

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of

PUGET SOUND ENERGY, INC., and  
NW ENERGY COALITION

For an Order Authorizing PSE To  
Implement Electric and Natural Gas  
Decoupling Mechanisms and To Record  
Accounting Entries Associated With the  
Mechanisms

DOCKETS UE-121697 and UG-121705  
(Consolidated)

PUGET SOUND ENERGY, INC.'S  
OPPOSITION TO ICNU'S MOTION TO  
COMPEL

**I. INTRODUCTION AND BACKGROUND**

1. Puget Sound Energy, Inc. ("PSE") respectfully submits to the Washington Utilities and Transportation Commission (the "Commission") this opposition to the Motion to Compel of the Industrial Customers of Northwest Utilities ("ICNU") filed March 12, 2013 ("Motion").
2. The correspondence, communications and documents ICNU seeks in ICNU Data Request No. 2.1<sup>1</sup> are neither relevant to issues in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence, and PSE objected to the data requests on these grounds. The data request also calls for the production of documents protected by the attorney-client privilege and the work product doctrine. PSE also objected on those grounds. Subject to those objections,

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<sup>1</sup> Although ICNU's Motion addresses both ICNU Data Request Nos. 2.1 and 2.2, ICNU's counsel stated in its discovery conference that it was primarily concerned with ICNU Data Request 2.1 and there was no discussion of ICNU Data Request 2.2 in that conference. However, for the purposes of moving

on March 5, PSE provided a six-page description of PSE’s and Commission Staff’s settlement proposal to resolve the issues in five dockets.<sup>2</sup>

## II. ARGUMENT

### A. ICNU’s Discovery Requests Are Not Relevant or Reasonably Calculated To Lead To the Discovery of Admissible Evidence

3. ICNU fails to establish any grounds for the relevancy of the requested documents. Nor can ICNU establish that these settlement-related documents are reasonably calculated to lead to the discovery of admissible evidence.<sup>3</sup> When considering the terms of the settlement, the Commission will not consider the negotiations that led to the settlement nor will it consider settlement communications or iterations of the settlement. Communications regarding settlement—including negotiations, compromises, and iterations of settlements—are not admissible under ER 408 and will not lead to admissible evidence. Thus, the documents ICNU now seeks would be deemed irrelevant in a Commission proceeding on the terms of the settlement agreement.
4. Although ICNU is not entitled to obtain discovery of these settlement correspondence, it has been fully apprised of the terms of the settlement and it can undertake discovery relating to the substance of the settlement. In no way has PSE attempted to “slip the Commission a secret

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forward, PSE has supplemented ICNU Data Request 2.2 to include more detail regarding times of meetings, persons present and subjects of the four settlement meetings. See Attachment A hereto.

<sup>2</sup> See Exhibit B to Davison Declaration, at 6-11. The settlement terms had previously been provided to stakeholders on March 4, 2013.

<sup>3</sup> See WAC 480-07-400(3) (“Data requests must seek only information that is relevant to the issues in the adjudicative proceeding or that may lead to the production of information that is relevant.”).

resolution and hide the pertinent details thereof from other parties”<sup>4</sup> as ICNU claims. To wit: the 6-page settlement term sheet that PSE provided in response to ICNU Data Request 2.1.<sup>5</sup> ICNU has the general terms of the settlement agreement in significant detail and can propound data requests relating to the substance of the settlement agreement. However, ICNU may not obtain documents relating to negotiations that led to settlement.

**B. ICNU’s Discovery Requests Call For Privileged Material.**

**1. Attorney-client privilege**

5. ICNU’s broad request in ICNU Data Request No. 2.1 improperly seeks documents protected by the attorney-client privilege. The Commission should not compel disclosure of such privileged documents.

6. ICNU incorrectly claims that there can be no attorney-client privilege because Data Request No. 2.1 requests only “documents regarding discussion *between* Staff and PSE concerning settlement or resolution of specified dockets.”<sup>6</sup> Contrary to ICNU’s assertions, Data Request No. 2.1 is much broader:

Please provide copies of any and all e-mails, documents, workpapers, notes, correspondence, memoranda, papers, proposals or other communications in written or electronic form *regarding* discussions between Washington Utilities and Transportation Commission (“WUTC”) Staff and PSE and/or NWEA concerning settlement or a resolution of the TransAlta Centralia power purchase agreement docket (Docket UE-121373), the above captioned decoupling docket, as well as PSE’s expedited rate filing (“ERF”) docket (UE-130137). This refers

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<sup>4</sup> ICNU Motion at ¶4.

<sup>5</sup> See Exhibit B. to Davison Declaration at 6-11.

<sup>6</sup> ICNU Motion at ¶14.

to the “global resolution of the five dockets” as set forth in Staff’s Motion for 30-Day Extension of Time, filed on February 1, 2013, in Docket UE-121373.

7. ICNU’s request for any and all documents and correspondence *regarding* discussions between WUTC Staff and PSE, broadly includes correspondence between PSE and its counsel regarding such discussions. These privileged documents should not be subject to disclosure.
8. In order to foster full and frank communications between a client and an attorney, the attorney-client privilege protects from disclosure communications (1) between the client and the attorney (2) for the purpose of seeking or giving legal advice (3) that are intended to be confidential and are not disclosed to third parties.<sup>7</sup> This would obviously include communications between PSE and its counsel regarding settlement discussions. For example, an email from PSE’s counsel to PSE related to any conversation between PSE and Staff concerning potential settlement would absolutely fall within the scope of ICNU’s request, and PSE appropriately objected to providing such information. The Commission should deny ICNU’s request for production of these privileged documents.

## **2. Work product doctrine**

9. Similarly, ICNU Data Request No. 2.1 broadly encompasses information prepared in anticipation of litigation. CR 26(b)(4) prohibits the production of such work product except upon a showing of undue hardship, which is not present here. ICNU may request

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<sup>7</sup> See generally *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *In re Grand Jury Investigation*, 974 F.2d 1068 (9th Cir. 1992); *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977).

documents that support or relate to specific terms of the settlement, without requesting correspondence, notes, etc., relating to the settlement discussions themselves.

10. Moreover, ICNU's claim that its request does "not ask for the personal notes of PSE counsel regarding prospective legal theory" fails to recognize the broad parameters of the work product doctrine. The work product doctrine protects against disclosure of documents and tangible things prepared in anticipation of litigation. It includes not only materials prepared by an attorney, but also materials prepared by a party or its representative.<sup>8</sup> The prospect of litigation is sufficient to trigger the rule, assuming the materials were prepared in anticipation of that litigation.<sup>9</sup>

11. ICNU's overly broad request would capture any PSE internal correspondence, notes, reports etc. that discuss the pros and cons of settlement versus continuing in litigation. The request also could be construed to encompass draft testimony in the ERF or decoupling dockets, both of which are part of the global settlement. Such documents, prepared in anticipation of litigation, should not be discoverable by opposing parties in litigation.

12. Likewise, the documents PSE and Commission Staff jointly prepared, exchanged and conferred about relating to a proposed resolution of litigation and possible litigation of the settlement should not be available to ICNU through discovery. The work product doctrine applies to parties with aligned interests who share documents prepared in

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<sup>8</sup> K. Tegland & D. Ende, Wash. Handbook on Civil Procedure, §40.4 (2012-2013 Ed. West).

<sup>9</sup> *Id.*

anticipation of litigation.<sup>10</sup> The information ICNU requested falls squarely under the work product doctrine, and PSE appropriately objected to ICNU's request for such information.

13. If ICNU's goal is to understand the basic terms of the settlement, ICNU can propound discovery seeking explanation and analysis of the settlement terms and PSE's position in the various dockets included in the settlement. In fact, ICNU has propounded such data requests. Through these requests, ICNU can obtain the same substantive information, without seeking documents prepared in anticipation of litigation by PSE and Commission Staff. ICNU is free to ask for the documents supporting or relating to the nuts and bolts of the settlement, but ICNU is not allowed to obtain through discovery documents that PSE or its attorney prepared in anticipation of litigation.

**C. ICNU's Request Clashes with the Commission's Policy Favoring Settlements.**

14. ICNU concedes that the content of settlement discussions is privileged and cites Commission precedent supporting this proposition.<sup>11</sup> ICNU further admits that the

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<sup>10</sup> See, e.g., *Sanders v. State*, 169 Wn.2d 827, 853 (2010) ("The 'common interest' doctrine provides that when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group."); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466 (11th Cir. 1984) (no waiver of work product doctrine where private plaintiffs' attorneys and EEOC were preparing for joint trial).

<sup>11</sup> See ICNU Motion, ¶22. ICNU confuses and misrepresents the Commission's instruction in *WUTC v. Avista*, Docket No. UG-041515. The fact that the Commission allows discovery on the terms of the settlement is an entirely different issue than allowing discovery of settlement communications, which ICNU seeks in its data request. PSE has no objection to allowing discovery and fair process of the settlement. PSE objects to discovery of the *content* of settlement discussions, which ICNU requests in Data Request No. 2.1.

documents it seeks to obtain through discovery are settlement documents.<sup>12</sup> There is no basis for allowing these settlement negotiations to be subject to discovery.

15. On January 22, PSE filed its Petition for Reconsideration of the Final Order in the Centralia Coal Transition PPA docket, UE-121373. PSE and Commission Staff then met to determine whether there was an opportunity to resolve Docket UE-121373,<sup>13</sup> the decoupling proceeding, and the soon-to-be-filed ERF, in a manner that would allow PSE to delay the filing of general rate cases, as suggested by the Commission in the Final Order of PSE's 2011 general rate case, UE-111048 and UG-111049.<sup>14</sup> PSE and Commission Staff reached an agreement in principle that would achieve these goals. These settlement discussions were entirely proper. First, there is no legal prohibition against parties proposing a settlement to a Commission final order that has been challenged. Second, there is no legal prohibition against settling open dockets—including dockets that have not been converted to adjudicative proceedings—in conjunction with the settlement of other adjudicative proceedings. Third, there is nothing improper about PSE and Staff meeting to discuss the decoupling dockets or the proposed ERF dockets. The Commission anticipated such discussions would take place in the

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<sup>12</sup> Data Request 2.1, on its face, seeks documents “concerning settlement.” Although ICNU acknowledges and concedes that settlement discussions are privileged and not admissible as evidence, yet it chose to append the “Summary Settlement Term Sheet” to its Motion without designation as confidential.

<sup>13</sup> The January settlement meetings took place long after the initial settlement conference in the Centralia docket.

<sup>14</sup> See *WUTC v. PSE*, Dockets UE-111048 and UG-111049, Order 08 ¶507, fn. 617 (May 7, 2012).

Final Order in PSE's 2011 general rate case,<sup>15</sup> and the discussions between Commission Staff and PSE did not violate Commission rules.

16. The "Commission policy favors settlement and negotiation."<sup>16</sup> ER 408 protects from admissibility compromises, offers to compromise, and evidence of conduct or statements made in compromise negotiations. Allowing discovery of all correspondence relating to a settlement has a chilling effect on future settlements. If parties will be subject to data requests for all correspondence relating to efforts to settle, they will be less inclined to initiate or engage in settlement discussions. The Commission should deny ICNU's request for correspondence and documents exchanged by parties as part of a settlement negotiation. As previously discussed, ICNU can obtain underlying data regarding decoupling and ERF through discovery in those dockets. It is not necessary for ICNU to obtain settlement-related correspondence and documents.

### III. CONCLUSION

17. The settlement-related documents that ICNU requests are not relevant or reasonably calculated to lead to the discovery of admissible evidence. Data Request No. 2.1 broadly implicates documents protected by the attorney-client privilege and the

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<sup>15</sup> *Id.*

<sup>16</sup> *WUTC v. U. S. WEST Communications, Inc.*, 1998 WL 223205 (Wash.U.T.C.), Tenth Supplemental Order at \*8, Docket No. UT-970766 (Jan. 15, 1998) *See also* RCW 34.05.060 and WAC 480-07-700. *See also generally*, In re: Alternative Dispute Resolution: WUTC Policy Statement and Final Report and Observations on Alternative Dispute Resolution (ADR) and Case Management Techniques, Docket No. A-940351 (Dec. 22, 1994).



work product doctrine. Moreover, disclosure of such documents undermines the public policy in favor of settlements.

18. ICNU has been provided a detailed 6-page document setting forth the terms of the settlement. ICNU can obtain the information it needs to fully investigate the settlement without circumventing the settlement rules and long-standing principles of privilege and confidentiality. For the reasons set forth above, the Commission should deny ICNU's Motion.

**DATED:** March 19, 2013

Respectfully Submitted,

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