

**BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION  
COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION  
COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

DOCKET NO. UG-110723

PUBLIC COUNSEL MOTION TO  
COMPEL RESPONSES BY PUGET  
SOUND ENERGY TO DISCOVERY  
REQUESTS

**I. MOTION TO COMPEL**

1. Pursuant to WAC 480-07-375(1)(c), 480-07-405(3), and WAC 480-07-425(1), Public Counsel moves to compel production of documents responsive to Public Counsel Data Request Nos. 16-18 in this matter.<sup>1</sup> As a general matter, these requests seek reports and analysis, briefing materials, and meeting minutes regarding Puget Sound Energy's (PSE) Pipeline Integrity Program (PIP) provided to the Boards of Directors within the Puget Holdings corporate structure.
2. PSE has objected to producing material provided to Boards of Directors in the corporate ownership structure above PSE.
3. Good faith effort to resolve dispute. As required by WAC 480-07-425(1), Public Counsel made a good faith effort to resolve this dispute. Public Counsel contacted counsel for PSE on October 5<sup>th</sup> and 6<sup>th</sup> and discussed the requests and the basis for PSE's objection to production. The parties were unable to resolve their dispute.

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<sup>1</sup> The subject Data Requests and the PSE responses are attached as Appendix A to this motion.  
PC MOT TO COMPEL RESPONSES BY PSE TO DISCOVERY REQUESTS  
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## II. BACKGROUND

### A. Public Counsel Data Requests At Issue.

4. The Public Counsel Data Requests (PC DRs) at issue request Board of Directors materials as follows:

- All internal reports and analysis prepared for the Board of Directors relating to the PIP (PC DR 16).
- All Board of Directors minutes which contain any reference to the PIP (PC DR 17).
- All briefing or other presentation materials provided to the Board regarding the PIP (PC DR 18).

The three data requests define “Board of Directors” to mean any Board of Directors of any company listed as having an affiliate interest with PSE in the Affiliated Interest Transaction report filed with PSE’s 2011 general rate case.<sup>2</sup> This includes, as listed in Appendix B, the Boards of Directors of Puget Holdings LLC and its wholly-owned subsidiaries, Puget Intermediate Holdings, Inc., Equico, Puget Energy, Inc., and Puget Sound Energy, Inc.

### B. PSE Response and Objections.

5. PSE has objected to Public Counsel’s requests on the grounds that they are: (1) not relevant or reasonably calculated to lead to admissible evidence; (2) unduly burdensome taking into account the needs of the adjudicative proceeding, and in particular that the requests ask for “information provided to ‘Boards of Directors’ in PSE’s corporate ownership structure above PSE.”<sup>3</sup> Without waiving these objections, PSE provided limited presentation materials from two

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<sup>2</sup> Dockets UE-111048/UG-111049, Puget Sound Energy Affiliated Interest and Subsidiary Transactions Report, Exhibit 2, filed April 29, 2011. A copy is attached as Appendix B to this motion.

<sup>3</sup> Appendix A.

PSE Board of Directors meetings, and two “minute excerpts” from “the Board meeting” on the same dates (which Board is not specified).

### III. ARGUMENT

#### A. **The Requested Board of Directors Documents Fall Within The Appropriate Scope of Discovery.**

6. WAC 480-07-400(3) expressly permits discovery of any information that is either relevant or may lead to the production of information that is relevant. The rules further provide that “[a] party may not object to a data request on grounds that the information sought will be inadmissible at hearing, if the information appears reasonably calculated to lead to discovery of admissible evidence.”<sup>4</sup>

7. The information requested in Public Counsel’s discovery meets the requirements of the rules. The Board of Directors documents Public Counsel has requested in PC DRs 16-18 are analyses, reports, briefing materials, and minutes making reference to the PIP. PSE cannot credibly argue that internal documents directly relating to the PIP, are not relevant evidence in an adjudication evaluating the PIP proposal, or could not lead to discovery of admissible evidence. The overall issue in the case is whether PSE has proven that the PIP is required by the public interest and will result in rates that are just, fair, reasonable and sufficient. The internal documents that Public Counsel has requested could show PSE’s position on those issues, including any analysis of the financial and operational impact and rationale of the proposal. On their face, these materials are relevant to the issues presented in this docket and are of the type routinely provided in discovery and presented as evidence in Commission hearings.

**B. PSE May Not Rely On Its Corporate Structure As A Basis To Oppose These Data Requests.**

8. A key component of PSE's objections focuses not on the subject of the requests, but on refusal to produce otherwise relevant documents because they involve Boards of Directors above PSE in the corporate ownership structure. Public Counsel understands PSE's position to be that relevant information directly pertaining to the PIP, or information that could lead to admissible evidence regarding the PIP, can be withheld on the basis that is burdensome to obtain such evidence from the corporate ownership structure above PSE. This position is problematic because it appears to be inconsistent with the commitments regarding access to information made during the Commission's consideration of PSE's acquisition by the Macquarie investment consortium ("PSE Sale" docket).

9. During the Commission's review of the PSE Sale, one important concern raised was whether the new ownership structure would interfere with access to information by the Commission and other parties. This was identified as an aspect of the "regulatory risk" of the transaction.<sup>5</sup> Addressing the concerns of Public Counsel and Commission Jones in this regard, the Commission majority stated:

Both Public Counsel and the dissent claim that the Commission will not have adequate access to financial information under the proposed transaction, thus impairing our ability to oversee PSE and consequently harming the public interest. Commitment 27 requires the Joint Applicants to maintain an audit trail for all corporate, affiliate or subsidiary transactions with, or that result in costs allocable to, PSE. Commitment 27(b) assures that the corporate structure will not be used as a basis to oppose access to books and records. Commitment 27(c) ensures that the Commission's access to records under RCW 80.04.070 (general) or RCW 80.16.030 (affiliated interests) will not be limited. Commitment 27(d) provides that Puget Holdings and PSE will

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<sup>5</sup> *In the Matter of the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction*, Docket U-072375, Order 08, (PSE Sale Order), ¶¶ 222-270.

provide information provided by and to credit rating agencies. In sum, subparts (a) through (c) of Commitment 27 confirm the *status quo* with respect to transparency, and subpart (d) of Commitment 27 provides a new requirement with respect to transparency. We agree with Joint Applicants that Commitment 27 represents a “step forward” from current requirements.<sup>6</sup>

In addition to Commitment 27, Commitment 19 provided further assurances from PSE and the acquiring investor consortium:

Puget Holdings and PSE will make reasonable commitments, consistent with recent Commission orders, to provide access to PSE’s books and records, access to financial information and filings; audit rights with respect to the documents supporting any costs that may be allocable to PSE; and access to PSE’s board minutes, audit reports, and information provided to credit rating agencies pertaining to PSE.<sup>7</sup>

Despite these commitments, PSE now asserts that the corporate structure adopted as part of the sale transaction is a barrier to discovery.

10. It is instructive to recall that in 2000, PSE underwent a corporate reorganization which created a holding company structure with PSE becoming the wholly-owned subsidiary of Puget Energy, Inc. The settlement stipulation in the reorganization docket provided that the transaction would not result in limitations on access to books and records, of either the parent or the regulated company, relating to regulated company operations. The Commission order approving

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<sup>6</sup> PSE Sale Order, ¶ 245 (footnotes omitted).

<sup>7</sup> PSE Sale Order, Attachment C (Multiparty Settlement Stipulation, App. A, Commitment 19, p. 2).

the holding company structure incorporated this agreement as a condition of approval:

PSE shall provide Staff and Public Counsel access to books and records (including those of Puget Energy, Inc., or any affiliate or subsidiary companies) required to be accessed to verify or examine transactions affecting PSE's regulated utility operations. The reorganization shall not result in reduced access to the necessary books and records, and the corporate structure created by this reorganization shall not be used by PSE as a basis to oppose requests for such books and records made by the Commission, its Staff or Public Counsel.<sup>8</sup>

Although this order was superseded by the PSE Sale Order,<sup>9</sup> the access to information provisions have continuing relevance as the baseline for the commitments in the 2008 sale. It was one stated goal of the PSE Sale Order to ensure that the then-existing level of access to corporate books and records was not impaired as a result of the transaction. The Commission majority made this point as it summed up the reasons why it rejected the concerns of Public Counsel and Commission Jones regarding information access:

Further and as previously discussed,, Commitments 27 (a), (b) and (c) require PSE and Puget Holdings to maintain all books and records, provide full access to same with audit rights, and *in general preserve the Commission's full authority and power to access and if necessary compel the production of information as provided by state law and our rules just as they now apply to PSE and Puget Energy.*

The fundamental importance of our regulatory regime is central to our analysis of this issue and others related to governance and regulatory risk. Whether publicly traded or privately held and regardless of the number of independent directors or the complexity of the corporate structure, *the Commission will have complete access to all necessary information at every level of the holding company, including all PSE-related information available to all board directors.* If PSE takes an action the Commission deems imprudent or contrary to its customers' or the public interest, we have no doubt the Commission will do its

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<sup>8</sup> *In the Matter of the Application of Puget Sound Energy, Inc., For An Order Approving a Corporate Reorganization to Create A Holding Company, Puget Energy, Inc.*, Docket No. UE-991779 (PSE Reorganization Docket), Order Accepting Stipulation (August 15, 2000), ¶ 9, Stipulation ¶ 2, pp. 1-2.

<sup>9</sup> PSE Sale Order, Attachment C (Multiparty Settlement Stipulation, App. A, Commitment 29, p. 5).

duty notwithstanding the vote of directors at any level of the holding company or their independent status.<sup>10</sup>

Indeed, as noted above, the Commission felt that the new conditions, such as Condition 27, were a “step forward,” an improvement over existing protections.<sup>11</sup> Prior to the approval of the sale, neither PSE nor its holding company would have been able to refuse to provide information of the type requested here on the grounds that its corporate structure made it too burdensome. The creation of the current more complex corporate structure was a voluntary action of PSE and its new owners. The Commission was assured that the new structure would not impair access to information. After making the commitments discussed above, PSE and Puget Holdings cannot now argue that the new corporate structure makes it too burdensome to respond to discovery.

**C. Public Counsel’s Requests Do Not Go Beyond The Needs Of This Adjudicative Proceeding.**

11. PSE objects that Public Counsel’s data requests are “unduly burdensome taking into account the needs of the adjudicative proceeding.”<sup>12</sup> This argument should be rejected for several reasons. The Commission has allowed discovery in the case, and issued an order to ensure that discovery responses are received in time for the hearing.<sup>13</sup> PSE is required to cooperate with discovery under Commission rules and the prehearing conference order. PSE has filed a new infrastructure cost recovery proposal with the Commission. The proposal is an unprecedented change in PSE’s recovery of gas infrastructure costs which has a multi-million

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<sup>10</sup> PSE Sale Order, ¶¶ 247-248 (emphasis added)(footnotes omitted).

<sup>11</sup> The Commission made a similar point in discussing the commitment in Condition 28(c), under which Puget Holdings agreed to comply with “all applicable provisions of Title 80,” although not a public service company. The Commission noted this as an “expansion” of its regulatory authority. PSE Sale Order, ¶ 243.

<sup>12</sup> Appendix A.

<sup>13</sup> Order 02, ¶ 6; Order 03, ¶ 7.

dollar impact consumers. The testimony and exhibits filed by PSE raise safety,<sup>14</sup> operational,<sup>15</sup> financial,<sup>16</sup> and consumer impact<sup>17</sup> questions. PSE may not arbitrarily restrict access to information relevant to the adjudication of these issues by defining the scope of discovery as narrower than the scope of its own proposal.

12. In addition, a chief rationale put forward in support of the PSE sale was the promise that it would offer PSE access to capital from long-term infrastructure investors. The condition of PSE's natural gas infrastructure was a known quantity at the time of the sale. With this knowledge, PSE's prospective owners represented that they would provide patient new capital, and would, as "[i]nfrastructure investors understand that to achieve a long term return, they must take a long term view and invest in the business."<sup>18</sup> On this basis, the Commission majority concluded:

These assured sources of capital through 2013 will fund new and improved infrastructure that is necessary to ensure PSE's provision of safe, reliable electricity and natural gas to customers in the Puget Sound region now and in future decades.<sup>19</sup>

The claims of urgency for capital recovery in the PIP proposal are inconsistent with these assurances. The discovery requested by Public Counsel can help determine if PSE's internal decision making is consistent with these earlier representations, and how that decision-making squares with the justifications offered for the PIP proposal.

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<sup>14</sup> Exhibit No. DAH-1T, pp 15-16.

<sup>15</sup> See, e.g., Exhibit No. DAH-1T, pp. 3-9.

<sup>16</sup> Exhibit No. TAD-1T, pp. 6-8.

<sup>17</sup> Exhibit No. JHS-1T, pp. 6-8.

<sup>18</sup> PSE Sale Case, Exhibit No. CHL-8HCT, p. 11:10-12; *see also* PSE Sale Order, ¶ 142 (quoting testimony of Eric Markell).

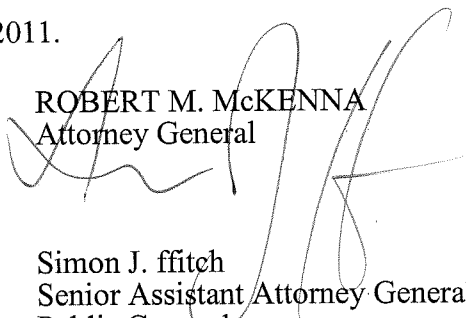
<sup>19</sup> PSE Sale Order, ¶ 155. *See generally*, PSE Sale Order, ¶¶ 128-157 ("PSE's Access To Needed Capital").



**IV. CONCLUSION**

13. For the foregoing reasons, Public Counsel respectfully requests that the Commission compel PSE to respond to Public Counsel Data Request Nos. 16-18.

14. DATED this 12<sup>th</sup> day of October, 2011.

  
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