

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of
PUGET SOUND ENERGY, INC.

For Approval of a Power Purchase
Agreement for Acquisition of Coal
Transition Power, as Defined in
RCW 80.80.010, and the Recovery of
Related Acquisition Costs

DOCKET UE-121373

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

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

DOCKETS UE-130137 AND UG-130138

Complainant,

COMMISSION STAFF'S OPPOSITION
TO PUBLIC COUNSEL'S MOTION
FOR LEAVE TO DEPOSE KENNETH
ELGIN

v.

PUGET SOUND ENERGY, INC.,

Respondent.

I. INTRODUCTION

I This is in response to the unprecedented motion of the Public Counsel Unit of the Attorney General's Office for leave to depose Kenneth Elgin, a non-witness analyst employed by the Commission. Commission Staff vehemently opposes the motion. The

Commission should not permit Public Counsel to attempt to make a non-testifying Staff analyst Public Counsel's witness; a witness who is adverse to Commission Staff's official advocacy position. Mr. Elgin's insignificant opinions are irrelevant in this context. The Commission should deny Public Counsel's motion.

II. LAW

2 The APA provides for the taking of depositions, except as otherwise provided by agency rules. RCW 34.05.446(3). The Commission's rules provide that "[a] party may depose any person identified by another party as a potential witness." WAC 480-07-410(1). That rule further provides that "[a] party may depose a person who has not been identified as a potential witness, if the presiding officer approves the deposition on a finding that the person appears to possess information significant to the party's case." *Id.* If a deposition is allowed, "[p]arties must limit the scope of questioning in a deposition to the same standard set forth in WAC 480-07-400(4) [*sic*]." Discovery 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." The information sought must appear "reasonably calculated to lead to discovery of admissible evidence." *Id.*, at (3). "The commission may impose sanctions for abusive discovery practice." *Id.*

III. ARGUMENT

3 In an unprecedented and ill-conceived move, Public Counsel requests permission to depose Mr. Elgin. Commission Staff did not identify Mr. Elgin as a witness in any of these cases. Mr. Elgin did not prefile testimony in any of these cases. Simply put, Mr. Elgin is *not* Staff's witness. Nor does Mr. Elgin possess any information "significant" to Public Counsel's case.

4 Public Counsel has identified two expert witnesses to support its position in these dockets, once it lands on its position on the merits of the settlement proposal. One can only conclude from Public Counsel's attempt to depose Mr. Elgin, that Public Counsel lacks confidence in its selection of its experts and their ability to analyze the substantial evidence already provided in these cases.

5 It is not uncommon for expert witnesses, including Commission Staff employees, to have differences of opinion on issues and outcomes, as Public Counsel is well aware. Public Counsel claims that its desire to depose Mr. Elgin originated "based on discovery recently received from Staff," and that "the basis for deposing Mr. Elgin did not become apparent until review of recently received discovery was completed." Public Counsel Motion, at 2.

6 However, it is common knowledge that Mr. Elgin has taken it upon himself to share his views opposing the proposed Settlement Agreement with Public Counsel and others. Mr. Elgin has been a vocal opponent of the Settlement Agreement. In other words, Public Counsel did not gain this information solely through discovery. In fact, Mr. Elgin has actively been working at cross purposes to Staff and its official advocacy position for many months. That Mr. Elgin has been collaborating with the opposition, subverting Staff's official position, is a matter for another day and another forum.

7 The potential ramifications of Public Counsel's unprecedented maneuver in this case also cannot be understated or lightly dismissed. Commission Staff must be able to participate effectively as a party when acting as an advocate for the public interest in adjudications before the Commission. This means that the Commission Staff—after careful review and consideration of the matters before it—must be allowed to formulate Commission Staff's position and to present witnesses, testimony, and exhibits to support

that position. Public Counsel's motion, here, if granted, would severely undermine that ability, as Public Counsel must well know.

8 For in reality, Public Counsel is belatedly attempting to, in effect, depose Mr. Elgin not as a "Staff" witness, but as its own witness adverse to Staff, even though Mr. Elgin is currently employed by the Commission in a non-witness capacity. Public Counsel is attempting to solicit, from Mr. Elgin, admissions against Commission Staff's interests. But Mr. Elgin's opinions in this regard are wholly irrelevant.

9 Just as prior iterations of a settlement agreement are deemed irrelevant, so, too, are the opinions of a non-witness in a case. Discovery must be reasonably calculated to lead to the discovery of admissible evidence. Here, under no analysis, could any information gained from a deposition of Mr. Elgin be considered relevant evidence.¹ In no way should the deposition testimony of a non-witness who possesses insignificant information be admitted into evidence.

10 Moreover, the Commission should remain mindful that because Mr. Elgin would not be a Commission Staff witness, but rather, an adverse witness for Public Counsel, Mr. Elgin would be required to hire his own independent counsel to represent him at the deposition.²

¹ At the April 10, 2013, deposition of Commission Staff witness in these proceedings, Thomas Schooley, Public Counsel squandered valuable time inquiring about, among other irrelevant matters, the motives underlying the Settlement Agreement and why Mr. Elgin is not a witness in these cases, in direct violation of Senior Review Judge Dennis Moss's discovery ruling. In his ruling, Judge Moss could not have been clearer: "I don't think it's appropriate to ask for, you know, the e-mails and correspondence and so forth and such to the extent it doesn't bear directly on the substance of the settlement agreement." Transcript of Joint Prehearing Conference, Volume 1, at p. 21, lines 19-22. "[S]o if you all brought forward settlement, we would not be inquiring into that process of how you got there." *Id.*, at p. 26, lines 6-8.

² The Commission may choose to draw down Public Counsel's budget to cover the costs of a Special Assistant Attorney General, in the event that the Commission grants Public Counsel's motion.

11 In short, Public Counsel's focus is misplaced. Public Counsel should be focusing on the merits of the proposed Settlement Agreement, not its prior iterations, and not who said what to whom and when. The Commission has made this abundantly clear.

IV. CONCLUSION

12 For the above reasons, the Commission should deny Public Counsel's motion for leave to depose Staff analyst Kenneth Elgin. Public Counsel is entitled to discover Staff's official case, not the wholly irrelevant positions of a non-witness, Commission employee in these proceedings. To rule otherwise would do great harm to Commission Staff's ability to present effective advocacy in these and other cases before the Commission.

DATED this 11th day of April 2013.

Respectfully submitted,

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