

1 D. MICHAEL SCHOENFELD, SBN 102332
LISA D. NICOLLS, SBN 234376
2 MURPHY AUSTIN ADAMS SCHOENFELD LLP
555 Capitol Mall, Suite 850
3 Sacramento, California 95814
Telephone: (916) 446-2300
4 Facsimile: (916) 503-4000
Email: mschoenfeld@murphyaustin.com
5 Email: lnicolls@murphyaustin.com

6 Attorneys for Plaintiff
WEST PACIFIC ELECTRIC COMPANY
7 CORPORATION

8 P. RANDOLPH FINCH, JR. SBN 185004
DAVID W. SMILEY, SBN226616
9 FINCH, THORNTON & BAIRD, LLP
4747 Executive Drive, Suite 700
10 San Diego, California 92121-3107
Telephone: (858) 737-3100
11 Facsimile: (858) 737-3101
Email: pfinch@ftblaw.com
12 Email: dsmiley@ftblaw.com

13 Attorneys for Defendants

14 UNITED STATES DISTRICT COURT
15 EASTERN DISTRICT OF CALIFORNIA

16 WEST PACIFIC ELECTRIC COMPANY
17 CORPORATION,

18 Plaintiff,

19 v.

20 DRAGADOS/FLATIRON, a joint venture;
21 LIBERTY MUTUAL INSURANCE
22 COMPANY, a Massachusetts corporation;
23 FIDELITY AND DEPOSIT COMPANY
24 OF MARYLAND, a Maryland corporation;
25 ZURICH AMERICAN INSURANCE
26 COMPANY, a New York corporation;
27 THE CONTINENTAL INSURANCE
28 COMPANY, a Pennsylvania corporation;
XL SPECIALTY INSURANCE
COMPANY, a Delaware corporation; THE
INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA, a
Pennsylvania corporation; AMERICAN
HOME ASSURANCE COMPANY, a New

Case No. 1:18-CV-00166-LJO-BAM

STIPULATION PROTECTIVE ORDER

Complaint Filed: January 30, 2018
Trial Date: Not Set

1 York corporation; NATIONAL
2 INDEMNITY COMPANY, a Nebraska
3 corporation; TRAVELERS CASUALTY
4 AND SURETY COMPANY OF
5 AMERICA, a Connecticut corporation;
6 FEDERAL INSURANCE COMPANY, an
7 Indiana corporation,

8 Defendants.

9 The parties to this Stipulation and Protective Order are Plaintiff West Pacific Electric
10 Company Corporation (“WPEC”), Defendant Dragados/Flatiron (“DFJV”), and Defendants
11 Liberty Mutual Insurance Company, Fidelity and Deposit Company of Maryland, Zurich American
12 Insurance Company, The Continental Insurance Company, XL Specialty Insurance Company, The
13 Insurance Company of the State of Pennsylvania, American Home Assurance Company, National
14 Indemnity Company, Travelers Casualty and Surety Company of America, and Federal Insurance
15 Company (collectively hereinafter referred to as “Surety Defendants”). Collectively, WPEC, DFJV
16 and the Surety Defendants are hereinafter referred to as the “Parties.” The Parties stipulate that the
17 Court shall enter a protective order under Federal Rules of Civil Procedure 26(c) and 34. The
18 Parties acknowledge that this Stipulated Protective Order does not entitle them to file confidential
19 information under seal; Civil Local Rules 141 and 141.1 set forth the procedures that must be
20 followed and the standards that will be applied when a party seeks permission from the court to file
21 material under seal.

22 1. Proceedings and Information Governed. This Stipulation will govern any and all
23 confidential document(s), information, or other thing furnished by a Party and/or any individual
24 or entity which is a third party to the Action in connection with the production of documents and
25 materials produced in response to any subpoenas and/or the exchange of documents and materials
26 pursuant to the requests of either of the Parties (“Receiving Party”).

27 2. Confidential Information Defined. For the purposes of this Stipulation,
28 “Confidential Information” will mean all information or material that:

(a) The party producing the information and/or document(s) (the “Producing Party”) considers in good faith after reasonable investigation and analysis to constitute or contain

1 trade secrets, confidential personal financial information, or confidential personal identification
2 information such as social security numbers, whether embodied in physical objects, documents,
3 or the factual knowledge of persons; and

4 (b) Has been designated as Confidential Information by the Producing Party in
5 compliance with this Stipulation. The restrictions of this Stipulation will not apply to any
6 information that:

7 (a) At the time of the disclosure to a qualified recipient (as defined in
8 paragraph 5) is in the public domain;

9 (b) After disclosure to a qualified recipient becomes part of the public domain
10 as a result of publication not involving a violation of this Stipulation;

11 (c) A qualified recipient can show was in its possession at the time of the
12 disclosure;

13 (d) A qualified recipient can show was received by it from a source who
14 obtained the information lawfully and under no obligation of confidentiality to the producing
15 party;

16 (e) A qualified recipient can show was independently developed by it after
17 disclosure; or

18 (f) Does not constitute or contain trade secrets, confidential personal financial
19 information, or confidential personal identification information such as social security numbers

20 3. Designation of Confidential Information. The parties will designate Confidential
21 Information by stamping or affixing to the physical objects or documents a legend that includes
22 the following language:

23 CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

24 4. Party's Own Information. The restrictions on the use of Confidential Information
25 established by this Stipulation apply only to the use by a party of Confidential Information
26 received from the Parties or from third parties whose documents are subpoenaed and whose
27 documents are designated in accordance with this Stipulation.

28 5. Persons Authorized to Receive Confidential Information. For the purpose of this

1 Stipulation, “qualified recipient” will mean:

2 (a) The attorneys of record in this action; any attorneys retained by the parties
3 in this action to consult on the litigation; their respective associates, clerks, legal assistants, and
4 stenographic and support personnel; and organizations, and their employees, retained by such
5 attorneys to provide litigation support services in this action;

6 (b) Any independent consultant or other person who is designated by written
7 agreement of all parties in this action or by order of the Court, obtained on noticed motion (or on
8 shortened time as allowed by the Court) permitting such disclosure, or who may otherwise obtain
9 authorization to receive Confidential Information in accordance with this Stipulation;

10 (c) The officers, directors and employees of a party;

11 (d) Mediators and Arbitrators agreed upon by the parties or appointed by a
12 Court;

13 (e) The persons who are authors or addressees of the Confidential Information;
14 and

15 (f) Other persons to whom the parties agree or the Court orders that
16 disclosures will be made.

17 6. Confidential Documents Produced By the Parties. At the request of the Parties, all
18 documents and physical objects produced as a result of this Stipulation, as identified in paragraph
19 1, and marked as confidential will initially be considered to constitute Confidential Information.
20 The Parties may designate any documents, testimony or information as containing Confidential
21 Information which it has previously produced or exchanged without such designation or that has
22 been produced by the parties and was not designated as containing Confidential Information at
23 the time produced. Notice of such post-production designation shall be given in writing to all
24 parties to whom such materials have previously been furnished within thirty (30) calendar days
25 after the document or information has been produced. From the time such post-production
26 designation is made, it shall have the same effect as if each individual item designated on a post-
27 production basis was, in fact, marked as set forth above.

28 7. Challenging “Confidential” Designations. A Receiving Party may object and

1 request removal of particular items designated “CONFIDENTIAL - SUBJECT TO
2 PROTECTIVE ORDER” by giving counsel for the Producing Party written notice of its intent to
3 seek removal, supported by reasons for the removal, specifying the items of Confidential
4 Information for which removal is sought. Counsel for the Producing Party has ten (10) days to
5 provide a written response describing the basis for each designation that is challenged, or to de-
6 designate items that have been labeled “CONFIDENTIAL – SUBJECT TO PROTECTIVE
7 ORDER.” The parties will confer to attempt to resolve the objection, but if the parties cannot
8 resolve the objection within five (5) business days after actual receipt of the written response, the
9 Receiving Party may file and serve the other parties with a motion seeking Court determination of
10 the designation. The burden of persuasion in any proceeding challenging the designation of
11 Confidential Information shall be on the Producing Party seeking to maintain the designation. A
12 Receiving party shall not be obligated to challenge the propriety of a Confidential Information
13 designation at the time it was made, and a failure to do so shall not preclude a subsequent
14 challenge thereto.

15 8. Use of Confidential Information. Any Confidential Information will be handled
16 by the receiving party in accordance with the terms of this Stipulation. Confidential information
17 will be held in confidence by each receiving party, will be used by each receiving party for
18 purposes of this action (or arbitration) only and not for any business or other purpose unless
19 agreed to in writing by all parties to this action (or arbitration) or as authorized by further order of
20 the Court, and will not be disclosed to any person who is not a qualified recipient, except as
21 provided in this Stipulation. All Confidential Information will be maintained to preclude access
22 by persons who are not qualified recipients. Any information designated as “CONFIDENTIAL –
23 SUBJECT TO PROTECTIVE ORDER” shall be treated as Confidential information until such
24 time as (a) the Producing Party agrees that it shall no longer be treated as Confidential
25 Information or (b) the Court rules that such information should not be treated as Confidential
26 Information. The application and enforcement of this protective order shall be governed by
27 FRCP Rules 26 and 37(b).

28 9. Copies of Confidential Information. Confidential information will not be copied

1 or otherwise reproduced by a receiving party, except for transmission to qualified recipients as
2 specified in paragraph 10, without the written permission of the producing party or by further
3 order of the Court/Arbitrator(s). Counsel receiving Confidential Documents shall maintain a list
4 showing the name of each person to whom access to Confidential Documents is given by said
5 counsel along with the date thereof.

6 10. Transmission of Information. Nothing in this Stipulation will prohibit the
7 transmission or communication of Confidential Information between or among qualified
8 recipients:

- 9 (a) By hand delivery;
- 10 (b) by face-to-face conference;
- 11 (c) In sealed envelopes or containers via the mails or an established freight,
12 delivery, or messenger service; or
- 13 (d) By telephone, telegram, facsimile, or other electronic transmission system
14 if, under the circumstances, there is no reasonable likelihood that the transmission will be
15 intercepted or misused by any person who is not a qualified recipient.

16 11. Disclosure to Experts, Consultants, and Other Persons. In the preparation for trial,
17 mediation, arbitration or analysis of claims and/or disputes relating to the Project, if a qualified
18 recipient finds it necessary to disclose a producing party's confidential information to an
19 independent technical or business expert, consultant, or any other person retained by the qualified
20 recipient or its attorneys to assist in this action, the qualified recipient may do so. However, any
21 such expert, consultant or other person receiving confidential information shall be bound by the
22 terms of this Stipulation and shall agree, in writing, as an express condition precedent to the
23 disclosure of said confidential information, to maintain the confidentiality of the disclosure.

24 12. Affidavits. Each person to whom confidential information will be given, shown,
25 disclosed, made available, or communicated in any way, except clerical and stenographic
26 personnel described in paragraph 5, will first execute an affidavit, in the form of Attachment A to
27 this Stipulation, agreeing to be bound by the terms of this Stipulation. A copy of the affidavit will
28 be served on all parties.

1 13. Court Procedures. Without written permission from the Designating Party or a
2 court order secured after appropriate notice to all interested persons, a Party may not file in the
3 public record in this action any Protected Material. A Party that seeks to file under seal any
4 Protected Material must comply with Civil Local Rule 141. Protected Material may only be filed
5 under seal pursuant to a court order authorizing the sealing of the specific Protected Material at
6 issue. Pursuant to Civil Local Rule 141, a sealing order will issue only upon a request establishing
7 that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise
8 entitled to protection under the law. If a Receiving Party's request to file Protected Material under
9 seal pursuant to Civil Local Rule 141 is denied by the court, then the Receiving Party may file the
10 information in the public record pursuant to Civil Local Rule 141 unless otherwise instructed by
11 the court.

12 14. Testimony. Any person may be interviewed and examined as a witness at
13 depositions and may testify concerning all confidential information of which the person has prior
14 knowledge. If an interview or examination concerns confidential information, the producing
15 party will have the right to exclude from the portion of the examination or interview concerning
16 the confidential information any person other than the witness, the witness's attorney(s), and
17 qualified recipients of the confidential information. If the witness is represented by an attorney
18 who is not a qualified recipient, then before the interview or examination, either the producing
19 party will be given the opportunity to seek a further protective order or the attorney will be
20 requested to provide an affidavit, in the form of Attachment A to this Stipulation, that he or she
21 will comply with the terms of this Stipulation and maintain the confidentiality of confidential
22 information disclosed during the course of the interview or examination. If the attorney declines
23 to give the affidavit, the parties' attorneys, before the interview or examination, will jointly seek a
24 further protective order from the Court/Arbitrator(s) prohibiting the attorney from disclosing the
25 confidential information.

26 15. Depositions. Only that portion of the deposition transcript that has ben designated
27 Confidential Information at the time of deposition or 15 days thereafter will be treated as
28 Confidential Information. Only the specific portions of the transcript that contain Confidential

1 Information (designated by page and line number) may be designated as “CONFIDENTIAL-
2 SUBJECT TO PROTECTIVE ORDER.” If any part of a deposition recorded by videographic
3 means is designated as “Confidential”, the recording storage medium and its container shall be so
4 labeled but only the specific portions of the video that contains Confidential Information shall be
5 treated as “Confidential.” All disputes over Confidential Information designations will be
6 governed by the procedures stated in paragraph seven (7), above.

7 16. Subpoenas. If, at any time, a Receiving Party or any person receiving Confidential
8 Information receives a subpoena or some other form of legal process seeking Confidential
9 Information, the Party or person to whom the subpoena or other form of legal process is directed
10 (“Subpoenaed Party”) shall within five (5) days after receiving the subpoena, legal process, or
11 request:

12 (a) Notify in writing the to the Party who originally produced such information
13 and/or to the Party who designated the information as “CONFIDENTIAL-SUBJECT TO
14 PROTECTIVE ORDER”;

15 (b) The notice shall include the date set for the production and a copy of the
16 subpoena or other process or order; and

17 The Subpoenaed Party shall not disclose any Confidential Information in response thereto
18 without first providing the Producing/Designating Party ten (10) days (after the date that notice
19 was given to the Producing/Designating Party) unless a shorter time period is required by law, to
20 inform the Subpoenaed Party either that the Producing/Designating Party does not object to the
21 production of the information or that it will seek court protection to prevent the production, unless
22 prohibited from doing so by law or regulation. If the Producing/Designating Party responds that
23 it will not seek court protection, then the Subpoenaed Party may produce the information. If the
24 Producing/Designating Party fails to provide the Subpoenaed Party with a response as to whether
25 or not it will object to the production or seek court protection, the Subpoenaed Party may produce
26 the information (11) days after providing notice to the Producing/Designating Party, unless a
27 shorter time period is required by law. If the subpoenaing party does not agree to be bound by the
28 terms of this Stipulation, the Producing/Designating Party may seek a court order prohibiting

1 disclosure.

2 If a party makes a motion to quash or modify a subpoena for discovery served on a third-
3 party, there will be no disclosure of the subject matter objected to under the subpoena until the
4 Court has ruled on the motion, and then only in accordance with the ruling.

5 17. Attorneys' Actions. Nothing in this Stipulation will bar or otherwise restrict an
6 attorney who is a qualified recipient from:

- 7 (a) Rendering advice to his or her client with respect to this action; or
- 8 (b) Generally referring to or relying on his or her examination of documents
9 that have been produced under this Stipulation and that contain Confidential Information.

10 18. Trial Use. Nothing in this Stipulation is intended to prevent the use of
11 Confidential Information which is admissible under the Federal Rules of Evidence and the rules
12 of court, either as an exhibit or referenced in testimony, subject to the Judge addressing the issue
13 and making ruling(s) that concern the use and/or admissibility of the asserted Confidential
14 Information.

15 19. No Waiver. The taking of, or the failure to take, any action to enforce the
16 provisions of this Stipulation, or the failure to object to any designation or any such action or
17 omission, will not constitute a waiver of any right to seek and obtain protection or relief, other
18 than as specified in this Stipulation, of any claim or defense in this action or any other action,
19 including but not limited to, any claim or defense that any information:

- 20 (a) Is or is not relevant, material, or otherwise discoverable;
- 21 (b) Is or is not confidential or proprietary to any party;
- 22 (c) Is or is not entitled to particular protection; or
- 23 (d) Embodies or does not embody confidential commercial information of any
24 party.

25 In making this claim or defense, the party must comply with the procedures described in
26 this Stipulation. This Stipulation is entered without prejudice to the right of any party to apply to
27 the Court at any time to relax or rescind the restrictions of this Stipulation, when convenience or
28 necessity requires. The procedures set forth in this Stipulation will not affect the rights of the

1 parties to object to discovery on grounds other than those related to confidential or proprietary
2 information claims, nor will they relieve a party of the necessity of proper response to discovery
3 devices.

4 20. No Probative Value. This Stipulation will not abrogate or diminish any
5 contractual, statutory, or other legal obligation or right of any party or person with respect to any
6 confidential information. The fact that information is designated as confidential information
7 under this Stipulation will not be considered to be determinative of what a trier of fact may
8 determine to be confidential or proprietary.

9 Absent a stipulation of all parties, the fact that information has been designated as
10 Confidential Information under this Stipulation will not be admissible during the trial of this
11 matter, nor will the jury be advised of this designation. The fact that any information is disclosed,
12 used, or produced in discovery or at trial in this action will not be construed to be admissible or
13 offered in any action or proceeding before any court, agency, or arbitration tribunal as evidence
14 that the information:

15 (a) Is or is not relevant, material, or otherwise admissible;
16 (b) Is or is not confidential or proprietary to any party;
17 (c) Is or is not entitled to particular protection; or
18 (d) Embodies or does not embody confidential commercial information of any
19 party.

20 21. Return of Information. Within thirty (30) days after the resolution of the pending
21 Project claims, counsel for the producing party will notify all receiving parties that the receiving
22 parties shall return or destroy all Confidential Information produced in accordance herewith
23 within thirty (30) days of the notice and the receiving party(ies) shall destroy all notes, synopsis,
24 summaries or digests of Confidential Information therein. Notice of destruction as aforesaid shall
25 be given by counsel to all other counsel. All Confidential Information not embodied in written
26 materials, documents, or tangible items will remain subject to this Stipulation. In no event will a
27 party retain a copy of any Confidential Information produced to it.

28 22. Court's Jurisdiction. The court retains jurisdiction to make amendments,

1 modifications, deletions, and additions to this Stipulation as the Court from time to time considers
2 appropriate. The provisions of this Stipulation regarding the use or disclosure of information
3 designated as confidential information will survive the termination of this action, and the Court
4 will retain jurisdiction with respect to this Stipulation.

5 23. Notices. Any of the notice requirements in this Stipulation may be waived, in
6 whole or in part, but only a writing signed by the attorney of record for the party against whom
7 such waiver is sought will be effective.

8
9 Dated: August 22, 2018 MURPHY AUSTIN ADAMS SCHOENFELD LLP

10
11 By/s/ Lisa D. Nicolls
12 D. MICHAEL SCHOENFELD
13 LISA D. NICOLLS
14 Attorneys for Plaintiff
15 WEST PACIFIC ELECTRIC COMPANY
16 CORPORATION

17 Dated: August 22,2018 FINCH, THORNTON & BAIRD, LLP

18 By /s/ David W. Smiley
19 P. RANDOLPH FINCH, JR.
20 DAVID W. SMILEY
21 Attorneys for Defendants

22 **EXHIBIT A TO STIPULATION AND PROTECTIVE ORDER**

23 I, _____, the undersigned, declare as follows:

24 1. I am the _____ (title) of
25 _____ (name of business entity) and have been
26 requested to sign this declaration prior to receiving any and all documents identified as being
27 subject to the confidentiality and limiting use provisions of the Stipulation and Protective Order
28 (“Stipulation”) entered in the case of *West Pacific Electric Company Corporation v. Dragados/Flatiron, et al.*, United States District Court for the Eastern District of California Case

1 No. 1:18-CV-00166-LJO-BAM.

2 2. I have read the Stipulation and/or had its terms explained to me and agree, without
3 reservation, to be bound by its terms absent judicial determination to the contrary.

4 3. I have the authority to sign this declaration on behalf of the business entity to which
5 I am an employee.

6 I agree to educate all others who are afforded access to any such records, through
7 my or my employer's use, about the terms of the Stipulation and have all those who actually access
8 any records named as confidential to also sign a declaration in their own name.

9 I declare under penalty of perjury under the laws of the State of California that the foregoing
10 is true and correct.

11 Executed this ___ day of _____, 20__, at _____,
12 _____.

13 **ORDER**

14
15 The parties' stipulated protective order filed on August 22, 2018 (Doc. 54) complies with
16 the requirements of Local Rules 141 and 141.1. Accordingly, IT IS HEREBY ORDERED that
17 the parties' Stipulated Protective Order is APPROVED in its entirety.

18
19 IT IS SO ORDERED.

20 Dated: August 27, 2018

21 /s/ Barbara A. McAuliffe
22 UNITED STATES MAGISTRATE JUDGE

23
24
25
26
27
28