

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-220513

PMSA'S MOTION TO STRIKE
MCNEIL & WOOD EVIDENCE
FOR FAILURE TO COMPLY
WITH DISCOVERY
OBLIGATIONS

1. Under WAC 480-07-375(1)(d) and WAC 480-07-425(2), the Pacific Merchant Shipping Association (PMSA) moves to exclude testimony and exhibits from Bruce McNeil and Christopher Wood due to the failure by Puget Sound Pilots (PSP) to comply with its discovery obligations with respect to these witnesses.

I. ISSUE PRESENTED

2. PSP refused to provide substantive responses to data requests related to its initial testimony by Mr. McNeil and Mr. Wood. PSP then filed rebuttal testimony and exhibits by Mr. McNeil and Mr. Wood containing information that PSP withheld in discovery. Under its rules, the Commission may strike evidence as a sanction for failure to comply with discovery obligations. Should the Commission strike this testimony for noncompliance with discovery rules?

II. RELIEF REQUESTED

3. PMSA requests an order striking testimony and exhibits of Mr. McNeil and Mr. Wood in their entirety—or at the very least the rebuttal portion—for failure to comply with the discovery rules when their rebuttal evidence proves

they had the ability to provide the information requested.

III. STATEMENT OF FACTS

4. PMSA relies on the PSP Responses to PMSA Data Requests (“DRs”) 471–545 (Exhibit CN-4) and the related testimony of actuary Chris Noble, Exhibit CN-1T at 27:1–28:23. This motion also relies on the testimony and exhibits of Mr. McNeil (initial filing, Exh. BJM-01T, et seq., and rebuttal, Exh. BJM-04T, et seq.) and Mr. Wood (initial filing, Exh. CRW-01T, et seq., and rebuttal, Exh. CRW-06T, et seq.), and other filings and evidence in the record of this case.
5. PSP filed with the Commission a proposed increase to Puget Sound pilotage district tariffs to initiate this general rate case TP-220513 on June 29, 2022.
6. In its general rate case filing, PSP’s retirement expenses are currently its single largest cost item, and therefore directly relevant to the setting of any new rate. PSP made issues surrounding the funding of its retirement plan, automatic adjusters for retirement costs, and the potential transition to a new retirement plan a central part of its filing and its requests. PSP proffered the testimony of retirement attorney Bruce McNeil, Exhibit BJM-01T et seq., and actuary Christopher Wood, Exhibit CRW-01T et seq., as their primary witnesses regarding their proposals to address PSP’s retirement expenses.
7. Commission Order 03 (Aug. 26, 2022), at ¶ 50, directed the parties to comply with discovery rules under WAC 480-07-400–425 and to work cooperatively to avoid the need for formal resolution of discovery disputes.
8. On January 6, 2023, PMSA sent PMSA DRs 471-545 to Puget Sound Pilots

under the subject of “Testimony Regarding Pilot Retirement Issues.” These DRs pertained exclusively and expressly to the testimony of Mr. McNeil, at Exh. BJM-01T et seq., and Mr. Wood, at Exh. CRW-01T et seq., and were grouped consistently with WAC 480-07-405(1)(a). All 74 of these requests related to the testimony of Mr. McNeil and Mr. Wood, including some (but not all) which related to legal advice and actuarial opinions. With respect to legal advice, which would pertain to Mr. McNeil only (Mr. Wood is not an attorney), PMSA DRs 471, 542, and 543 noted that PSP had waived privilege related to Mr. Neil’s advice on the “enforceability” of the current PSP retirement plan and advice on its proposed Multiemployer. For example, at DR 471 PMSA noted:

Though a request for a copy of the legal advice provided would typically be subject to a claim of attorney-client privilege, in this instance the client specifically requested that its lawyer disclose the legal opinion in his testimony and filed that testimony in this case. Therefore, any privilege claim with respect to this legal opinion has been affirmatively waived.

9. On January 23, 2023, PSP served on the parties “PSP’s Responses to PMSA Data Requests 471–545.” As noted in the testimony of Mr. Noble, “PSP did not provide substantive answers to any of the formal data requests that were submitted regarding its proposed retirement plan and its actuarial study or the testimony of Mr. Wood and Mr. McNeil.”¹ Instead, PSP objected to every DR and provided none of the information requested, as shown in Exhibit CN-4.
10. In response to PMSA DR 471, PSP responded that “PSP objects to providing any legal opinions on the grounds of attorney-client privilege, which was never

¹ Noble, Exh. CN-1T 28:4–6.

waived.” This attorney-client privilege objection was also claimed in response to PMSA DRs 542 and 543.

11. In response to PMSA DR 472, PSP responded with two grounds, summarized as follows: “PSP objects to this Data Request on the grounds of undue burden and expense and because PMSA has ample opportunity to obtain this information through its own expert pension attorney and/or actuary,” and “[w]ith respect to PSP’s pension experts, the request seeks information protected by the attorney-client and/or work product privileges.”

12. PSP then asserted the DR 472 objections for 71 of PMSA’s 74 data requests regarding PSP’s retirement testimony. For DRs 473-541, 544, and 545, PSP gave the blanket response that “PSP objects to this Data Request on the same basis as set forth in response to Data Request 472.” The DR 472 blanket objections, including attorney-client privilege, were invoked regarding all testimony of Mr. Wood, even though he is not an attorney, and for requests for admissions of facts that are not covered by either attorney-client or work-product privileges and involved no expenses or burden on witnesses. These objections were also claimed in response to DR 522, which asked for descriptions of Mr. Wood’s personal “experience with the creation of an actual multiple employer plan subject to § 413(c) of the Internal Revenue Code.” PSP added some additional objections to DRs 529 and 538.

13. The lack of substantive responses hindered Mr. Noble’s analysis and testimony, as well as PMSA’s ability to provide information on this subject in

this case. Mr. Noble testified to this point:

Some of the questions that I helped develop were intended to build a common understanding of how the proposed plan would operate and how much it would cost. In the absence of constructive answers to those questions, it seems that the proposed plan would be an inefficient and possibly ineffective tool for providing pilots with the retirement income they would expect from the current Farebox plan because the cost of administering the plan would be disproportionate to its size and restrictions on benefits would prevent the plan from providing the same benefits as the current Farebox plan.²

14. Faced with the lack of responses, PMSA had a choice: either (1) bring a motion to compel after meeting and conferring with PSP's counsel or (2) address the issue in testimony and briefing to bring attention to the lack of PSP responsiveness. In compliance with the Commission's preference to avoid formal resolution of discovery disputes (Order 03, ¶ 50), and considering the looming deadline for response testimony, PMSA chose to avoid a motion to compel and instead provide information that would allow the Commission to decide what weight to give PSP's evidence in light of this lack of responsiveness.
15. After withholding all of the information that PMSA had sought in these data requests, PSP then directly addressed the same specific subjects in rebuttal testimony and exhibits for Mr. McNeil and Mr. Wood on March 3, 6, and 7, 2023.
16. For example, PMSA DR 523 asked Mr. Wood to "describe the assumptions used in your projections for plan-related expenses (i.e. actuarial, auditing, trustee, administrator, and PBGC premiums)" PSP's response to DR 523

² *Id.* at 28:15–23.

was the blanket assertion of DR 472 objections, including violations of privileges and undue burden. But in Mr. Wood’s rebuttal testimony, he addresses nearly the exact same issue, as he describes estimated expenses for “PBGC Premiums,” “Legal Services,” and “Actuarial Services.”³

17. In another example, PMSA DR 521 asked Mr. Wood to “describe the ‘funded pension system’ for Oregon pilot groups with which you had experience.” PSP’s response to DR 521 was the blanket assertion of DR 472 objections, including violations of privileges and undue burden. However, in Mr. Wood’s rebuttal testimony, again, he again addresses nearly the exact same issue, as he dedicates an entire section of his testimony to describing the “History of Decisions Made by the Oregon Board of Maritime Pilots to Transition Pay-As-You-Go Pension Plans for Oregon Pilot Groups to a Fully Funded Defined Contribution Plans.”⁴

18. In another example, PMSA DR 493 asked Mr. McNeil to address if “the limits on compensation in a tax-qualified defined benefit plan under IRC § 401(a)(17) and on benefits that may be provided under IRC § 415(b) are applied, please describe approximately how these limits would change the difference between the projections with a new tax-qualified plan and the projection of the current plan.” PSP’s response to DR 493 was the blanket assertion of DR 472 objections, including violations of privileges and undue burden. However, Mr. McNeil’s rebuttal testimony also contemplates nearly the

³ Wood, Exh. CRW-06T at 8:1–9:6.

⁴ *Id.* at 1:21–4:13.

exact same question, describing how the PSP-proposed plan would address “the limit on compensation that may be taken into consideration in a tax-qualified defined benefit plan under section 401(a)(17) of the Internal Revenue Code or the limit on benefits that may be provided by such a plan under section 415(b)”⁵

19. Despite PSP’s blanket claims of privileges, costs, and undue burdens as grounds for not providing substantive responses to PMSA DRs, PSP presented the same information as rebuttal evidence before the Commission.

IV. STANDARDS FOR COMMISSION CONSIDERATION

20. The Commission may consider a motion to strike testimony as an objection to the admission of proffered testimony; “[t]ypically, the Commission will grant a motion to strike, in whole or in part, or deny the motion.”⁶

21. The Commission “routinely considers and rules on such motions as a practical means of resolving disputes over the admissibility of evidence before a hearing commences. This is done in the interest of gaining efficiency in the hearing process by not forcing parties to prepare discovery and cross-examination with respect to testimony that is irrelevant or otherwise inadmissible on its face.”⁷

22. When faced with a party that objects to data requests and “refuse[s] fully to answer” data requests when discovery is required, the Commission may grant

⁵ McNeil, Exh. BJM-04T 6:16–7:16.

⁶ *WUTC v. Puget Sound Energy*, Docket UE-170033, UG-170034 Order 07 (Aug. 25, 2017), at ¶ 6.

⁷ *Id.* at ¶ 5.

the motion of a party to exclude testimony and other evidence proffered by the withholding party on that subject.⁸

V. ARGUMENT

23. Because PSP refused to disclose information in response to data requests that it later provided as rebuttal evidence, the Commission should strike both (1) the evidence that the data requests originally pertained to, and (2) the rebuttal evidence that belatedly provided the information requested. It is precisely for situations like this that the Commission is allowed to strike testimony under WAC 480-07-425(2).
24. Exclusion of evidence is a proper remedy for a party's failure to produce the underlying information when requested in discovery because the parties should have had timely access to the information when it was requested, rather than receiving it for the first time as part of PSP's rebuttal testimony. As Washington courts have held, "the particular sanction imposed should at least insure that the wrongdoer does not profit from his wrong."⁹ Striking the evidence related to the unanswered data requests is a sanction tailored to precisely the wrong that was committed here.
25. PSP should not be allowed to duck the duty to produce specific data and the underlying documents in discovery where their production would allow for the examination of related claims—but then introduce that very same information

⁸⁸ *WUTC v. U S West Communications, Inc.*, UT-950200, 11th Suppl. Order (Jan. 3, 1996), pp. 4-6 (II.C. "Motion to Compel AT&T to Respond to Data Requests").

⁹ *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984), *review granted on other issues*, 103 Wn.2d 1004 (1984).

as rebuttal evidence. Further, by presenting information through its later testimony, PSP is given the opportunity to cherry-pick those questions to which it prefers to reply, while skipping any inconvenient or difficult questions.

26. PSP's blanket refusal to provide substantive responses, even when the objections made no sense, was improper. The DR 472 blanket response was improperly asserted across the Board by PSP, blindly excluding any substantive response from its "pension experts." PSP's later rebuttal testimony made that impropriety all the more glaring.

27. PMSA and other parties were effectively stymied from gaining access to PSP information that was directly relevant to the creation of their response testimony. And, by reserving the subject for its rebuttal testimony, PSP was able to give itself the flexibility to choose which questions it wanted to answer, avoid those questions which it did not want to answer, and provide itself with an extra month of time to develop its answers.

28. Moreover, Mr. McNeil continues in his rebuttal testimony to offer legal opinions in this case, including disclosure of and description of the legal advice that he has provided to PSP regarding the pilots' retirement plan. Mr. McNeil should not be allowed to simultaneously testify as to the content of his legal opinions but then refuse to answer data requests on the basis that his legal opinions and advice are somehow privileged and protected from disclosure.

29. These facts weigh strongly in favor of exclusion of this evidence as an appropriate sanction for such conduct during discovery. It is a particularly apt

given PSP's sweeping assertion of privileges and undue burdens across dozens of discovery requests when its later rebuttal evidence confirms that those objections were completely inapplicable.

VI. CONCLUSION

30. PSP should not be allowed to benefit from avoiding responses to data requests and later submitting the requested information in rebuttal testimony. The withholding of substantive responses in discovery has real impacts on other parties' ability to muster evidence. That withholding is made more unfair when the withholding party then selectively submits the same information as rebuttal testimony. At this late date in the proceeding, the other parties have no opportunity to file further response testimony. PMSA cannot, for example, provide the analysis that Mr. Noble was unable to perform because of the lack of substantive answers to the questions he helped develop. As such, the Commission is left with a one-sided record for its decision. To discourage parties from evasive discovery tactics and benefitting from the same withheld evidence later, the Commission should strike Mr. McNeil's and Mr. Wood's testimony and exhibits.

DATED this 14th of March, 2023.

Respectfully submitted,

s/ Michelle DeLappe
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