

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

In the Matter of the Petition of	)	DOCKET NOS. UE-121697 and
	)	UG-121705
PUGET SOUND ENERGY, INC., and	)	
NW ENERGY COALITION	)	
	)	
For an Order Authorizing PSE to Implement	)	MOTION TO COMPEL OF ICNU
Electric and Natural Gas Decoupling	)	
Mechanisms and to Record Accounting	)	
Entries Associated with the Mechanisms	)	
_____	)	

**I. RELIEF REQUESTED**

1 Pursuant to WAC §§ 480-07-375(1)(c), 480-07-405(3), and 480-07-425(1), the Industrial Customers of Northwest Utilities (“ICNU”) submits this Motion to Compel (“Motion”) requesting the Administrative Law Judge to issue an order compelling Puget Sound Energy (“PSE” or “the Company”) to produce the documents that are responsive to ICNU’s Data Requests (“DRs”) 2.1 and 2.2. Pursuant to WAC § 480-07-425(1), ICNU certifies that good faith efforts have been made to resolve the dispute. Copies of PSE’s incomplete data responses and documents related to the attempts to resolve this dispute are attached to the accompanying Declaration of Melinda Davison as Exhibits A, B, and C.

**II. STATEMENT OF FACTS**

2 These proceedings were initiated on October 25, 2012, when PSE, along with the Northwest Energy Coalition (“NWEC”), filed a petition for a decoupling mechanism seeking an order authorizing PSE to implement an electric and natural gas decoupling mechanism, and to begin recording accounting entries associated with the mechanism, effective November 1, 2012.

On March 1, 2013, PSE and the NWEAC filed an Amended Petition for Decoupling Mechanisms, which included a “rate plan” that provides for annual rate increases for certain customers.<sup>1/</sup>

3           On February 1, 2013, Commission Staff filed a Motion for 30-Day Extension of Time in Docket UE-121373. In that motion, Staff referenced a “global resolution” of five dockets involving PSE, including the instant proceedings. ICNU had not been invited to participate in or be informed about any discussions concerning any sort of resolution of the issues in these dockets.

4           On February 11, 2013, ICNU submitted its second set of data requests to PSE seeking documentation and information regarding the PSE/Staff “global resolution” of five dockets. PSE responded on February 26, 2013, offering a bevy of objections, but little to no information directly responsive to DR 2.1 and only partial information responsive to DR 2.2. Neither response included any supporting documentation. Copies of PSE’s responses are included as Exhibit B to the Declaration of Melinda Davison.

5           Per WAC § 480-07-425(1), and as specifically urged by the Commission in these dockets, ICNU made a good faith effort to work cooperatively with PSE in order to avoid having to bring discovery matters forward for formal resolution. On March 1, 2013, Melinda Davison and Sheree Strom Carson, counsel for ICNU and PSE, respectively, held a telephone discussion regarding DRs 2.1 and 2.2. Ms. Davison expressed ICNU’s position, that PSE had failed to fully respond and failed to provide any documents in response to ICNU’s requests. On behalf of PSE,

---

<sup>1/</sup> Amended Petition for a Decoupling Mechanism ¶ 24, Re Puget Sound Energy, Inc., WUTC Docket No. UE-121697/UG-121705 (Mar. 1, 2013).

Ms. Carson committed to an additional response by March 5, 2013. A written memorial of this correspondence is found in Exhibit C.

6            On March 5, 2013, PSE provided a supplemental response to DR 2.1 but nothing further regarding DR 2.2. PSE’s supplemental response was essentially an attachment summarizing the Staff/PSE “global resolution” of five dockets. No further documentation was provided. This response and attachment are found in Exhibit B.

7            On March 7, 2013, ICNU confirmed receipt of PSE’s supplemental response to DR 2.1. Via email, ICNU informed PSE that it considered the supplemental response insufficient. Also, ICNU asked PSE to confirm its intent as to whether the Company would further supplement its responses to DRs 2.1 and 2.2. This correspondence is found in Exhibit C. PSE’s legal counsel informed ICNU’s legal counsel that no further documents would be produced.

### III.        LEGAL STANDARD

8            The Commission’s rules provide that a party shall respond to a data request within ten business days of receipt of a request.<sup>2/</sup> Data requests may seek information that is “relevant to the issues in the adjudicative proceeding or that may lead to the production of information that is relevant.”<sup>3/</sup>

9            A party may make a motion to compel discovery, and the adjudicative officer may hear and decide the motion.<sup>4/</sup> The Washington Supreme Court maintains that “[t]he scope of

---

<sup>2/</sup> WAC § 480-07-405(7)(b).

<sup>3/</sup> WAC § 480-07-400(3); CR 26(b)(1).

<sup>4/</sup> WAC § 480-07-425(1); *see, e.g., WUTC v. Puget Sound Power & Light Co.*, Docket No. UE-960299, Sixth Suppl. Order (Aug. 1, 1996).

discovery is very broad.”<sup>5/</sup> Washington Civil Rule 37(a)(3) states that evasive or incomplete answers are to be treated as a failure to answer. Also, a party may not object to a data request on grounds that the information sought will be inadmissible at the hearing, so long as the information sought appears reasonably calculated to lead to discovery of admissible evidence.<sup>6/</sup>

#### IV. ARGUMENT

10 PSE first objects to ICNU DRs 2.1 and 2.2 on the grounds that they are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

11 The relevance of ICNU’s requests should be self-evident. ICNU is a party to or has petitioned to intervene in dockets which PSE hopes to settle under its “global resolution.” PSE, as a regulated utility, cannot slip the Commission a secret resolution and hide the pertinent details thereof from other parties. This would be true in in any single case, but much more for a resolution that would dispose of five dockets. At the very least, both of the data requests are reasonably calculated to lead to the discovery of admissible evidence concerning the resolution of these dockets, which, as an intervening party, ICNU is entitled to obtain. ICNU is not seeking legitimately privileged information.

12 Ironically, the relevance of ICNU’s requests are proven by the largely evasive response PSE originally tendered to DR 2.1. According to the Company, it is in “the process of scheduling settlement conferences/technical conferences with other parties and will provide workpapers and proposals to ICNU and other parties as requested and needed as part of that

---

<sup>5/</sup> Cedell v. Farmers Ins. Co. of Wash., 2013 Wash. LEXIS 149 at 9 (Feb. 21, 2013).  
<sup>6/</sup> WAC § 480-07-400(3).

process.”<sup>7/</sup> Plainly, PSE recognizes the necessity of providing ICNU with workpapers and other documents relating to the “global resolution” and has promised to do so (although ICNU has yet to see a single workpaper or anything other than a post hoc summary of PSE/Staff negotiations). How PSE could assert that requested documentation is not relevant and object on that basis—while at the same time promising to provide such information—can only be explained rationally in one way. PSE’s relevance objection is simply a boilerplate objection: it was not very thoughtfully or very carefully tailored to its response. In sum, relevance is not a coherent objection, and should not be taken seriously as grounds for any continued withholding of requested documentation.

13 All of PSE’s additional objections are qualified, i.e., an objection of the “to the extent it seeks information protected by” variety. The first of these is an objection to ICNU’s data requests on the basis of attorney-client privilege.

14 This is also an example of a boilerplate objection having no rational bearing upon ICNU’s requests. For instance, DR 2.1 explicitly requests documents “regarding discussions *between*” Staff and PSE concerning settlement or resolution of specified dockets.<sup>8/</sup> By definition, attorney-client privilege cannot apply to discussions between Staff and PSE because the two parties are not in an attorney-client relationship. Likewise, DR 2.2 asks PSE to “identify all PSE employees or individuals hired by PSE, Staff members, or representatives of any other parties known to PSE to have participated in discussions regarding a global settlement.”<sup>9/</sup> The

---

<sup>7/</sup> Exhibit B at 1.

<sup>8/</sup> Exhibit A at 2 (emphasis added).

<sup>9/</sup> Id. at 3.

information requested here expressly refers to multi-party negotiations and is then followed by a request for specifics concerning “*these* communications.”<sup>10/</sup> Attorney-client privilege does not and cannot apply to such requests and PSE’s objection should not be upheld.

15                   PSE next objects to ICNU DRs 2.1 and 2.2 to the extent they are covered by the work product doctrine.

16                   An objection on the work product doctrine basis is inapt on the same grounds as attorney-client privilege. ICNU has requested documents and information directly relating to discussions and communications *between* parties, namely PSE and Staff. DRs 2.1 and 2.2 do not ask for the personal notes of PSE counsel regarding prospective legal theory. That said, parties *do* regularly request information regarding internal party communications that are related to contested issues. The work product doctrine is not, then, a blanket shield, even against internal communications before the Commission; much less should it be used to hide settlement documentation passing between parties from all other parties who would be affected by that settlement. A work product objection should not be allowed to prevent the discovery of documents and information requested in DRs 2.1 and 2.2.

17                   Another objection that is proffered by PSE is that the discovery requested is protected by the deliberative process.

18                   The deliberative process exemption is inapplicable because the communications the Company seeks to protect are integral to the fair adjudication of contested cases. The exemption may be wielded in limited circumstances to “protect the give and take of deliberations

---

<sup>10/</sup>            Id. (emphasis added).

necessary to formulation of agency policy,” and “only protects documents which are part of a deliberative or policy-making process.”<sup>11/</sup> Here, the documents requested are to aid in understanding the settlement give and take between Staff and PSE, which is not part of some deliberative or policy-making process. The Commission could not resolve contested cases fairly if some parties are allowed to secretly contribute to the deliberative process of the WUTC during adjudication while other parties are excluded from the content of such advice. This objection does not apply to this situation.

19

A crucial distinction must be recognized between the Commission and its Staff in regard to the deliberative process exemption. According to WUTC rules, “commission staff and the public counsel section of the attorney general's office become parties to an adjudicative proceeding for all purposes upon entering an appearance.”<sup>12/</sup> Staff entered an appearance in this case on October 26, 2012—the very next day after PSE filed its original petition. As a result, since October 2012 (well before the secret settlement meetings apparently took place) Staff has been a party to these dockets, which are dockets the Commission itself is deciding. The WUTC and its Staff cannot be considered a single identity for purposes of the deliberative process exemption when one is serving as a decision maker and the other as a party. ICNU is unaware of any precedent that would permit such an anomaly. Accordingly, the deliberative process exemption should not be applied to PSE’s communications with Staff.

---

<sup>11/</sup> Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn. 2d 243, 256 (1994) (internal quotations and citations omitted).

<sup>12/</sup> WAC § 480-07-340(2).

20                   Lastly, PSE objects to DRs 2.1 and 2.2 to the extent discovery is barred by Evidence Rule 408 (“ER 408”), which, according to PSE, “protects the confidentiality of settlement negotiations.” At this stage, at issue is whether the documents must be produced in discovery; ICNU is not attempting to introduce the documents as evidence.

21                   The Commission has stated “that ER 408 is not subject to mandatory application in Commission proceedings.”<sup>13/</sup> As an initial matter, therefore, ER 408 is not an absolute shield against discovery.

22                   As to the confidentiality of settlement negotiations, the Commission has stated that “the content of settlement discussions is privileged.”<sup>14/</sup> In the very same case, however, the Commission also determined “that the proper approach is to reserve ruling on the settlement until all parties have enjoyed the opportunity to inquire into the proposal, formulate positions, present their views, and cross-examine witnesses supporting the proposal.”<sup>15/</sup> In other words, discovery and fair process must precede settlement consideration.

23                   In the final analysis, ICNU seeks only to participate constructively in all dockets in which it has intervened. Nevertheless, this goal cannot be achieved without access to prospective settlement documents and information regarding the Company’s “global resolution” proposals. The Commission has followed common sense in establishing rules governing alternative dispute resolution—rules which forbid settlement conferences that would prejudice the rights of any party or exclude intervenors.<sup>16/</sup> The just and fair spirit of these rules, in full

---

<sup>13/</sup> Whatcom Cmty. Coll. v. Qwest Corp., Docket No. UT-050770, Order No. 03 ¶ 18 (Sep. 13, 2005).

<sup>14/</sup> WUTC v. Avista Corp., Docket No. UG-041515, Order No. 06 ¶ 32 (Dec. 7, 2004).

<sup>15/</sup> WUTC v. Avista Corp., Docket No. UG-041515, Order No. 05 ¶ 12 (Nov. 2, 2004).

<sup>16/</sup> WAC § 480-07-700(3).



accord with Commission precedent, should compel PSE to either share settlement information with other parties or withdraw its “global resolution” from any serious consideration. At issue is whether the documents requested are relevant. PSE in effect admits as much. To the extent that PSE’s other bases for objection have any merit, they do not justify withholding all requested documents except one summary settlement term sheet.

## V. CONCLUSION

24 ICNU has properly requested information regarding DRs 2.1 and 2.2. PSE has not provided a valid legal basis for withholding relevant information. ICNU has, in good faith, attempted to negotiate with PSE to resolve this discovery dispute, but has not been successful. Therefore, ICNU requests that the Administrative Law Judge issue an order requiring PSE to respond, fully and promptly, to DRs 2.1 and 2.2. PSE should not be permitted to refuse to provide relevant information related to this proceeding.

25 WHEREFORE, ICNU respectfully asks that the Commission grant its Motion to Compel and order PSE to fully answer ICNU DRs 2.1 and 2.2.

Dated in Portland, Oregon, this 12th day of March, 2013.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Melinda J. Davison

Melinda J. Davison

Joshua D. Weber

333 S.W. Taylor, Suite 400

Portland, Oregon 97204

(503) 241-7242 telephone

(503) 241-8160 facsimile

mjd@dvclaw.com

jdw@dvclaw.com

Of Attorneys for Industrial Customers

of Northwest Utilities