

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

COUGAR RIDGE WATER SYSTEM,

Respondent.

DOCKET NO. UW-040367

COMMISSION STAFF
RESPONSE TO COUGAR RIDGE
WATER SYSTEM'S MOTION TO
COMPEL

1 Commission Staff submits the following response to Cougar Ridge Water
System's June 23, 2004, Motion to Compel.

2 The sole issue in this case is whether Cougar Ridge Water System received
revenue in excess of \$429 per customer over a one year period so as to become
subject to regulation as a "water company" under Title 80 RCW. None of the facts
that are relevant to this determination are in dispute. Almost every fact relevant to
this question was admitted by the company in response to data requests from Staff.

See, generally, Staff Motion for Summary Determination.

3

The only argument that the company has advanced in opposition to a finding that it has exceeded the revenue threshold for jurisdiction is the legal argument that “annual revenue” must be measured over a calendar year, and may not be measured over any other twelve month period. Cougar Ridge Response to Motion for Summary Determination at pp. 2, 3.

4

Despite the fact that almost all of the relevant facts are in the possession of the company, Cougar Ridge has made extensive use of discovery processes against Staff. Staff has responded to much of that discovery, including providing Mr. Ward and Mr. Eckhardt for deposition. Second Declaration of Jonathan C. Thompson at ¶¶ 2, 3. In many cases it has done so over the objection that much of the information sought from Staff by Cougar Ridge is not reasonably calculated to lead to the discovery of admissible evidence. Copies of Cougar Ridge’s first set of data requests and Staff’s responses thereto are attached to the Second Declaration of Jonathan Thompson. Staff has expended a great deal of time, effort, and expense in responding to Cougar Ridge’s first five data requests. *Id.* At ¶ 4.

A. Assistant Attorney General “Probable Cause” Memorandum

5

Cougar Ridge seeks a memorandum that was prepared by the Attorney General’s Office (with input from Staff) to advise the Commissioners on their

“probable cause” determination as to whether to initiate a special proceeding and complaint in this case. Cougar Ridge Data Request No. 9. Staff disclosed the existence of this memo and objected to its disclosure in its May 13, 2004, response to Cougar Ridge’s Data Request No. 2 (attached to Second Declaration of Jonathan C. Thompson).

6 Staff has objected to the request as seeking attorney-client privileged communications.

7 Cougar Ridge argues that supplying a memorandum directly to the Commissioners about Cougar Ridge Water System “demonstrates a situation in which the process is tainted by information being supplied directly to the ultimate decision maker, even before this matter was pending in this tribunal.” Cougar Ridge Response at p. 4.

8 Cougar Ridge’s arguments about bias ignore long-established principles of administrative law. RCW 34.05.458(2) provides that “A person, including an agency head, who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise a presiding officer in the same proceeding

unless a party demonstrates grounds for disqualification in accordance with RCW 34.05.425.”

9 The Commission’s statutes, in many places, contemplate the Commission bringing complaints “on its own motion.” *See e.g.* RCW 80.04.110. This necessarily entails the Commission reviewing facts gathered through Staff investigation in order to determine whether to initiate an adjudicative complaint proceeding in which the Commission will sit as the ultimate decision maker.

10 The Washington Administrative Procedure Act’s statutory provision regarding “probable cause determinations,” RCW 34.05.458(2), mirrors federal decisions upholding against due process challenge combinations of adjudicative and investigative functions in administrative agencies. *See e.g., Withrow v. Larkin*, 421 U.S. 35, 47-48, 95 S.Ct. 1456, 43 L.Ed. 712 (1975).

11 The document in question contains, throughout, legal advice to the Commission from one of its legal advisors. These communications do not constitute *ex parte* contacts because they were made before an adjudication was initiated and the “*ex parte* wall” went up.

12 The privilege is neither Staff’s nor the Attorney General’s to waive. It is the Commission’s.

B. Phone logs, Consumer Affairs Documents, Calendars, Agendas, Computer files, and time sheets

13 Cougar Ridge’s most recent round of data requests are astonishingly overbroad and in most cases are written without any effort to confine them to the needs of the case (“Please produce a copy of any records generated by the Consumer Affairs Department of the Office of Penny Hanson of the office of Vicki Elliot.” “Please produce a copy of the phone logs of Eugene Eckhardt and/or James Ward”). Requested items include calendars, meeting notes, computer files and time sheets of Mr. Ward and Mr. Eckhardt.

14 Cougar Ridge simply states that “[f]rom the depositions of Mr. Ward and Mr. Eckhardt, it appears that all of the above materials contain critical, relevant information that should be disclosed.”

15 Cougar Ridge offers no theory of how any of the information it lists at page 4 of its Response and Motion is reasonably calculated to lead to admissible evidence in a case in which the sole issue is whether Cougar Ridge’s activities meet the test for regulation by the Commission.

16 Staff has, since Cougar Ridge made its motion, and over its objection, provided the phone logs of James Ward going back to the month when Mr. Ward first had a telephone contact concerning Cougar Ridge. *See* Second Supplemental

Response to Cougar Ridge Data Request No. 3, attached to Second Declaration of Jonathan C. Thompson. Mr. Eckhardt does not keep a phone log, so there is nothing to produce in response to that request and the question of relevance is moot. *Id.* There also are no records in possession of the Consumer Affairs division that relate to Cougar Ridge (although the data request did not limit the request to Cougar Ridge). *Id.*

17 Cougar Ridge requests Mr. Eckhardt's calendars, meeting agendas and notations, and Mr. Eckhardt and Mr. Ward's "computer files" and timesheets for 2003 and 2004. Staff objects that in addition to being patently overbroad and not reasonably calculated to lead to discovery of admissible evidence, the requests appear to be designed to harass and to cause delay. Staff objects to these requests on the grounds stated by the Administrative Law Judge in the Ninth Supplemental Order, In Re the Petition of U S West Communications, Inc., Docket No. UT-980948 (April 19, 1999) (copy enclosed).

C. Waiver of Attorney-client Privilege

18 In responding to the company's data requests in this case, Staff has withheld and redacted a number of communications, primarily e-mails between counsel and Staff members in which legal advice was solicited and/or provided or in which case

strategy was discussed. Staff has provided privilege logs identifying these documents. Second Declaration of Jonathan C. Thompson (Data Request responses attached).

19 Cougar Ridge contends that the privilege was “breached” or waived in early January, 2004 when “the opinion of the Attorney General’s office was disclosed to the public in early January, 2004.” It is true that Staff produced in response to a data request from Cougar Ridge an e-mail that Mr. Ward sent to a customer of Cougar Ridge in January of 2004 that stated (incorrectly) that it was the opinion of the Attorney General’s office that the company was not subject to the Commission’s jurisdiction. Second Declaration of Thompson ¶ 5. Even if Mr. Ward were capable of waiving the Commission’s privilege, this would not constitute a waiver of the attorney-client privilege that would compel disclosure of any communications between Staff or the Commission and its legal advisors. The reason is that Mr. Ward simply disclosed (though inaccurately) a legal conclusion, not any actual legal analysis. As the Court of Appeals stated in *Seattle Northwest Securities v. SDG Holding Company, Inc.*, 61 Wash. App. 725, 739-40 (1991):

If such a disclosure did waive the attorney-client privilege, every letter an attorney writes to opposing counsel, an audit firm, or a witness in a case could be construed as waiving the privilege. To penalize a disclosure of a legal conclusion by characterizing it as a waiver would

greatly hamper attorneys in their ability to effectively represent and advise their clients. The exception would swallow the rule and render the privilege a virtual nullity. We conclude that no partial disclosure of confidential materials sufficient to constitute a waiver of the attorney-client privilege occurred in the present case.

Because the statement was merely a statement of a legal conclusion (albeit incorrect), there was no waiver of the privilege.

D. Guidelines for testifying as a witness as deposition

20 At deposition, Mr. Eckhardt stated that Staff counsel, had provided him with some written guidelines or suggestions concerning having one's deposition testimony taken. Cougar Ridge Response at p. 5. Cougar Ridge seeks discovery of these. Staff objects. The document simply has no bearing on the case, is not specific to this case, and constitutes privileged legal advice as well as attorney work product. Cougar Ridge cites no authority for its claim of right to inspect the document. The mere fact that a witness reviewed a document prior to testifying does not destroy the privilege or work product protection. Under federal rules analogous to our state superior court discovery rules, courts have held that the witness needs to have relied on the writing to refresh his memory in order for the opposing party to have a right to what would otherwise be a privileged or work

product document. See discussion in *MSX International Engineering Services, Inc. v. Suss*, 212 F.R.D. 159, 165 (S.D. NY 2002).

E. Conclusion

21 For the foregoing reasons, the Commission should deny Cougar Ridge's motion to compel discovery,

DATED this 29th day of June, 2004.

CHRISTINE O. GREGOIRE
Attorney General

JONATHAN C. THOMPSON
Assistant Attorney General
Washington Utilities and
Transportation Commission
(360) 664-1189