

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,**

**Complainant,**

v.

**PUGET SOUND ENERGY,**

**Respondent.**

**Docket UG-230393**

**PUGET SOUND ENERGY'S  
RESPONSE TO PUBLIC COUNSEL'S  
MOTION TO STRIKE**

**I. INTRODUCTION**

1. Pursuant to WAC 480-07-375(4), Puget Sound Energy ("PSE") hereby submits this response to Public Counsel's Motion to Strike Certain Testimony Filed By PSE (the "Motion"). Public Counsel's Motion, filed one week before the hearing, seeks to strike relevant evidence that will assist the Commission in determining the prudence of certain costs of the Tacoma LNG Facility. The Motion is based on an apparent discovery dispute, one that PSE was unaware existed until either response testimony or the Motion was filed. Even then, Public Counsel did not attempt to resolve this apparent discovery dispute.
2. The Motion seeks a dramatic remedy – to strike rebuttal testimony from PSE witnesses Ronald J. Roberts ("Roberts Testimony") and Susan E. Free ("Free Testimony") as discovery sanctions. Public Counsel cannot demonstrate PSE violated the rules of discovery, identifies no

order PSE has violated, sought no discovery conference before requesting sanctions, and glosses over the fact that it issued no follow up communications to PSE after the rebuttal testimony in question was filed. Striking the Roberts Testimony and Free Testimony does not further the interest of providing the Commission with a complete record and is a dramatic escalation of an apparent discovery dispute of which PSE was unaware. The Motion should be denied.

## II. STATEMENT OF FACTS

3. This case addresses the prudence of costs incurred in the construction of the Tacoma LNG Facility after the initial decision to build the plant in late 2016.<sup>1</sup> During discovery, PSE followed the Commission's direction in the final order in Docket UG-220067 and limited the scope of its responses to costs incurred after the decision to build the Tacoma LNG Facility. In the spirit of cooperation, however, PSE provided information that extended to the period before the decision to build. When Parties, in particular Public Counsel, made broad requests for information dating decades back, PSE objected on a variety of grounds but still provided some responsive information. At no point throughout discovery did Public Counsel indicate to PSE that the discovery responses were inadequate or reach out to PSE and make a good faith effort to informally resolve Public Counsel's discovery dispute as required by Commission rules.<sup>2</sup> Instead, Public Counsel's witness alleged the responses were insufficient in a footnote in his response testimony, but Public Counsel still did not reach out to PSE to discuss this alleged

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<sup>1</sup> See Docket UG-230393, Order 04, ¶ 18; *WUTC v. PSE*, Docket UE-220066/UG-220065 et al., Order 24/10 ¶¶ 52, 393 (noting the settlement allows parties to review, in this proceeding, the prudence and reasonableness of costs incurred after the decision to build the plant).

<sup>2</sup> WAC 480-07-425(1).

deficiency. Public Counsel did not communicate with PSE that it believed some of PSE's responses were inadequate, narrow the scope of its data requests, or otherwise take any affirmative steps to resolve an apparent discovery dispute.

4. The Commission requires parties to make good faith efforts to resolve discovery disputes informally and provides for further steps to resolve discovery disputes, such as a motion to compel, after attempting to resolve a dispute informally.<sup>3</sup> Public Counsel did neither and instead jumped immediately to a request to strike testimony, which is among the more severe forms of sanctions.

**a. Roberts Testimony**

5. Public Counsel requests the Commission strike a portion of the Roberts Testimony<sup>4</sup> which addresses an argument made by Public Counsel witness Earle comparing cost-benefit calculations. The Roberts Testimony clarifies an apparent discrepancy in Earle's testimony, that Earle compared levelized benefits from PSE's 2005 Least Cost Plan to non-levelized costs of the Tacoma LNG Facility. The 2005 Least Cost Plan that PSE provided to Public Counsel in discovery explicitly states the costs and benefits included therein are levelized.<sup>5</sup>
6. Public Counsel alleges Public Counsel Data Request No. 37 ("Request No. 37") is the basis for striking the Roberts Testimony. Request No. 37 was a follow up to Public Counsel Data

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<sup>3</sup> WAC 480-07-425(1); *See also* Docket UG-230393, Order 03, ¶ 10.

<sup>4</sup> Specifically, the Motion identifies Roberts, Exhibit RJR-11T at 15:8-20 and 16:1-2.

<sup>5</sup> Exhibit I-2 of the 2005 Least Cost Plan provides a table with "Levelized Expected Cost of Outages" and "Levelized Incremental Benefit of Increasing One Planning Level" found at [https://www.pse.com/-/media/PDFs/IRP/2005/appendix\\_documents/Appendix-I-Gas-Planning-StandardFinal-w-bookmarks.pdf?modified=20230721173647](https://www.pse.com/-/media/PDFs/IRP/2005/appendix_documents/Appendix-I-Gas-Planning-StandardFinal-w-bookmarks.pdf?modified=20230721173647).

Request No. 30 (b) (“Request No. 30”).<sup>6</sup> Request No. 30 asked PSE to provide a copy of PSE’s 2005 Least Cost Plan and supporting information based on testimony in PSE’s 2022 General Rate Case.<sup>7</sup> PSE responded by objecting but also provided access to the 2005 Least Cost Plan and supporting documentation, including the appendices.<sup>8</sup>

7. Request No. 37 was issued on August 7, and asked PSE to provide a wide variety of information related to the 2005 Least Cost Plan, including supporting information dating back to 1995. PSE properly responded and objected to Request No. 37 on August 21. Public Counsel did not follow up with PSE in an attempt to narrow the request, schedule a discovery conference, nor did Public Counsel file a motion to compel. Until Public Counsel’s response testimony was filed on September 8, 2023, where it asserted the Commission should not rely on design day criteria, PSE was unaware any issue with its discovery responses existed,<sup>9</sup> or that Public Counsel did not understand the levelized costs and benefits in Appendix I in the 2005 Least Cost Plan were annualized.

**b. Free Testimony**

8. In response testimony, parties made claims about PSE’s legal costs, both before and after the decision to build the Tacoma LNG Facility was made.<sup>10</sup> PSE responded to this testimony in

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<sup>6</sup> PSE includes its response to Request No. 30 (b) as Appendix A to this response for ease of reference. PSE will request Public Counsel include PSE’s Response to Request No. 30 (b) as part of Earle, Exh. RLE-5 (Request No. 37) for completeness at the hearing so the response is part of the record.

<sup>7</sup> Request No. 30, subpart b stated: “Docket UE-220066 and UG-220067, Testimony of Ronald J. Roberts, Exh. RJR- 30T at 7:14–17. Please provide a copy of PSE’s 2005 Least Cost Plan along with all supporting appendices and workpapers including calculations and data in Excel format.”

<sup>8</sup> PSE made this information available at the following link: <https://www.pse.com/en/IRP/Past-IRPs/2005-IRP>.

<sup>9</sup> Earle, Exh. RLE-1CT at 13:2 n. 32 (claiming PSE “refused” to answer basic questions).

<sup>10</sup> See Earle, Exh. RLE-1CT, at 19:15-24:3; see also Sahu, Exh. RXS-1T, at 51:3-21.

its rebuttal testimony and received no follow up data requests related to the Free Testimony.<sup>11</sup> Although this proceeding “considers the prudence and reasonableness of the investments and decisions the Company made after September 22, 2016[,]”<sup>12</sup> Public Counsel has questioned the sufficiency of PSE’s internal legal costs to argue for an audit dating back to 2013.<sup>13</sup>

9. Public Counsel Data Request No. 26 (“Request No. 26”) asks PSE to provide the “monthly legal costs and labor hours” and “all billing records pertaining to legal costs” for the Tacoma LNG Project. PSE provided Exhibit A in its response, which provided legal costs per month as they were posted and the number of internal legal hours associated with legal costs from April 2017 through June 2023. Public Counsel moves to strike the Free Testimony, which 1) discusses legal costs in general terms prior to April 2017,<sup>14</sup> 2) discusses the appellate litigation in 2022,<sup>15</sup> and 3) provides a table showing the difference between when internal legal costs are posted, versus when the internal legal work is actually performed.<sup>16</sup> Public Counsel asserted in its response testimony that if no internal legal hours were posted for a certain month, no work was done. The Free Testimony clarified that misconception.

10. PSE sufficiently responded to Request No. 26 but it cannot control Public Counsel’s witness misinterpreting the information provided therein. Public Counsel did not seek to clarify,

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<sup>11</sup> Specifically, the Motion identifies Free, Exh. SEF-4T at 17:1–11, 18:16–20, 19:1–18, 20:3–4 (Table 2).

<sup>12</sup> Docket UG-230393, Order 04, ¶ 18.

<sup>13</sup> See Earle, Exh. RLE-1CT, at 21:9-13; Earle, Exh. RLE-1CT at 27:5-27:17 (requesting an audit of recordkeeping starting in 2013).

<sup>14</sup> Free, Exh. SEF-4T at 17:1–11.

<sup>15</sup> Free, Exh. SEF-4T at 18:16–20, 19:1–18.

<sup>16</sup> Free, Exh. SEF-4T at 20:3–4 (Table 2).

follow up, narrow, or otherwise take any additional action after it received PSE's response to Request No. 26 or after the Free Testimony was filed.

### III. LEGAL ISSUES

11. The Motion requests the Commission issue sanctions by striking testimony as a remedy for alleged discovery violations. In discovery, PSE provided responses containing a variety of information related to the 2005 Least Cost Plan and PSE's monthly legal costs and labor hours, and Public Counsel used the information provided in those responses in its testimony. Then, in the Motion, Public Counsel claims those responses are insufficient, yet Public Counsel did not reach out to PSE once to raise a concern regarding the sufficiency of PSE's responses or challenge the objections raised. Public Counsel did not make a good faith effort to resolve informally its perceived discovery dispute, nor did it file a motion to compel or establish any violation of a discovery order in this proceeding. Public Counsel then asks the Commission to issue one of the most dramatic remedies for an alleged discovery violation, striking relevant testimony from the record. The Commission should reject this overture.

### IV. ARGUMENT

12. While PSE maintains it sufficiently responded to Public Counsel's discovery requests, the Commission has clear rules and procedures to resolve discovery disputes, should they arise over the course of a proceeding.<sup>17</sup> These procedures require parties to first attempt to resolve any discovery disputes informally, and if that approach is unsuccessful, the party asserting the

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<sup>17</sup> See WAC 480-07-425.

dispute can file a motion to compel discovery.<sup>18</sup> At that time, the Commission can weigh the burden of responding to the discovery requested with the issues at stake before it enters an order to compel.<sup>19</sup> Public Counsel followed none of these procedures, chose to litigate an apparent discovery dispute through testimony, and then asks the Commission to institute harsh sanctions against PSE.<sup>20</sup> Furthermore, the Commission has been clear in the past that if an explanation comes out “later in the proceeding, this is not necessarily troubling” because “it is reasonable that the Company would have to adjust its testimony over the course of the proceeding given specific arguments raised by the parties.”<sup>21</sup> Finally, the Commission has taken a lack of a motion to compel as evidence suggesting an absence of concern with compliance to discovery requests.<sup>22</sup>

**a. PSE Provided Sufficient Responses and the Commission Should Deny the Motion to Strike the Roberts Testimony**

13. PSE provided sufficient responses regarding the 2005 Least Cost Plan. In response to Request No. 30, PSE made available a substantial amount of information regarding the 2005 Least Cost Plan.<sup>23</sup> This information included the 2005 Least Cost Plan along with all eleven

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<sup>18</sup> “Parties **must** make good faith efforts to resolve informally all discovery disputes.” WAC 480-07-425(1)(a) (emphasis added).

<sup>19</sup> See WAC 480-07-400(3) (The scope of discovery depends on the time available, the burdensomeness of the request, the needs of the adjudicative proceeding, party resources, and the importance of the issues at stake).

<sup>20</sup> See *Mayer v. Sto Indus., Inc.*, 156 Wn. 2d 677, 687-691, 132 P.3d 115, 120-122 (2006) (noting in civil court, remedies such as dismissal, default, and the exclusion of testimony, sanctions that affect a party’s ability to present its case, are among the harsher remedies available and should only be granted where there is a willful or deliberate refusal to obey a discovery order and substantial prejudice).

<sup>21</sup> See Dockets UE-220066, UG-220067, & UG-210918 (Consolidated) Final Order 24/10 ¶ 400.

<sup>22</sup> *Id.* (“[W]e have not been presented with, or granted, any motions to compel that would suggest that PSE failed to comply with discovery requests related to this issue.”)

<sup>23</sup> The 2005 Least Cost Plan was made publicly available in response to Request No. 30 at <https://www.pse.com/en/IRP/Past-IRPs/2005-IRP>.

supporting appendices. In Request No. 37, Public Counsel requested additional information and underlying data for the 2005 Least Cost Plan, much of which dated back to the 1990s. PSE objected to this request because of the particularly large burden of obtaining data that is decades old and because the issues involved in this case are based on the prudence of costs after PSE's decision in late 2016 to build the Tacoma LNG plant.

14. Public Counsel claims in its Motion that PSE refused to provide “a full and substantial response regarding PSE’s 2005 Least Cost Plan” which prevented Public Counsel’s witness Mr. Earle from examining the basis of PSE’s witness Roberts’ assertions that Public Counsel’s cost to benefit comparison is incorrect. Public Counsel also claims that because “PSE refused to answer questions about the [2005] Least Cost Plan,” the record is insufficient to verify assertions about Public Counsel’s comparison or “ascertain what would be the correct comparison.” Public Counsel’s claims are misleading at best. PSE provided the entire 2005 Least Cost Plan in its response to Public Counsel data request No. 030 (b).

15. The Roberts Testimony points out that Public Counsel’s testimony compares the entire capital cost of the Tacoma LNG Facility to the “levelized” benefits of moving from 52 heating degree days (HDD) to 48 HDD using a 20-year model. The table referred to in Public Counsel’s testimony clearly refers to the “Levelized Incremental Benefit of Increasing One Planning Level.” Although the Appendix I did not specifically describe what “levelized” means, levelized is commonly understood as the net present value (“NPV”) of a future stream of numbers, annualized over the number of years in that stream.

16. Public Counsel does not contest the relevancy of the Roberts Testimony or its responsiveness to the assertions made by witness Earle. Accordingly, given the relevancy of the Roberts Testimony, PSE's comprehensive response providing the 2005 Least Cost Plan and appendices, lack of discovery order related to the 2005 Least Cost Plan requests, lack of informal attempts to resolve any alleged discovery request, minimal probative value and burden of providing the underlying information demanded Request No. 37 from pre-2005, and harsh severity of the sanction demanded, the Commission should deny the Motion and allow the Roberts Testimony as evidence.

**b. PSE Provided Sufficient Responses and the Commission Should Deny the Motion to Strike the Free Testimony**

17. PSE provided a sufficient response to the request demanding the "monthly legal costs and labor hours" and "all billing records pertaining to legal costs" for the LNG Project. Public Counsel did not make a good faith effort to informally resolve its perceived discovery dispute, nor did it file a motion to compel. Public Counsel did not seek to clarify, follow up, narrow, or otherwise take any additional action after it received PSE's response to Request No. 26 or after the Free Testimony was filed.

18. The Free Testimony is relevant because it clarified an incorrect assumption regarding the data provided in response to Request No. 26 and there is no evidence that a discovery violation occurred. PSE provided a detailed spreadsheet containing monthly legal costs and the labor hours associated with those costs in Attachment A with its response to Request No. 26. The Free Testimony clarifies that sometimes PSE's system which records internal monthly legal costs does not directly align with when those hours were worked, instead it reflects when those costs

were posted to the accounting system. The data provided in Attachment A is an accurate reflection of when PSE's monthly legal costs and labor hours were posted.<sup>24</sup> PSE's response regarding monthly legal costs was sufficient.

19. Furthermore, the other sections of the Free Testimony challenged by Public Counsel are not based on information provided in response to Request No. 26, rather, those sections discuss legal costs in general terms prior to April 2017<sup>25</sup> and the status of the appellate litigation in 2022.<sup>26</sup> The Free Testimony regarding legal costs prior to April 2017 simply provides the overall costs and confirms those costs were properly allocated to PSE. The Free Testimony discussing the status of appellate litigation is in response to Earle's testimony and clarifies the multiple appeals of permitting decisions by the Tribe that occurred and continued to occur through 2022, and the legal fees that resulted from these continued appeals. PSE did not improperly withhold information, and PSE's discovery response was sufficient.

20. The Commission should deny the Motion and allow the Free Testimony into evidence. The Free Testimony is relevant because it is responsive and corrects certain misconceptions related to PSE's legal costs. The Free Testimony has probative value to the proceeding because it explains PSE's legal costs incurred after the decision to build, which is an issue in the proceeding. As explained above, PSE provided a sufficient response to Request No. 26

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<sup>24</sup> Notwithstanding the relevance, PSE supplemented Attachment A on November 1, to provide additional clarity on legal costs incurred before April 2017. That supplemental response did not change the presentation of legal costs incurred after March 2017.

<sup>25</sup> Free, Exh. SEF-4T at 17:1-11.

<sup>26</sup> Free, Exh. SEF-4T at 18:16-20, 19:1-18.

particularly given the breadth of the request. Finally, the sanction of striking testimony is particularly harsh when Public Counsel did not informally attempt to resolve any discovery dispute, follow up with PSE regarding its answer to Request No. 26, nor has Public Counsel demonstrated PSE violated any discovery order in this proceeding.

## V. CONCLUSION

21. PSE respectfully requests the Commission deny the Motion.

RESPECTFULLY SUBMITTED this 3rd day of November, 2023.

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