

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF
RESPONSE TO BENCH REQUEST

DATE PREPARED: June 6, 2022
DOCKET: UG-210755
REQUESTER: Bench

WITNESS: N/A
RESPONDER: Settling Parties
TELEPHONE: (360) 915-4521

BENCH REQUEST NO. 2:

Please provide the specific dates and means (i.e., call, email.) used to communicate the proposed settlement to the non-settling parties prior to the February 18, 2022, email Staff made to the presiding officer, as well as whether the Settling Parties provided an opportunity to respond to, participate in or provide feedback on the proposed settlement.

RESPONSE:

Pursuant to WAC 480-07-405(6)(b), the Settling Parties strongly object to Bench Request No. 2 as calling for information that would cause the Settling Parties to violate the Commission's rule establishing the procedures for settlement negotiations. Settling Parties did not object to Bench Request No. 2 during the hearing because they needed to review the Bench Request in writing, as well as the Commission's settlement rules, to fully understand their obligations and bases for objecting. With all due respect, this Bench Request is inappropriate and improper. If the Settling Parties were to fully respond to this Bench Request, they would be in violation of the law. The provisions of the Commission's own rule are clear and unambiguous. WAC 480-07-700(6) provides:

(6) **Settlement negotiation guidelines.** In any settlement negotiation, including collaboratives, settlement conferences, and mediations, the following apply unless all participants agree otherwise:

(a) No statement, admission, or offer of settlement made during negotiations is admissible in evidence in any formal hearing before the commission without the consent of the participants or unless necessary to address the process of the negotiations;

(b) Information exchanged exclusively within the context of settlement negotiations will be treated as confidential and will be privileged against disclosure to the extent permitted by law;

(c) Participants in a commission-sanctioned ADR process must periodically advise any nonparticipating parties and the commission of any substantial progress made toward settlement and must immediately advise the commission if that process is without substantial prospects of resolving the issue or issues under discussion (i.e., if the participants agree that they are at an impasse or any neutral third party who is assisting the participants in the ADR process declares an impasse); and

(d) Any mediator, facilitator, or settlement judge who assists the participants in an ADR process will not participate in any adjudication, arbitration, or approval process for the same proceeding unless all parties consent in writing.

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Under subsections (a) and (b), the communications responsive to this Bench Request were statements made during negotiation and therefore are not admissible.¹ That information would likewise be inadmissible under the Washington State rules of evidence.²

As Staff stated in rebuttal testimony,³ the vague accusations made by AWEC⁴ are untrue, and the Settling Parties categorically deny any wrongdoing at any point in this proceeding. It was improper for AWEC to bring up the settlement negotiation process in their testimony. It put the Settling Parties in a position where they could not defend the actions they took during the settlement negotiation process without violating the Commission's rule. Should the Commission overrule this objection, the Settling Parties will of course provide evidence demonstrating our communications with the other parties. If the Commission does overrule this objection, the Settling Parties request that the Commission issue a bench request to the non-settling parties regarding what efforts they made to communicate with the Settling Parties during the period in question.

However, we urge the Commission to sustain this objection. Overruling the objection will have a chilling effect on future settlement negotiations. Statements and information provided over the course of settlement negotiations are generally confidential and inadmissible because this allows parties to communicate openly and reach settlements. If these protections are not enforced in Commission proceedings, parties, including Commission Staff, will be far less forthright during settlement negotiations, which in turn will result in far fewer settlements. This would be a disturbing and unwelcome precedent that conflicts with Commission policy, as the Commission favors the resolution of contested issues through settlement when doing so is lawful and consistent with the public interest.⁵

The Settling Parties also object based on the relevance of the information sought. The communications made during the settlement negotiation process do not alter the contents of the settlement agreement in any way, shape, or form. The settlement agreement stands on its own, independent of the process preceding it. The question before the Commission is whether the settlement meets the well established standards the Commission uses to evaluate settlements.⁶ The negotiation process does not change the contents of the settlement, and

1 As Staff noted in its rebuttal testimony, this information is not necessary to address the process of settlement negotiations

2 See Wash. ER 408.

3 Huang, Exh. JH-1T at 4:14-6:14.

4 Mullins, Exh. BGM-1T at 4:25-5:13.

5 *WUTC v. Cascade Natural Gas Corp.* Docket UG-060256, Final Order Accepting Settlement at ¶ 80 (Jan. 12, 2007).

6 WAC 480-07-750(2).

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therefore the communications made during the settlement process are not relevant to the Commission's determination to approve, modify, or reject the settlement.

Furthermore, even if the Settling Parties had not communicated with the non-settling parties at all, there would be nothing improper about that course of action. Nothing in Commission rule requires signatories to a multiparty settlement to make any kind of overture to other parties before or after such a settlement is reached.⁷ To be clear, both Staff and the Company *always* strive to reach consensus with other parties to achieve settlement on reasonable terms whenever possible. As a rule, the Settling Parties would not reach a multiparty settlement without first speaking to the other parties and concluding that a full settlement on reasonable terms was not possible. Even so, the implication of this Bench Request is that there is an expectation or requirement to continuously communicate with non-settling parties even if prior communication made clear that reaching a settlement with that party was highly unlikely, if not impossible. Such a misguided standard does not exist anywhere in the Commission's rules, its policy statement regarding negotiations under the telecommunications act,⁸ or in the Superior Court's civil rules related to settlement.

Finally, the information sought by this Bench Request is not "necessary to address the process of the negotiations" under WAC 480-07-700(6)(a). First, the negotiation process is over. Any alleged issue with the negotiation process can no longer be addressed. Under WAC 480-07-700(6)(a), otherwise inadmissible information could have been brought to the Commission's attention to address the issue while further negotiations were still possible. If the non-settling parties truly believed that something improper occurred during the negotiation process, those parties could (and should) have petitioned the Commission for a remedy at the time. Now, however, the same information cannot be necessary to address a process that is already over. Second, as noted above, the information is irrelevant to the question at issue, and therefore it cannot be necessary to address the settlement process at this stage of the proceeding.

⁷ See WAC 480-07-730(3).

⁸ *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket UT-960269, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, And Approval Of Agreements Under The Telecommunications Act Of 1996 (June 28, 1996).