

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of	)	DOCKETS UE-121697
	)	and UG-121705 (<i>consolidated</i>)
PUGET SOUND ENERGY, INC.,)	
and NORTHWEST ENERGY)	
COALITION	)	ORDER 05
)	
For an Order Authorizing PSE To)	
Implement Electric and Natural Gas	)	GRANTING LEAVE TO CONDUCT
Decoupling Mechanisms and To Record	)	DEPOSITION
Accounting Entries Associated With the)	
Mechanisms)	
)	
.....)	
WASHINGTON UTILITIES AND	)	DOCKETS UE-130137
TRANSPORTATION COMMISSION,	)	and UG-130138 (<i>consolidated</i>)
)	
Complainant,)	
	)	ORDER 05
v.)	
)	
PUGET SOUND ENERGY, INC.,	)	GRANTING LEAVE TO CONDUCT
	)	DEPOSITION
Respondent.)	
.....)	

MEMORANDUM

1 **PROCEEDINGS.** Puget Sound Energy, Inc. (PSE), and the Northwest Energy Coalition (NWEC), collectively referred to as the “Joint Parties,” filed a petition on October 25, 2012, in Dockets UE-121697 and UG-121705 (*consolidated*), seeking approval of an electric and a natural gas decoupling mechanism and authority to record accounting entries associated with the mechanisms. After the petition and supporting testimony were filed, the Washington Utilities and Transportation Commission (Commission) held two technical conferences to allow interested stakeholders to further discuss the proposed decoupling mechanisms. PSE agreed to cooperate with interested stakeholders by responding to their inquiries seeking additional information about the decoupling proposal.

- 2 PSE and NWEAC, taking this process into account, reached agreement on certain modifications to the decoupling mechanisms and filed on March 4, 2013, an amended petition and testimony in support of these modifications to the original decoupling proposal. The Commission's regulatory staff (Commission Staff or Staff)¹ filed testimony in support of the revised proposal on March 4, 2013.

- 3 Puget Sound Energy, Inc., filed revised tariff sheets in Dockets UE-130137 and UG-130138 (*consolidated*) on February 4, 2013, seeking to update to May 2013 its rates established in general rate proceedings in May 2012.² The filing is limited in scope and rate impact. It does not meet the criteria defining a "general rate case" in WAC 480-07-505(1). PSE refers to the filing as an Expedited Rate Filing (ERF). Its purpose is to establish baseline rates on which the Joint Parties' decoupling mechanisms are proposed to operate during the several year term of a "rate plan" proposed by PSE, NWEAC and Staff in a stipulation filed on March 22, 2013, in these four dockets and in Docket UE-121373.³

- 4 The Commission placed Dockets UE-121697 and UG-121705 on the agenda for its regular open meeting on March 14, 2013. The Commission, following discussion, set these dockets for hearing. During the same open meeting, the Commission suspended operation of the as-filed tariffs in Dockets UE-130137 and UG-130138, effectively setting these dockets for hearing as well. The Commission, among other things,

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

² *WUTC v. Puget Sound Energy, Inc.*, Dockets UE-111048 and UG-111049 (*consolidated*), Order 08 (May 7, 2012).

³ The parties to this stipulation style it a "Multi-Party Settlement Agreement Re: Coal Transition PPA and Other Dockets" and refer to it as a "global settlement." The Coal Transition PPA terminology refers to Docket UE-121373 in which the Commission's Order 03- Final Order Granting Petition, Subject to Conditions is pending on PSE's Petition for Reconsideration and Motion to Reopen the Record. Aside from consideration of the resolution proposed for Docket UE-121373 in PSE/NWEAC/Staff stipulation, the only remaining process prior to the Commission's entry of a Final Order in Docket UE-121373 is for parties to file responses to PSE's Petition for Reconsideration and Motion to Reopen the Record, now set for May 30, 2013, in coordination with the procedural schedule established in the Decoupling and ERF dockets, as discussed in Order 02 and in this Order concerning these dockets.

designated the undersigned Administrative Law Judge (ALJ) as a presiding officer in these four dockets and directed the ALJ to set an expedited schedule for discovery, any additional prefiled testimony, and hearing.⁴

5 The Commission, on due notice, convened a joint prehearing conference on March 22, 2013, in the Decoupling and ERF dockets.⁵ The Commission subsequently entered Order 02-Prehearing Conference Order in this proceeding and, by separate order, in the Decoupling proceeding. In both orders, the Commission granted various petitions to intervene and established a common procedural schedule to hear the ERF and Decoupling matters, which are interrelated to the extent previously discussed.

6 **PUBLIC COUNSEL’S MOTION FOR LEAVE TO DEPOSE KENNETH ELGIN; STAFF’S AND PSE’S OPPOSITION; PUBLIC COUNSEL’S REPLY.** Deposition practice, while decidedly uncommon in Commission proceedings,⁶ nevertheless is allowed under the Commission’s procedural rules governing discovery. WAC 480-07-410(1) provides:

A party may depose any person identified by another party as a potential witness. 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.

⁴ The undersigned ALJ also is the presiding officer assisting the Commissioners in Docket UE-121373.

⁵ The prehearing conference also was noticed for Docket UE-121373, a proceeding not related to the matters considered in this order. The Commission simultaneously entered in Docket UE-121373 Order 06-Continuing the Deadline Date for Parties to File Answers to Puget Sound Energy’s Petition for Reconsideration and Motion to Reopen the Record and Revised Notice of Intention to Act. Order 06 set May 30, 2013, as the date for responses to PSE’s pending petition and motion, the same date established in the Decoupling and ERF dockets for parties to file post-hearing briefs.

⁶ *In re: Waste Management of Wash., Inc.*, Docket TG-120033, Order 06 at ¶ 5, (Nov. 5, 2012) (“Depositions are infrequently authorized in Commission adjudicative proceedings and generally are reserved for circumstances in which that form of discovery is the most efficient and least burdensome means of obtaining relevant information.”).

- 7 On April 10, 2013, Public Counsel filed with the Commission its Motion for Leave to Depose Kenneth Elgin. Public Counsel simultaneously gave notice of Mr. Elgin’s deposition, setting it for April 17, 2013, at 1:30 p.m. Mr. Elgin is not a witness in either the Decoupling or the ERF dockets.
- 8 Mr. Elgin is employed by the Commission as Special Deputy Director of Regulatory Services. Mr. Elgin has not filed testimony in the ERF or Decoupling matters. Public Counsel, however, states that discovery responses “recently received from Staff,” suggest that “Mr. Elgin possesses knowledge and information significant to Public Counsel’s case in these matters.” Public Counsel’s motion does not elaborate concerning the substance of the discovery responses.
- 9 PSE’s measured response opposing Public Counsel’s motion focuses on its lack of specificity. PSE states that Mr. Elgin is not listed as a responder on any Staff data request responses and “Public Counsel has not identified any information that Mr. Elgin appears to possess that is significant to Public Counsel’s case.” PSE argues that the Commission has refused to compel depositions in similar cases, when the movant has failed to adequately show a purpose for the deposition.⁷
- 10 PSE argues in addition that no purpose would be served by Mr. Elgin’s deposition because Public Counsel has already deposed both Staff witnesses in this proceeding. Finally, PSE states that “Public Counsel waited until the date of the discovery cutoff to request leave (expeditiously) to depose Mr. Elgin,” thus “increas[ing] the burden on parties rather than increas[ing] efficiency.” PSE, in this connection, relies inappropriately on a remark by the presiding ALJ concerning the possible use of depositions in this proceeding. In point of fact, the presiding ALJ commented with reference to a then-pending, unopposed notice of deposition that: “because we are hoping to expedite the whole discovery process, which we’ll talk about a little bit more here in a minute, ... this [deposition] may be a very efficient way to cut to the chase, so to speak.”⁸

⁷ PSE cites *In re: Waste Management of Wash., Inc.*, Docket TG-120033, Order 06 at ¶ 6 (Nov. 5, 2012). The cited case, however, is one in which the witness Stericycle sought to depose testified concerning only subject matter earlier ruled to be outside the scope of discovery that would be allowed in the case.

⁸ *In the Matter of the Petition of Puget Sound Energy, Inc., and Northwest 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); and *Washington Utilities and Transportation Commission v. Puget Sound*

- 11 Staff asserts that Mr. Elgin does not “possess any information ‘significant’ to Public Counsel’s case.” This, however, is not the focus of Staff’s opposition. Instead, Staff’s response includes a series of serious allegations intended to show that Public Counsel and Mr. Elgin have collaborated improperly in connection with these matters and that Public Counsel wishes to take Mr. Elgin’s deposition for reasons unrelated to a good faith effort to discover information that leads to relevant evidence in these dockets. Staff argues that:

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.

Staff argues that to allow Mr. Elgin’s deposition under such circumstances would “severely undermine” Staff’s ability “to participate effectively as a party when acting as an advocate for the public interest in adjudications before the Commission.” More particularly, Staff argues that allowing Mr. Elgin to be deposed would undercut the Staff’s ability in future cases to carefully review and consider the matters before it, formulate Commission Staff’s position, and present witnesses, testimony and exhibits to support that position.

- 12 Public Counsel, on April 12, 2013, filed its Motion for Leave to Reply to Staff and PSE Responses to Public Counsel’s Motion for Leave to Depose Kenneth Elgin, and Public Counsel Reply to Staff and PSE Opposition to Public Counsel Motion for Leave to Depose Kenneth Elgin. Public Counsel’s reply, which the Commission determines it will consider, sets forth in detail the bases for Public Counsel’s belief that Mr. Elgin is “an appropriate deponent” under WAC 480-07-410(1):

He has been identified in discovery as one of the Staff persons who has conducted analysis for Staff of the ERF and Decoupling proposals, in particular the ERF and “K” Factor. Specifically, Public Counsel Data Request No. 6 to Staff requested information about the “analyses and tests undertaken by Staff personnel in assessing the reasonableness of PSE’s ERF and Decoupling proposals.” (See Attachment A). The

response identifies Mr. Elgin, *inter alia*, and provides documents regarding his analysis. Public Counsel Data Request No. 7 asked for the identification of Staff members “involved in the review of the reasonableness of PSE’s proposals” and their specific areas of review. Mr. Elgin, *inter alia*, was identified as being involved in “Specific analysis of the ERF and K factor.” (See Attachment B). Mr. Elgin’s initial proposal for an expedited rate filing (ERF) mechanism was favorably noted in the PSE 2011 GRC order, and triggered the development and filing of PSE’s ERF proposal in this docket.⁹

...

His knowledge and analysis of the ERF, and the K-factor, an integral component of the decoupling and rate plan proposals, are significant to Public Counsel for purposes of analyzing the PSE proposal and the Staff position in the case. This does not constitute making Mr. Elgin Public Counsel’s witness, as Staff alleges. Public Counsel is aware of the ruling regarding the scope of discovery regarding the settlement. Questioning will address substantive issues and analysis. Staff can raise any concerns about the scope to the ALJ during the deposition.

13 Public Counsel argues, however, that any concerns that the settlement privilege might be implicated are misplaced because the settlement filed by PSE, NWECA and Staff in these dockets is being treated not as a settlement, per se, but as these parties’ stipulated position. Public Counsel argues that it “is entitled to conduct discovery to understand the basis of another party’s position in the case.”

14 Bringing this matter fully to a head, Staff filed a letter on April 15, 2013, the substance of which is worth quoting in full, as follows:

Public Counsel’s motion for leave to depose Mr. Elgin provided no basis for granting such extraordinary relief. Public Counsel sought generally for the Commission to allow a deposition of Mr. Elgin “regarding all matters related to the proposals under consideration.” In Public Counsel’s reply to Staff’s response, Public Counsel now identifies Staff’s responses to Public Counsel Data Requests 6 and 7 as

⁹ Indeed, Mr. Elgin’s proposal is mentioned in several witnesses’ testimony and has been referred to repeatedly by PSE and others during the course of these proceedings. *See, e.g.*, Dockets UE-130137 and UG-130138, Piliaris Prefiled Direct Testimony, Exhibit No. JAP-1T at 2:1-9; Barnard Prefiled Direct Testimony, KJB-1T at 1:13-2:1 and 2:8-12.

the bases for the request for leave to depose Mr. Elgin. While Public Counsel's reply now attempts to make the requisite showing under WAC 480-07-410(1), the request for leave to depose Mr. Elgin should nonetheless be denied.

In its responses to Public Counsel Data Requests 6 and 7, Commission Staff, while preserving its objections, and in the interests of full disclosure, listed Ken Elgin as an analyst who conducted limited early review of PSE's ERF and decoupling proposals. Mr. Elgin evidently prepared certain documents on his own initiative; those documents contain notes to himself. Some of those notes reflect Mr. Elgin's opinions that were not adopted in Commission Staff's final position on the Multi-Party Settlement. Public Counsel has been able to depose Staff's designated expert witness Mr. Schooley on Mr. Elgin's documents and notes to the extent they relate to the technical aspects of the proposed settlement agreement, in accordance with Judge Moss's prior discovery ruling. Public Counsel also is able to use those documents and notes with its own testifying and non-testifying expert witnesses to develop Public Counsel's position. However, allowing a deposition of Mr. Elgin, a non-testifying Staff employee, is an extraordinary step. Mr. Elgin holds no facts relevant and significant to this matter that are not otherwise ascertainable by Public Counsel through its own experts, depositions of designated Staff witnesses, and the voluminous records that have been provided in response to data requests.

15 Staff also returns to its argument that Public Counsel seeks to depose Mr. Elgin for an improper purpose: "to obtain the dissenting personal opinion of a non-witness analyst to use against a testifying Staff analyst." Staff argues that "this is an issue of institutional importance." Staff is concerned that if Public Counsel were to achieve the purpose Staff alleges then "any party could effectively turn any employee with a dissenting opinion into their own purported expert."

16 **DISCUSSION AND DETERMINATION.** Depositions, as we observe above, are not a common part of discovery practice in Commission proceedings. The deposition of a non-witness is rarer yet, if not unprecedented. The Commission's discovery rules, nevertheless, allow for depositions and they can be allowed in appropriate, albeit limited, circumstances. While Public Counsel's case is not a strong one, on balance we find such circumstances present here.

- 17 The key threshold question under WAC 480-07-410(1) is whether Mr. Elgin, a Staff analyst who is not a witness in these dockets, “appears to possess information significant to the [deposing] party’s case.” Public Counsel’s bare assertion that this is so in its motion seeking leave to depose Mr. Elgin, standing alone, does not offer enough to cross this threshold. Had the question been left there, or had it been met only with measured argument such as that presented in PSE’s response, the Commission most likely would have found no adequate basis to grant Public Counsel’s motion.
- 18 Staff, however, pushed this matter into a different posture, leveling accusations at both Mr. Elgin and at Public Counsel of improper collaboration and improper purpose in noticing this deposition. These allegations are of such a serious nature as to require us to entertain Public Counsel’s reply. Public Counsel, in its reply, not only denied outright that it wished to depose Mr. Elgin for any improper purpose, Public Counsel also provided arguments establishing more fully the basis for deposing him. Public Counsel supported these arguments by furnishing the discovery responses that Public Counsel asserts prompted its interest in deposing Mr. Elgin.
- 19 Staff’s April 15 letter acknowledges these data request responses as Public Counsel’s asserted bases for its request for leave to depose Mr. Elgin. While Staff downplays the significance of Mr. Elgin’s involvement, certain comments in Staff’s letter are suggestive. Staff states that “Public Counsel has been able to depose Staff’s designated expert witness Mr. Schooley on Mr. Elgin’s documents and notes to the extent they relate to the technical aspects of the proposed settlement agreement.” Thus, it appears that one of Staff’s two witnesses has at least reviewed Mr. Elgin’s work, whether or not he relied on it. In addition, Staff’s letter suggests that Mr. Elgin’s “documents and notes” have been provided to Public Counsel in response to discovery requests. These statements belie Staff’s argument that such information as Mr. Elgin possesses about these matters is wholly insignificant.
- 20 While we agree with Staff that allowing the deposition of a non-witness Staff analyst such as Mr. Elgin is “an extraordinary step,” we cannot simply accept on face value Staff’s argument that “Mr. Elgin holds no facts relevant and significant to this matter that are not otherwise ascertainable.” Public Counsel should be allowed to make a

limited and narrow inquiry via deposition into the substantive work Mr. Elgin performed in analyzing issues in the Decoupling and ERF dockets.¹⁰

- 21 In so ruling, we are mindful, as Staff argues in its response to Public Counsel’s motion for leave to depose Mr. Elgin, that “[i]t is not uncommon for expert witnesses, including Commission Staff employees, to have differences of opinion on issues and outcomes.” We expect Public Counsel to be mindful of this point, too. If Mr. Elgin holds opinions that are at odds with Staff’s advocacy position, these are of no consequence. It is Staff’s advocacy positions as presented through its witnesses that are relevant to the Commission’s decisions. Any individual member of Staff may have a contrary opinion, but such individual opinions are not relevant. It follows that it is not appropriate for Public Counsel to inquire into whatever differences of opinion Mr. Elgin may have vis-à-vis Staff’s advocacy positions in these matters. As Public Counsel acknowledges in its reply to Staff’s response: “Questioning will address substantive issues and analysis.” If Public Counsel’s questions stray beyond this narrow scope, counsel for Staff can object and direct the deponent to not answer. The presiding ALJ can be called upon to resolve any dispute that arises.
- 22 We emphasize, too, that inquiries into Staff’s motivations for supporting PSE’s Decoupling and ERF filings as part of the settlement agreement among PSE, NWECA and Staff, the give and take of settlement negotiations, and Staff’s internal settlement deliberations are not proper areas for inquiry during Mr. Elgin’s deposition. In other words, contrary what Public Counsel suggests in its reply, the privileged nature of settlement negotiations is very much a consideration insofar as the settlement agreement among PSE, NWECA and Staff is concerned.
- 23 Finally, we emphasize that the decision to allow depositions in these proceedings, including Mr. Elgin’s deposition, is influenced in significant part by the expedited nature of these proceedings and the significant amount of informal process that preceded the initiation of formal proceedings. In these unique circumstances, it is reasonable to allow parties more latitude in their formal pursuit of relevant information than might otherwise be the case. This order should not be relied on as

¹⁰ We disagree with Staff’s assertion that we risk establishing a “decidedly destructive precedent” by granting Public Counsel leave to depose Mr. Elgin because we expressly do not authorize Public Counsel to use this deposition “to obtain the dissenting personal opinion of a non-witness analyst to use against a testifying Staff analyst.” We expect that counsel for Staff will maintain these limits on the scope of inquiry by making appropriate objections and by involving the presiding ALJ, if necessary, in case of dispute.

establishing precedent for the conduct of discovery in future cases. The ruling here is strictly limited to the unique circumstances presented.

ORDER

24 THE COMMISSION ORDERS THAT Public Counsel's Motion for Leave to Depose Kenneth Elgin is GRANTED subject to the conditions and limitations stated in the body of this Order.

Dated at Olympia, Washington, and effective April 16, 2013.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge