

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKET UE-161123

RESPONSE OF NVEC TO  
MICROSOFT'S OBJECTION TO, AND  
MOTION TO DENY, ACCESS TO  
CONFIDENTIAL INFORMATION BY  
NVEC EXPERTS KELLEY AND  
O'BRIEN, AND REQUEST TO  
WITHDRAW THE MARCH 1 NOTICE  
SETTING A BRIEFING SCHEDULE ON  
MICROSOFT'S MOTION

**I. INTRODUCTION**

1. Citing no basis in fact and an inapt Commission precedent involving a trade association intervenor, Microsoft Corporation (Microsoft) filed an objection to the designations by the Northwest Energy Coalition (NVEC) experts Dina Dubson Kelley and Michael H. O'Brien and their agreements under the Protective Order<sup>1</sup> to safeguard confidential information produced in this proceeding. Microsoft argues that because the employer of Ms. Kelley and Mr. O'Brien, Renewable Northwest (RNW), a non-profit organization that advocates for renewable energy, has some members who are market participants, it should be viewed as analogous to the Northwest and Intermountain Power Producers Coalition (NIPPC), which is trade association that has as its purpose protecting the economic interests of its members. Microsoft argues that because the Commission allowed NIPPC to intervene in the proceeding on the condition that it

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<sup>1</sup> Order 03, Protective Order With "Highly Confidential" Provisions (Nov. 22, 2016).

not be allowed to see confidential information, Ms. Kelley and Mr. O'Brien, as employees of RNW, likewise should not be allowed to view any confidential information.

2. NWEC urges the Commission to overrule Microsoft's objections and deny its motion. This is for two reasons. First, NIPPC is a trade association and a party. It is by no means analogous to RNW, which is non-profit advocacy group and merely the employer of NWEC witnesses Kelley and O'Brien. Second, the terms of the protective order, RNW's internal code of ethics, and Ms. Kelley's and Mr. O'Brien's character all serve to protect Microsoft from any devious disclosure of information obtained in this proceeding.

## **II. RELIEF REQUESTED**

3. On March 1, the Commission issued a Notice calling for responses to Microsoft's objections and motion by March 7, with a response due by March 14. With all due respect, that schedule would put NWEC and its experts in a bind. As testimony is due March 13, that schedule, regardless of the merits of Microsoft's position, would effectively deny NWEC's experts access to some information.

4. Therefore, for the reasons stated below, NWEC respectfully requests that (1) Microsoft's objections to the expert agreements of Ms. Kelley and Mr. O'Brien be overruled and its motion to deny their access to confidential information in this proceeding be denied; (2) the deadline for filing NWEC testimony be extended an appropriate amount of time to allow its experts to review all relevant information generated in this proceeding; and (3) the Notice issued March 1 setting up a briefing schedule for consideration of Microsoft's objections and motion be withdrawn so that relief requested by NWEC can be granted at the earliest possible date.

### III. BACKGROUND

5. Earlier in this proceeding, the Commission granted NWEA's Petition to Intervene; no party objected.<sup>2</sup> However, PSE objected to intervention by NIPPC, arguing that NIPPC "is only seeking intervention to further the independent business interests of its members."<sup>3</sup> At the prehearing conference at which interventions were considered, the attorney for Microsoft "voiced concerns that NIPPC, an association with members who Microsoft Corporation might negotiate the purchase of power, could receive a contractual advantage by gaining access to confidential load information."<sup>4</sup> The Commission, through the Administrative Law Judge, denied NIPPC's petition to intervene stating:

The association has not demonstrated, with any specificity, that this proceeding will involve issues making NIPPC's participation necessary or in furtherance of the public interest. Even if NIPPC had met the public interest standard, the Commission would still have had to balance the association's participation against the Company and Microsoft Corporation's confidentiality concerns, possibly resulting in a substantial limiting of NIPPC's participation in the proceeding.<sup>5</sup>

6. However, the Commission responded to the concerns of Staff and Public Counsel that NIPPC may have something important to offer the Commission. The Commission stated:

Staff and Public Counsel have suggested that NIPPC might offer a unique perspective on public policy issues related to this tariff filing. *If either party believes that the association has relevant information that will provide the Commission with a full and complete record, Staff or Public Counsel may offer a NIPPC-related witness. It would be the sponsoring party's duty to maintain the confidentiality of any documents obtained during discovery and to protect commercially-sensitive information.* Otherwise, the Commission will present NIPPC and other non-parties with the opportunity to publically comment on the tariff filing outside the context of the evidentiary hearing.<sup>6</sup>

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<sup>2</sup> Order 02, ¶5.

<sup>3</sup> See Order 03, ¶4.

<sup>4</sup> Order 03, ¶16.

<sup>5</sup> Order 03,

<sup>6</sup> Order 03, ¶25 (emphasis added).

In other words, the Commission offered a path for other parties to offer “NIPPC-related” witnesses, placing the burden on the sponsoring party to protect confidentiality of information.

7. NIPPC petitioned for interlocutory review of Order 04, and, in Order 05, the full Commission granted NIPPC’s petition allowed its intervention. However, exercising its discretion, the Commission conditioned that intervention on limiting NIPPC’s access to confidential information.<sup>7</sup> While the Commission reversed the Administrative Law Judge’s decision on whether NIPPC should be able to intervene, it did not reject the provision in Order 04 that would allow the calling of “NIPPC-related witnesses” who could have access to confidential information.

8. On February 15, 2017, NWEAC filed and served Expert Agreements for Ms. Kelley and Mr. O’Brien. Microsoft filed its objections and its motion to deny access to confidential information to those experts on February 27.

9. The current procedural schedule requires intervenors, like NWEAC, to file its testimony by March 13. As things currently stand, NWEAC is unable to provide its experts Kelley and O’Brien with access to all information, either in testimony or in responses to discovery requests, that could inform their work for NWEAC.

#### IV. ARGUMENT

##### A. Microsoft’s Comparison of RNW to NIPPC Is an Inapt Analogy

10. In support of its objections and motion, Microsoft relies entirely on what appears to be a legal argument, analogizing RNW to NIPPC. The argument goes something like this: the Commission, while allowing NIPPC to intervene, disallowed it access to confidential

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<sup>7</sup> Order 05, ¶20.

information; RNW is like NIPPC; therefore, RNW should not be allowed access to information. But that analogy is inapt for two reasons.

11. First, NIPPC is a trade association. According to NIPPC's website: "The Northwest & Intermountain Power Producers Coalition (NIPPC) is a membership-based advocacy group representing electricity market participants in the Pacific Northwest."<sup>8</sup> In other words, it is a trade association representing the commercial interests of its members. In contrast, RNW is a non-profit advocacy group. Its website states: "Renewable Northwest is the region's leading non-profit focused exclusively on advocating for new, clean, sustainable, renewable resources."<sup>9</sup> While it is true that there are some RNW members who are also generators of electricity, the majority of its members are not. Members primarily include other advocacy organizations, but also include some energy companies and a number of consultants. Indeed, K&L Gates is a member of RNW, as are a few other law firms.<sup>10</sup> And RNW's bylaws require that a majority of the organization's Board of Directors be "affiliated with nonprofit conservation, environmental, or other public interest organizations."<sup>11</sup> So, the purposes and operations of NIPPC and RNW are dramatically different.

12. The second reason why Microsoft's comparison of RNW to NIPPC is inapt is that RNW is not a party and is not seeking to be a party. NWECC is the party in question, and it seeks to use some experts in renewable energy to assist it (and therefore assist the Commission) in this proceeding. So, what legal principle is Microsoft attempting to impose upon the Commission? If a party to the proceeding seeks to use a witness employed, say by the Sierra Club, need the

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<sup>8</sup> <http://nippc.org>.

<sup>9</sup> <http://www.rnp.org/node/our-story>.

<sup>10</sup> [http://www.rnp.org/our\\_members](http://www.rnp.org/our_members).

<sup>11</sup> <http://www.rnp.org/sites/default/files/pdfs/RNP%20Bylaws.pdf> (Art. III, section 2).

Commission review the Sierra Club's membership list to make sure that no member may have an economic interest in the proceeding? Or if a party seeks to employ a consulting firm, need the Commission review the client list of that firm to make sure that no other client has an interest in the outcome of the proceeding?

13. The Commission answered this question in Order 03, quoted in paragraph 6 above, when it stated that even if NIPPC is not a party, "if [a] party believes that [NIPPC] has relevant information that will provide the Commission with a full and complete record, [that party] may offer a NIPPC-related witness." The Commission continued that "[i]t would be the sponsoring party's duty to maintain the confidentiality of any documents obtained during discovery and to protect commercially-sensitive information."<sup>12</sup>

**B. There Is No Basis in Fact for Denying NWECE's Experts Access to Confidential Information Given the Strictures of the Protective Order and Ethical Standards Applicable to Those Witnesses.**

14. Microsoft relies entirely on what may be a legal argument, comparing RNW to NIPPC. It makes no argument, based on facts, that NWECE's experts, Ms. Kelley and Mr. O'Brien, would surreptitiously comb the record for confidential information and pass it on to certain RNW members. Either Microsoft is suggesting this motive, or it is not. If it not suggesting it, then there is no basis for its position. If it is suggesting it, then that is misguided, if not offensive to the professional integrity of Mr. Kelley and Mr. O'Brien.

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<sup>12</sup> Order 03, ¶25. By further example, if the concern is not just that employees of an organization could share confidential information with interested members, but also that some members with access to such information could share with other members, then what about the fact that K&L Gates is a member of RNW alongside of the energy companies Microsoft fears will get confidential information. The answer to that concern, of course, is that K&L Gates attorneys would be bound by the terms of the protective order, so we do not have to worry about them sharing information inappropriately. The same is no less true for Ms. Kelley and Mr. O'Brien.

15. As experts signing the Expert Agreements of the Protective Order, Ms. Kelley and Mr. O'Brien agreed "to comply with and be bound by the Protective Order" in this case. That Protective Order states:

**Purpose of Access and Use; Confidentiality.** No Confidential Information distributed or obtained pursuant to this Protective Order may be requested, reviewed, used or disclosed, directly or indirectly, by any party, expert or counsel or any other person having access pursuant to this Order, except for purposes of this proceeding and Docket UE-161123. Persons having access to the Confidential Information pursuant to this Order must request, review, use or disclose Confidential Information only by or to persons authorized under this Order, and only in accordance with the terms specified in this Order. Without limiting the foregoing, persons having access to Confidential Information shall not use any Confidential Information to design, develop, provide, or market any product, service, or business strategy that would compete with any product of the party asserting confidentiality.<sup>13</sup>

In other words, Ms. Kelley and Mr. O'Brien are bound by order of this Commission not to disclose information. If they violated the terms of that order, they would be subject to penalty.

As an attorney, Ms. Kelley may even be subject to disciplinary action by the Oregon State Bar.

Even RNW's internal code of ethics prohibits disclosure of such information.<sup>14</sup> Just as attorneys for K&L Gates can be counted on not to disclose confidential information to other RNW members, experts Kelley and O'Brien can be counted on to comply with the terms of the Protective Order.

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<sup>13</sup> Order 03, ¶6.

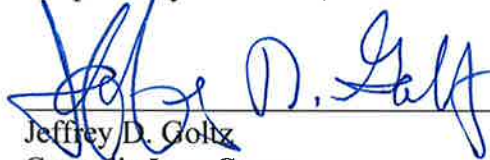
<sup>14</sup> <http://www.rnp.org/sites/default/files/pdfs/RNP%20Code%20of%20Ethics%20adopted%2009Mar19.pdf>.

## V. CONCLUSION

16. For the reasons stated above, NWEC requests that Microsoft's objections to the expert agreements of Ms. Kelley and Mr. O'Brien be overruled and its motion to deny their access to confidential information in this proceeding be denied. NWEC also requests that the deadline for filing NWEC testimony be extended an appropriate amount of time to allow them to review all relevant information generated in this proceeding and that the Notice issued March 1 setting up a briefing schedule for consideration of Microsoft's objections and motion be withdrawn so that relief requested by NWEC can be granted at the earliest possible date.

Dated, March 3, 2017.

Respectfully submitted,



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