

**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-230172

PACIFICORP'S RESPONSE TO  
STAFF'S MOTION TO COMPEL  
DISCOVERY

*I* In accordance with WAC 480-07-375(4) and Administrative Law Judge (ALJ) Howard's October 6, 2023 Notice Confirming Deadline to Respond to Motion to Compel, PacifiCorp dba Pacific Power & Light Company (PacifiCorp or Company) respectfully files this Response to Staff's Motion to Compel Discovery (Motion) in the above-captioned docket. The data requests (DRs) at issue prejudice the Company in its preparation of rebuttal testimony and inappropriately ask the Company to formulate and disclose its rebuttal positions, and conduct new time-consuming modeling of other intervenors' response testimony in advance of filing the Company's rebuttal testimony. PacifiCorp has made clear to Staff that the information it seeks will either be contained in the Company's rebuttal testimony or PacifiCorp will provide it within a reasonable time after that filing.<sup>1</sup> This approach ensures that the Company has adequate time to develop and present well supported positions on other intervenors' response testimony while

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<sup>1</sup> The only exception to this is DR 155, which asks the Company to prepare an Aurora run using a 2025 base year. As discussed in Attachment 1, Declaration of Ramon Mitchell, the Company does not have this analysis and cannot prepare it in less than 4-6 weeks.

maintaining procedural fairness. PacifiCorp therefore requests that the Washington Utilities and Transportation Commission (Commission) deny Staff's Motion.

### **I. Background**

2 On September 22, 2023, Staff served data requests (DR) 150-157 on the Company. In general, except for DR 151, the DRs sought the Company's premature disclosure of its rebuttal positions on various issues related to other intervenors' response testimony. It appears that Staff's intention is to incorporate the Company's rebuttal positions in its cross-answering testimony, due the same day as the Company's rebuttal testimony. The Company answered DR 151 and objected to DRs 150 and 152-157 on the basis that the DRs would require the Company to provide rebuttal testimony prior to the deadline, and to DR 155 on the additional basis that it seeks analysis that the Company has not performed.<sup>2</sup> Staff and the Company conferred on October 3, 2023, and the Company committed to providing supplemental responses to DRs 150 and 153, but Staff and the Company were unable to come to a resolution on the remaining DRs. The same day, without waiving its previously stated objections, the Company provided supplemental responses to DRs 150 and 153. On October 4, 2023, Staff filed its Motion to Compel responses to DRs 152 and 154-157 (collectively referred to as "Staff's DRs"). The next day, on October 5, 2023, PacifiCorp filed supplemental responses to Staff's DRs, maintaining the previously stated objection and clarifying that the Company is currently in the process of developing rebuttal positions, which will be provided in

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<sup>2</sup> PacifiCorp's objections to DRs 150, 152-157 included the following text: "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." The additional objection to DR 155 stated: "PacifiCorp further objects as this request is seeking analysis that has not been performed by the Company."

rebuttal testimony, and offering to supplement responses to the Staff DRs after filing rebuttal testimony.<sup>3</sup> That same day, Staff’s counsel conferred with PacifiCorp to indicate that Staff had reviewed the supplemental responses but did not intend to withdraw its Motion.

## II. Legal Standard

3 The Commission’s discovery process is governed by WAC 480-07-400, as well as applicable rules of evidence in nonjury trials before Washington superior courts.<sup>4</sup> Under these rules, a DR may request that a party provide “a narrative response describing a party’s policy, practice, or position.”<sup>5</sup> Further, “[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 . . . .”<sup>6</sup>

4 Subsection (3) of WAC 480-07-400 limits the scope of discovery to relevant issues in the proceeding, and prohibits parties from seeking discovery that is unduly burdensome.<sup>7</sup> In determining the appropriate scope of discovery, the ALJ must balance the “needs of the adjudicative proceeding, limitations on the parties’ resources, scope of

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<sup>3</sup> See Attachment 2, PacifiCorp’s 1st Supplemental Response to DRs 152, 154-157 (“PacifiCorp is currently actively reviewing and analyzing intervenor testimony and developing a position that will be provided in the Company’s rebuttal testimony on October 27, 2023. PacifiCorp will supplement these responses after providing rebuttal testimony.” For DR 155, PacifiCorp also stated: “Additionally, PacifiCorp does not admit that it would be more reasonable to forecast Rate Year 1 NPC based on Aurora model data for April 2024 to March 2025. However, PacifiCorp will be providing an updated NPC forecast and associated workpapers that removes the impact of the Ozone Transport Rule for 2024 in the Company’s Rebuttal Testimony.”).

<sup>4</sup> WAC 480-07-495(1).

<sup>5</sup> WAC 480-07-400(1)(c)(iii).

<sup>6</sup> *Id.*

<sup>7</sup> WAC 480-07-400(3).

the responding party's interest in the proceeding, and the importance of the issues at stake in the adjudicative proceeding.”<sup>8</sup>

### III. Argument

5           Staff's DRs at issue in the Motion seek to undermine the agreed-upon procedural schedule between the parties and approved by the Commission. Staff's DRs demand that the Company formulate and disclose its rebuttal position on other intervenors' testimony before the designated date for submission of rebuttal testimony. This requirement would place an unfair burden on the Company's ability to prepare its rebuttal testimony and gives Staff and other parties an unfair advantage by providing them with a preview of the Company's positions that can be referenced and responded to in Staff and intervenors' cross-answering testimony. In essence, this would provide parties the opportunity to file surrebuttal, which was not contemplated or agreed to in the procedural schedule. Furthermore, Staff's request in DR 155 for new modeling based on an intervenor's proposals using the Aurora software is not only unduly burdensome and outside of the scope of WAC 480-07-400, but also impossible to provide in advance of the Company's rebuttal testimony. This places an additional strain on the Company's resources and hampers its ability to adequately respond within the given timeframe.

#### A. Staff Has Not Articulated a Compelling Need for the Requested Information in Advance of the Company's Rebuttal Filing.

6           Under WAC 480-07-400(3), the ALJ must balance the needs of the proceeding and the interests of the party requesting the discovery with the burden imposed on the

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<sup>8</sup> *Id.*; see also *Gillett v. Conner*, 132 Wash. App. 818, 825 (2006) (directing the court to “balance the degree to which [the discovery request] would aid in the search for truth against the burdens and dangers posed by the inspection, and limit the frequency or extent of use of the discovery methods to prevent undue burdens.”).

party that would have to produce it. Here, Staff has not justified its position that PacifiCorp must provide the requested information before PacifiCorp files its rebuttal testimony instead of a reasonable time thereafter. The Company understands that Staff's purpose in posing these DRs is to support the development of Staff's cross-answering testimony. However, the clear purpose of cross-answering testimony in this proceeding is to allow non-Company parties to respond to each other's response testimony.<sup>9</sup> Seeking out and responding to the Company's position on intervenors' assertions as part of cross-answering testimony goes beyond the proper scope of that testimony and instead veers toward providing surrebuttal testimony. This was not contemplated or agreed to in the procedural schedule and would be prejudicial to PacifiCorp, which bears the burden of proof and was afforded the procedural right in the schedule to file the last round of testimony.<sup>10</sup>

7 In its 1<sup>st</sup> supplemental responses to DRs 152, and 154-157, the Company made clear that it plans to address Staff's requests in its rebuttal testimony, and has offered to provide supplemental responses to the DRs after filing its rebuttal testimony. Staff has not articulated why allowing the Company additional time to respond would be prejudicial, especially because there will still be 30 days between the rebuttal testimony filing date and the discovery deadline of November 27, 2023, during which time parties may serve additional DRs.<sup>11</sup>

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<sup>9</sup> See *WUTC v. Pacific Power & Light Co.*, Docket UE-152253, Order 11 at 5 (May 27, 2016) (finding that Sierras Club's testimony which provided a new analysis in response to arguments raised by Staff was proper cross-answering testimony because it was responding directly to another intervenor's testimony).

<sup>10</sup> See WAC 480-07-540 ("Public service companies . . . bear the burden of proof in the general rate proceedings . . .").

<sup>11</sup> Such DRs, of course, would be properly within the scope of WAC 480-07-400(1)(c)(iii) as they would ask for clarification of the Company's positions that it has already articulated, rather than asking the Company to take a position on an issue or argument it has yet to take a position on or that it plans to address in future testimony.

**B. Staff's DRs Prejudice the Company by Creating an Undue Burden and Allowing Staff an Unfair Preview of the Company's Rebuttal Positions.**

8 As detailed in Section D, below, each of Staff's DRs refer implicitly or explicitly to an argument that an intervenor made in response testimony and asks the Company to respond directly to that argument. These DRs prejudice the Company because it has limited time and resources to analyze party positions and prepare responsive testimony, and Staff's DRs unreasonably disrupt the Company's development of its rebuttal case. The parties to this proceeding reached an agreement regarding the procedural schedule in which PacifiCorp was granted a specific timeline to analyze the testimony of other parties and gather all necessary information before finalizing its position and disclosing it to other parties through the filing of rebuttal testimony.<sup>12</sup> Staff's DRs effectively violate this agreement and PacifiCorp's procedural rights as provided in Order 03. Critically, disrupting the Company's preparation of its rebuttal testimony will inhibit the Company's development of the record in this proceeding.

9 This is a complex case and the Company needs the full time allotted to prepare its rebuttal testimony. There are a total of seven non-Company parties and twenty-one witnesses who filed response testimony. In its review of this testimony, the Company identified at least 157 issues that may require a response. The Company has a total of six weeks to prepare its rebuttal testimony, with only two and a half weeks remaining as of the time of filing this response. Responding to Staff's DRs prior to the filing of rebuttal testimony would prejudice the Company's ability to fully develop its position and present its full case to the Commission.

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<sup>12</sup> See generally Docket UE-230172, Order 03.

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Furthermore, it is important to note that the Company has *not* yet finalized its positions on other intervenors' rebuttal positions. The Company follows a comprehensive and thorough review process with its subject matter experts and senior management before determining its rebuttal position on other parties' response testimony. If the Motion were granted, it would essentially put the Commission in the position of ordering the Company to immediately develop and disclose its rebuttal position on other intervenors' testimony ahead of the procedural schedule. This would lead to significant prejudice against the Company, as it would not be afforded its procedural rights provided in Order 03, which allow for sufficient time to develop and disclose its rebuttal positions.

**C. Staff's Request Would Establish an Unworkable Precedent for DRs in Adjudicative Proceedings.**

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Staff asserts that upholding PacifiCorp's objection would "freeze the discovery process" and set a discovery policy whereby parties need not answer DRs if the party intends to answer the same question in future testimony.<sup>13</sup> Staff's argument misstates the Company's position. The Company does not assert that *any* DR to which a party intends to later respond would be inappropriate. Instead, the Company's position is that a DR that asks a party to preview its position on *other* parties' assertions in advance of filing testimony is both inappropriate and unduly burdensome. Further, denying Staff's Motion would not freeze the discovery process—instead it would ensure that parties are granted sufficient time to develop their positions in response to other parties' assertions without being required to disclose those positions prematurely.

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<sup>13</sup> Staff's Motion to Compel Discovery at ¶ 12.

12           As a practical matter, discovery in this proceeding has not been frozen, and the Company has continued to respond to DRs from Staff. For instance, DR 151 requested that the Company expand on its position regarding deadbands in the PCAM as articulated by Company witness Jack Painter. This DR properly asks for clarification on the Company's position on a particular issue based on the Company's own testimony, and the Company provided a response. Contrary to Staff's assertion, the discovery process will continue even if its Motion is denied.

13           On the other hand, if Staff were to prevail, it would set an alarming precedent, which could turn the processing of a contested case on its head. Under Staff's theory that it is permissible to ask for a party's "position" in response to assertions made by other parties, in future proceedings, the Company could conceivably ask for Staff and intervenors' positions in advance of their filing response testimony, thereby allowing the Company additional time to review and analyze their positions to support preparation of the Company's rebuttal testimony. Similarly, a non-Company party could ask another non-Company party for their positions prior to filing response testimony, allowing preemptive responses to issues that would otherwise be addressed in cross-answering testimony. Allowing DRs in these situations would encourage gamesmanship in discovery and would be incredibly disruptive to parties in preparing their testimony. Staff's approach cannot possibly be what was contemplated by the procedural schedule approved by the Commission or rule providing that discovery may request a party's "position."<sup>14</sup>

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<sup>14</sup> See WAC 480-07-400(1)(c)(iii).



**D. PacifiCorp’s Objections to Staff’s DRs Were Reasonable Given the Content of the DRs.**

14 A close review of each of the DRs illustrates why PacifiCorp reasonably sought to respond to the DRs after the filing of its rebuttal testimony. The DRs that are subject to the Motion are DRs 152, 154, 155, 156, and 157:

- a. DR 152 explicitly references Public Counsel witness Earle’s testimony and asks the Company to respond to the witness’ assertion regarding the alleged information asymmetry between the Company and intervening parties as related to the Company’s request to modify its PCAM.
- b. DRs 154 and 155 do not specifically reference intervenor testimony, but implicitly refers to AWEC witness Mullins’ recommendation that the Company perform its NPC updates based on the specific rate years at issue, corresponding to the years beginning March 1, 2024, and March 1, 2025, rather than the calendar year NPC studies presented in PacifiCorp’s filing.<sup>15</sup>
- c. DR 156 explicitly references AWEC witness Mullins’ testimony and exhibits and asks questions regarding monthly coal prices for the Jim Bridger plant.
- d. DR 157 explicitly references AWEC witness Mullins’ testimony regarding Aurora modeling, and asks Company witness Mitchell to respond to several assertions.

15 Notably, DRs 152, and 154-156 do not reference any Company witness or seek clarification on the Company’s position based on the Company’s testimony. Company witnesses Jack Painter and Ramon Mitchell will be addressing the issues raised in these DRs in their rebuttal testimony, and thus DRs 152, and 154-156 effectively request a

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<sup>15</sup> Mullins, Exh. BGM-1T at 3.

preview of the Company's rebuttal positions. DR 157 is even more explicit, and asks Company witness Mitchell to respond to assertions made by AWEC witness Mullins.

16 Finally, while preparation of responses to DRs 152, 154, 156, and 157 would be burdensome and prejudicial to the Company, DR 155 is in another category altogether. Simply put, it is impossible for the Company to respond to DR 155 within the requested time period.<sup>16</sup> In DR 155, Staff asks the Company to rebuild the inputs for Aurora for April 2024-March 2025 based on assertions from AWEC witness Mullins.<sup>17</sup> Due to the Company's current Aurora modeling being based on the calendar year 2024, implementing this update would not simply involve rerunning the existing model. Instead, it would require dedicating several internal Company employees to work exclusively on this specific request and building an entirely new model for 2025. This process would take approximately four to six weeks to complete, and given other demands on the Company's NPC team, could not be completed any sooner than mid-December 2023 to early January 2024.<sup>18</sup> It is important to note that the creation of a new model is not addressed in WAC 480-07-400, which only mandates the "rerun or recalculation" of an existing model.

17 The ALJ has set the hearing on this Motion for Thursday, October 12, and a deadline for responding to the DRs should Staff prevail of Monday, October 16. Given the complexity of the response required for this DR, it would be impossible to respond within that time period or even by the deadline for Staff's cross-answering testimony of October 27. Moreover, the Company is in the process of preparing an updated NPC

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<sup>16</sup> Attachment 1, Declaration of Ramon J. Mitchell at ¶¶ 4-7.

<sup>17</sup> Staff's Motion to Compel Discovery, Attachment 1.

<sup>18</sup> See Attachment 1, Declaration of Ramon J. Mitchell at ¶¶ 5, 7.

forecast for its rebuttal testimony that will address a portion of Staff’s request in DR 155 regarding the Ozone Transport Rule, and, therefore, Staff’s additional request is unreasonably burdensome and unnecessary.<sup>19</sup>

18 In response to PacifiCorp’s objection to DR 155, Staff asserts that this DR is reasonably within the confines of the discovery rules. While the Commission’s rules do provide that the Company “be willing, on request, to rerun or recalculate the study, model, formula, or methodology based on different inputs and assumptions,” the DR must still be within the scope of discovery and not be unduly burdensome on the company.<sup>20</sup> Further, the rules provide the Commission “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.”<sup>21</sup> As responding to this DR would take significant Company resources and require the building of the forecast inputs for 2025, and Staff has not articulated compelling need for this information, PacifiCorp requests that the Commission deny the Motion as to DR 155. If the Commission grants the Motion with respect to DR 155, PacifiCorp will need at least until mid-December 2023 to complete the requested analysis.

#### IV. Conclusion

19 For the foregoing reasons, the Company respectfully asked that the Commission deny Staff’s Motion to Compel. This will ensure that all parties have sufficient time to develop and present well-supported positions on other parties’ response testimony to the Commission, both in this case and in future contested cases.

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<sup>19</sup> *Id.* at ¶ 6.

<sup>20</sup> WAC 480-07-400(1)(c)(iii) (allowing DRs asking for a party to rerun a study, “subject to the standards in subsection (3) of this section” which limit the scope of discovery).

<sup>21</sup> WAC 480-07-400(1)(c)(iii)

Dated October 11, 2023,

*/s/ Jocelyn Pease*

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Jocelyn Pease, WSBA No. 50266  
McDowell Rackner Gibson PC  
419 SW 11th Avenue, Suite 400  
Portland, OR 97205  
Telephone: 503-595-3925  
[jocelyn@mrg-law.com](mailto:jocelyn@mrg-law.com)

Carla Scarsella  
Ajay Kumar  
PacifiCorp  
825 NE Multnomah Street, Suite 2000  
Portland, OR 97232  
Phone: (503) 813-6338 (Scarsella)  
(503) 813-5161 (Kumar)  
Email: [carla.scarsella@pacificorp.com](mailto:carla.scarsella@pacificorp.com)  
[ajay.kumar@pacificorp.com](mailto:ajay.kumar@pacificorp.com)

Attorneys for PacifiCorp