Washington Utilities and Transportation Commission in Order 03, issued in this docket on May 24, 2023. PacifiCorp further objects as this request is seeking analysis that has not been performed by the Company.

PREPARER: Counsel

SPONSOR: Counsel

WUTC Data Request 156

Power Costs - Please state whether Exh. BGM-7C represents the monthly price of coal for Jim Bridger Units 3 and 4 (expressed in \$/ton).

- (a) If not, please explain the difference and provide any supporting documentation or calculations necessary to fully understand PacifiCorp's position.
- (b) If it does, please reconcile that monthly price of coal with the annual price of coal (expressed in \$/mmBtu) found in workpapers 230172-PAC-RJM-AGMFuelPrices (C), tab "yr_x". (Note that the same data are also presented in workpaper 230172-PAC-RJM-Aurora2024NPCMasterBaseWA1 (C), tab "Coal Expense Calculation").
- (c) Please explain whether PacifiCorp's coal expenses included in Exh. RJM-2 include the depreciation and reclamation costs discussed in Exh. BGM-1CT at 32-33.
- (d) In either case, noting that Exh. BGM-7C provides coal prices on a monthly basis and the "Coal Expense Calculation" provides coal consumption on a monthly basis, please provide witness Mitchell's opinion as to whether coal expense should be calculated using monthly consumption and prices or using annual figures. Please provide any supporting calculations for this response.

Response to WUTC Data Request 156

PacifiCorp objects to this data request as it seeks rebuttal testimony before the schedule established by the Washington Utilities and Transportation Commission in Order 03, issued in this docket on May 24, 2023.

PREPARER: Counsel

SPONSOR: Counsel

WUTC Data Request 157

Power Costs - In Exh. BGM-1CT at 38-41, witness Mullins argues that the total-company Aurora modeling frequently results in Washington's gas units being ramped down in favor of lower-cost non-Washington plants, rather than in favor of market purchases.

- (a) Does witness Mitchell agree with this observation?

- (b) During hours in which Washington's gas units are not fully dispatched, but Washington jurisdictional generation is insufficient to meet Washington load, is it reasonable to assign costs to serve that Washington load on the basis of available Washington gas unit dispatch cost if that cost is lower than market power prices during the same hour?

Response to WUTC Data Request 157

PacifiCorp objects to this data request as it seeks rebuttal testimony before the schedule established by the Washington Utilities and Transportation Commission in Order 03, issued in this docket on May 24, 2023.

PREPARER: Counsel

SPONSOR: Counsel