

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION
COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY

Respondent.

DOCKET UG-230393

PUBLIC COUNSEL’S MOTION TO
STRIKE CERTAIN TESTIMONY
FILED BY PUGET SOUND
ENERGY

I. INTRODUCTION

1. Pursuant to WAC 480-07-375(1)(d), the Public Counsel Unit of the Washington Attorney General’s Office (Public Counsel) moves to strike portions of the testimony Puget Sound Energy (PSE or the Company) submitted to the Washington Utilities and Transportation Commission (The Commission) in Docket UG-230393. The Commission should strike these sections of Susan E. Free and Ronald J. Roberts’ testimony with prejudice because it relays information that Public Counsel requested of the Company during discovery and which the Company refused to disclose at that time. Having failed to afford other parties the pre-hearing opportunity to examine its evidence and develop the record, the Company cannot now introduce the same non-disclosed information into the record to support its claims/requests.

II. LEGAL STANDARD

2. Under WAC 480-07-495(1),

[a]ll relevant evidence is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. The presiding officer will consider, but is not required to follow, the rules of evidence governing general civil proceedings in nonjury trials before the Washington superior courts when ruling on the admissibility of evidence.

3. WAC 480-07-405(8) states that “[p]arties must immediately supplement any response to a data request or bench request upon learning that the prior response was incorrect or incomplete when made or upon learning that a response that was correct and complete when made, is no longer correct or complete.” “The Commission has a duty to all parties to ensure that proceedings are conducted in a fair manner . . . [a]ccordingly, the Commission will act to strike evidence that does not comply with established procedures and unfairly prejudices other parties.”¹

III. DESCRIPTION OF TESTIMONY AT ISSUE AND PRIOR ATTEMPTS TO OBTAIN INFORMATION THROUGH DISCOVERY

4. Public Counsel issued Data Request No. 26 to PSE on July 18, 2023, seeking information about the monthly legal costs and associated labor hours incurred by the Company for the Tacoma LNG Project.² On August 1, 2023, PSE responded, explaining the allocation of legal cost but objecting to subparts b and c of the Data Request as overbroad, unduly burdensome, and vague. Instead, the Company provided a spreadsheet showing a partial breakdown of its legal

¹ *In re Continued Costing and Pricing of Unbundled Network Elements, Transports, and Termination*, Docket UT-003013, 6th Supp. Order ¶¶ 18–19 (Aug. 18, 2000).

² Robert L. Earle, Exh. RLE-12 (Puget Sound Energy’s Response to Public Counsel’s Data Request No. 26) (filed Sept. 8, 2023).

costs.³ The spreadsheet did not include a breakdown of the hours and costs incurred from September through December of 2022.⁴

5. On August 7, 2023, Public Counsel issued Data Request No. 37 to PSE, asking for information about the Company's 2005 Least Cost Plan.⁵ PSE provided its response on August 21, 2023, objecting to the Data Request as overbroad, unduly burdensome, and outside the scope of this proceeding. The Company asserted that the 2005 Least Cost Plan had not been mentioned in testimony and that the issue of design peak day gas requirements was resolved in the 2022 General Rate Case order.⁶

6. Months later, on October 6, 2023, PSE submitted the rebuttal testimony of Susan E. Free, Exhibit SEF-4T, and Ronald J. Roberts, Exhibit RJR-11T. Despite PSE's earlier burden and scope objections, these witnesses purport to testify about information directly responsive to Public Counsel's Data Requests that the Company refused to provide in discovery.

7. In the relevant portions of rebuttal testimony, Susan E. Free testifies that, in response to Public Counsel's testimony, PSE performed research into the legal costs incurred by PSE for the Tacoma LNG Project and determined that they amounted to \$2.7 million in external legal fees prior to April 2017.⁷ Free disagrees with Public Counsel's witness Robert L. Earle that the environmental permitting litigation was largely over by September 2022 to November 2022 and describes the legal work that the Company's internal and external legal counsel performed

³ *Id.* (Puget Sound Energy's Response to Public Counsel's Data Request No. 26).

⁴ *Id.* (Puget Sound Energy's Response to Public Counsel's Data Request No. 26, Attachment A).

⁵ Robert L. Earle, Exh. RLE-5 (Puget Sound Energy's Response to Public Counsel's Data Request No. 37).

⁶ *Id.* (Puget Sound Energy's Response to Public Counsel's Data Request No. 37).

⁷ Rebuttal Test. of Susan E. Free, Exh. SEF-4T at 17:1–11.

during the period of August through December 2022.⁸ In support of that testimony, Free includes a table providing the weekly breakdown of internal legal hours worked and fees charged from the week of August 29, 2022, to the week of December 5, 2022. This evidence is precisely the information Public Counsel asked for in Data Request No. 26 that PSE refused to provide.

8. Similarly, the rebuttal testimony of Ronald J. Roberts contests Earle’s analysis of the project costs of Tacoma LNG and its reliability benefits based on PSE’s 2005 Least Cost Plan. Roberts testifies that the benefit numbers identified by the plan are levelized and represent annual benefits. Roberts concludes it is therefore inappropriate to compare the \$182 million cost of the facility with the \$15.1 million benefits figure of the Least Cost Plan.⁹ The testimony regarding the 2005 Least Cost Plan is information sought by Public Counsel in Data Request No. 26 that PSE again did not provide.

IV. ARGUMENTS

9. As noted, the Commission has “a duty to all parties to ensure that proceedings are conducted in a fair manner . . . [and] will act to strike evidence that does not comply with established procedures and unfairly prejudices other parties.”¹⁰ PSE’s attempt to ambush the parties by introducing new, previously withheld information in rebuttal testimony is unfair and extremely prejudicial to Public Counsel and deprives the Commission of the benefits of a full and complete record.

⁸ *Id.* at 18:16–19:18.

⁹ Rebuttal Test. of Ronald J. Roberts, Exh. RJR-11T at 15:8–16:2

¹⁰ *In re Continued Costing and Pricing of Unbundled Network Elements, Transports, and Termination*, Docket UT-003013, 6th Supp. Order ¶ 18–19 (Aug. 18, 2000).

10. It is the Commission's paramount interest to have the best possible record for its decision.¹¹ The best record is one that results from the parties being fairly able to obtain and examine the relevant evidence through discovery. Concerns of fair play, due process, and orderly proceedings all counsel against allowing a party to withhold evidence sought through discovery and later introduce that evidence in the last stages of the adjudication. Permitting one party to do so effectively prevents other parties from examining and responding to the evidence, precluding them developing a full and complete record, and denying the Commission access to the best record possible on which to base its decisions.
11. PSE provided an incomplete answer to Public Counsel's Data Request No. 26 concerning the breakdown of its legal costs and hours of labor, and never supplemented its response with the information it now seeks to introduce. As a consequence, Public Counsel has suffered undue prejudice by being denied the opportunity fully develop the information on which the Company now bases its rebuttal testimony. Public Counsel reasonably relied upon the answer PSE provided in developing Response Testimony. PSE's introduction of different evidence now departs from established procedure in a manner that is unfair to the other parties.
12. Free asserts that PSE conducted new research to create a compilation of its Tacoma LNG Project legal costs in response to Public Counsel's testimony. The Commission will not generally require a party to respond to data requests that would require creating new data or documents.¹² Nevertheless, to the extent that PSE created data or documents that did not exist at the time Public Counsel's Data Request No. 26 was issued, the Company was required to supplement its

¹¹ *In re Joint Application of MidAmerican Energy Holdings and PacifiCorp Order Authorizing Proposed Transaction*, Docket UE-051090, Order 5 ¶ 11 (Nov. 10, 2005).

¹² WAC 480-07-400(1)(iii).

response to Public Counsel with the new information. The Commission's rules require a party to immediately supplement its response upon learning that a prior response is no longer correct or complete.¹³

13. In its response to Public Counsel's Data Request No. 37, PSE limited the scope to information provided in its last rate case, an answer on which Public Counsel reasonably relied in developing Response Testimony. PSE's refusal to provide Public Counsel with a full and substantial response regarding the Company's 2005 Least Cost Plan prevents Public Counsel from examining the basis of PSE witness Roberts' assertions that the cost to benefit comparison conducted by Public Counsel's witness Earle is incorrect. Because PSE refused to answer questions about the Least Cost Plan, there is not a sufficient record to verify the validity of these later assertions or to ascertain what would be the correct comparison. Again, the Company has unfairly deprived the parties and the Commission of the benefits of a full and complete record.

14. The Company's introduction of evidence that was asked for but not provided during discovery is unfair and undermines the benefits of the discovery process. Accordingly, the Commission should strike these portions of PSE witnesses Free and Roberts' rebuttal testimonies.

V. TESTIMONY AFFECTED BY THIS MOTION

15. Table 1 contains a list of the portions of the rebuttal testimony filed by PSE affected by this motion.

¹³ WAC 480-07-405(8).

Table 1 Identification of Testimony to be Stricken

Exhibit	Description	Items to be stricken (page: lines)
Free, Exhibit SEF-4T	Rebuttal Testimony of Susan E. Free	at 17:1–11, at 18:16–20 at 19:1–18 at 20:3–4 (Table 2)
Roberts, Exhibit RJR-11T	Rebuttal Testimony of Ronald J. Roberts	at 15:8–20 at 16:1–2

VI. CONCLUSION

16. For the reasons set forth above, Public Counsel respectfully requests that the Commission grant its Motion and strike with prejudice the portions of the rebuttal testimonies of Susan E. Free and Ronald J. Roberts identified in the above table.

DATED this 30th day of October, 2023.

ROBERT W. FERGUSON
Attorney General

/s/ Lisa W. Gafken

LISA W. GAFKEN, WSBA No. 31549
Assistant Attorney General, Unit Chief

Attorney for Public Counsel

Office of the Attorney General of
Washington
Public Counsel Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-2055
Lisa.Gafken@ATG.WA.GOV