

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKETS UE-220066,
UG-220067, and UG-210918
(Consolidated)

**SIERRA CLUB
RESPONSE TO BENCH REQUEST
NO. 1**

Sierra Club responds to Bench Request No. 1 to explain how testimony submitted by Gloria D. Smith in this case comports with Ms. Smith’s ethical duties under Washington Rule of Professional Conduct (“RPC”) 3.7, because (1) Ms. Smith ceased to be an advocate on behalf of Sierra Club in this case after Earthjustice appeared as counsel for Sierra Club on April 27, 2022, and (2) Ms. Smith’s testimony is uncontested.

ANALYSIS

I. MS. SMITH ACTED AS A REPRESENTED CLIENT IN THIS MATTER.

RPC 3.7 provides that “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness[.]”¹ Since Ms. Smith is participating in this matter as a client and is not acting as an “advocate” in this proceeding on behalf of Sierra Club, RPC 3.7 does not apply in this circumstance. Admittedly, Sierra Club recognizes it should have notified the Commission of this change in Ms. Smith’s status as a represented client prior to filing testimony.

While Ms. Smith initially made an appearance on behalf of Sierra Club in this matter on February 18, 2022, after that time Sierra Club secured representation by Earthjustice. Ms. Smith

¹ Wash. RPC 3.7(a).

initially put in a notice of appearance on behalf of Sierra Club, to ensure the organization timely intervened in this matter. A pre-hearing conference order was scheduled in this matter for February 28, 2022. Parties seeking to intervene must appear at least three business days prior to the pre-hearing conference order. WAC 480-07-355(1)(a). Ms. Smith appeared on February 18, 2022 to move for Sierra Club’s intervention in this proceeding. Ms. Smith represented Sierra Club in that initial pre-conference hearing. However, after that initial appearance, Sierra Club entered into an attorney-client relationship with Earthjustice. On April 27, 2022, Earthjustice attorneys Jaimini Parekh and Jan Hasselman entered their appearance as legal counsel on behalf of Sierra Club, the NW Energy Coalition, and Front and Centered (collectively the “Joint Environmental Advocates”). Once Earthjustice appeared on behalf of Sierra Club, Ms. Smith ceased representing Sierra Club in this proceeding.

Since that time, Earthjustice has exclusively acted as the “advocate” for Sierra Club in this proceeding. From April 27th forward, Ms. Smith made no more appearances in this docket as an attorney, acting only as a client. Earthjustice represented Sierra Club during the discovery process, settlement negotiations, appeared in pre-hearing conferences before Judge Howard, and filed testimony on behalf of Sierra Club.² Earthjustice will represent Sierra Club at the October 3 evidentiary hearing, where Ms. Smith will appear only in her capacity as a witness. Given that

² See, e.g., Transcript of Virtual Status Conference Vol. II, at 105, 109 (Aug. 18, 2022), 220066-220067-210928-Transcript-Volume 2.pdf; Letter from Morgan Hentrup to Amanda Maxwell Re: Docket Nos. UE-220066, UG-220067, UG-210918 (consolidated); NWEC, Front and Centered, Sierra Club Settlement Testimony (Aug. 26, 2022), 220066-67-JEA-CLtr-Settlement-Testimony-8-26-22.pdf, Letter from Morgan Hentrup to Amanda Maxwell Re: Docket Nos. UE-220066 & UG-220067 (consolidated), NWEC, Front and Centered, Sierra Club Witness Testimony and Exhibits (July 28, 2022), 220066-67-NWEC-CLtr-Testimony-7-28-22.pdf; Letter from Morgan Hentrup to Amanda Maxwell Re: Docket Nos. UE-220066 & UG-220067 (consolidated), NWEC, Front and Centered, Sierra Club Witness Testimony and Exhibits (July 28, 2022), 220066-67-NWEC- CvrLtr-Joint Env’tl Advocates Prelim Exhibit List.pdf.

Earthjustice represented Sierra Club during discovery, settlement, and in evidentiary filings, Ms. Smith has not “act[ed] as an advocate at a trial” in this case. As such, the prohibition set out in RPC 3.7 does not apply here.

II. MS. SMITH OFFERS TESTIMONY ON UNCONTESTED ISSUES.

Sierra Club also submits that even if Ms. Smith were providing testimony in her capacity as a lawyer, RPC 3.7 would still allow it in these circumstances. The rule is designed to prevent lawyers from testifying when it could confuse the fact-finder or prejudice other parties. Ms. Smith’s testimony presents no such risk here. Ms. Smith’s testimony is permissible under RPC 3.7(a)(1) because it relates exclusively to uncontested issues, an exception to the ethical rule.

A lawyer may provide testimony if it relates to uncontested issues.³ Ms. Smith’s testimony is permissible under RPC 3.7(a)(1) because it relates exclusively to uncontested issues: namely, unopposed elements of the Partial Multiparty Settlement, titled Settlement Stipulation and Agreement on Revenue Requirement and All Other Issues Except Tacoma LNG (“Settlement”).

None of the parties opposing settlement challenged any facts asserted in Ms. Smith’s testimony. Ms. Smith’s testimony “addresses why, in the Joint Environmental Advocates’ view, the provisions of the Settlement related to gas system decarbonization are in the public interest and in the interest of an equitable, decarbonized energy system in Washington.”⁴ Public Counsel and CENSE are the only parties who filed testimony in opposition to the Settlement Stipulation & Agreement on Revenue Requirement & All Other Issues Except Tacoma LNG & PSE’s Green

³ RPC 3.7(a)(1) provides that an attorney may provide testimony if “the testimony relates to an uncontested issue.” *See also State v. Wood*, 19 Wn.App.2d 743, 763 (Wash. Ct. App. 2021) (holding that an attorney may provide testimony if another does not contest the facts submitted therein) (*citing* RPC 3.7(a)(1)).

⁴ Exh. GDS-1T, at 2.

Direct Program (“Revenue Requirement Stipulation”). Neither Public Counsel nor CENSE contested the provisions of the Revenue Requirement Stipulation related to gas system decarbonization. Public Counsel witness Andrea C. Crane explained that Public Counsel supports the decarbonization and targeted electrification provisions of the Settlement that are the subject of Ms. Smith’s testimony.⁵ CENSE’s opposition testimony focuses on provisions of the Settlement relating to the prudence of Energize Eastside, and does not mention the provisions related to gas system decarbonization.⁶ Moreover, no party has indicated that it intends to cross-examine Ms. Smith or contest her testimony at the settlement hearing.⁷

Since Ms. Smith’s testimony is uncontested and simply provides a high-level, policy overview, “none of the policies against allowing a lawyer to occupy a dual role underlying Rule 3.7 are present[.]”⁸ Accordingly, Ms. Smith’s testimony comports with the exception in Rule 3.7(a)(1) that allows a lawyer to provide uncontested testimony in a proceeding.

III. SIERRA CLUB’S INTEREST IN ADMITTING MS. SMITH’S TESTIMONY OUTWEIGHS ANY RISK OF PREJUDICE.

Further, Ms. Smith’s testimony is permissible because Sierra Club’s interest in admitting the testimony outweighs any minimal risk of confusion or prejudice. RPC 3.7 recognizes that in determining whether a lawyer may offer testimony on behalf of a client, “a balancing is required between the interests of the client and those of the tribunal and the opposing party.”⁹ “The

⁵ Exh. ACC-19T, at 3, 15.

⁶ Exh. RL-35T, at 4.

⁷ See Exhibit Lists for CENSE and Public Counsel, filed September 26, 2022.

⁸ Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics – The Lawyer’s Deskbook on Professional Responsibility* § 3.7-1(b) (2021-2022 ed.). See also RPC 3.7, Cmt. 3 (“Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical.”).

⁹ Wash. RPC 3.7 Cmt. 4; see also *Pub. Util. Dist. No. 1 of Klickitat Cnty. v. Int’l Ins. Co.*, 124 Wash. 2d 789, 812 (1994) (finding denial of a motion to disqualify an attorney under RPC 3.7

primary rationale supporting Rule 3.7 is that the fact-finder may be confused if the person actually acting as an advocate before the fact-finder also offers testimony with his or her argument.”¹⁰ Ms. Smith’s testimony presents no risk of confusing the fact-finder. First, the fact-finder in this case is not a jury, but the Commission aided by an administrative law judge. In such cases, a lawyer’s testimony presents “less chance of confusion by the fact-finder,” which is equipped to distinguish statements that should be taken as proof from those that should be taken as an analysis of the proof.¹¹

Second, Ms. Smith’s testimony will not mislead the tribunal or prejudice other parties due to the nature of the case, the tenor of Ms. Smith’s testimony, and the fact that Ms. Smith’s testimony does not conflict with that of other witnesses.¹² The case presents minimal risk of prejudice because it involves a proposed settlement, and as noted above, no party opposes the settlement provisions addressed in Ms. Smith’s testimony. The tenor of Ms. Smith’s testimony makes clear that its purpose is to present the Joint Environmental Advocates’ view of the Settlement and to recommend that the Commission approve the Settlement, rather than to present contested factual evidence that could be confused with legal analysis of those facts.¹³ And again, Ms. Smith’s testimony does not conflict with those of other witnesses. In fact, all of the other

“to be an appropriate compromise, balancing the interests of both the plaintiffs and the defendants”).

¹⁰ Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics – The Lawyer’s Deskbook on Professional Responsibility* § 3.7-1(a) (2021-2022 ed.).

¹¹ *Id.*

¹² Wash. RPC 3.7 Cmt. 4 (listing these as factors to be evaluated in determining whether a lawyer’s testimony will prejudice the tribunal or opposing party).

¹³ Exh. GDS-1T, at 1-2.

testimony that addresses the uncontested settlement provisions addressed in Ms. Smith’s testimony echoes Ms. Smith’s support for those provisions.¹⁴

As in-house representatives of a nonprofit intervenor in UTC proceedings, Sierra Club attorneys frequently find themselves acting as both counsel and clients.¹⁵ Although Earthjustice is representing Sierra Club in this proceeding, it is not always possible or practical for Sierra Club to secure outside counsel. These circumstances present a risk of hardship to Sierra Club if its attorneys are prohibited from addressing the Club’s perspective on settlements and other policy issues in testimony.¹⁶ The attorneys representing Sierra Club in UTC proceedings are often the most knowledgeable Sierra Club staff about how the proceedings relate to the Club’s mission and interests, and in many cases they have the greatest access to confidential information from the proceedings that could bear on assessments of settlements and any other aspects the proceedings presented in testimony.

Ms. Smith is a prime example. As noted in her testimony, Ms. Smith’s work includes “managing the legal work in the thirteen western states for several Sierra Club campaigns” and “coordinating with Sierra Club’s campaign, organizing, and chapter staff to ensure that [Sierra

¹⁴ See Exh. ACC-19T, at 3, 15; Exh. AZA-7T, at 3:3-9; Exh. KCH-7T, at 2:22 to 3:2; Exh. BAE-1T, at 2-3; Exh. BTC-7T, at 12-13; Exh. BGM-11T, at 4-5; Exh. JAP-SEF-JJJ-1JT, at 4-5, 30-35, 39, 43.

¹⁵ In this respect, Sierra Club attorneys are like a lawyer who represents himself *pro se*, who RPC 3.7 would not prevent from testifying and representing himself. Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics – The Lawyer’s Deskbook on Professional Responsibility* § 3.7-1(a) (2021-2022 ed.) (“The advocate-witness rule would not prevent a *pro se* litigant (even a lawyer who represents himself *pro se*) from testifying and representing himself. Rule 3.7 does not try to accomplish the impossible. It simply seeks to eliminate unnecessary confusion imposed on the fact-finder by requiring that the trial advocate and the witness not be the same person if that is reasonably possible.”).

¹⁶ See RPC 3.7(a)(3) (allowing an attorney to testify when “disqualification of the lawyer would work substantial hardship on the client”).

Club's involvement in litigation related to building electrification] advances the Club's mission.¹⁷ In light of her position, her more than 13 years' experience with Sierra Club,¹⁸ and her engagement throughout this proceeding, Ms. Smith is uniquely positioned to address how the Settlement advances the public interest and Sierra Club's goals. While Ms. Smith has not acted as an advocate in this proceeding due to Earthjustice's representation of Sierra Club, an application of RPC 3.7 that prohibits the testimony of in-house attorneys in similar situations could impose hardship on Sierra Club and other intervenor organizations where they are not represented by outside counsel.

CONCLUSION

Given that Ms. Smith acted as a represented client in this proceeding, and her testimony is uncontested, Sierra Club respectfully requests that the Commission find that her testimony in support of the Revenue Requirement Stipulation comports with her ethical duties under RPC 3.7. Nevertheless, if Commission finds it necessary, Sierra Club is willing to remedy any concern the Commission may have by either (1) moving to withdraw Ms. Smith as Counsel of Record, or (2) having a different witness sponsor Ms. Smith's testimony.¹⁹

Dated this 27th day of September, 2022.

Respectfully submitted,

/s/ Jaimini Parekh

Jaimini Parekh

Jan Hasselman

Earthjustice

¹⁷ Exh. GDS-1T, at 1.

¹⁸ Exh. GDS-2.

¹⁹ Mr. Edward Burgess provided testimony on behalf of the Joint Environmental Advocates regarding issues related to gas decarbonization issues in this proceeding and could sponsor Ms. Smith's testimony. *See Pub. Util. Dist. No. 1 of Klickitat Cnty. v. Int'l Ins. Co.*, 124 Wn.2d 789, 812 (1994) (finding no violation of Rule of Professional Conduct 3.7 where other witnesses could testify on the issues raised in an attorney's testimony).

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