

BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket TP-220513

**RESPONDENT PUGET SOUND
PILOTS' OPPOSITION TO PMSA'S
FIRST MOTION TO STRIKE**

(Oral Argument Requested)

MEMORANDUM

I. INTRODUCTION.

- I.* Intervenor Pacific Merchant Shippers' Association's ("PMSA") motion to strike the testimony of Puget Sound Pilots' ("PSP") expert witnesses Bruce McNeil and Christopher Wood's testimony (both original and rebuttal) should be denied. To date, PMSA has propounded **769** data requests to PSP witnesses in this rate case, dozens if not hundreds of which violate WAC 480-07-400(3).¹ In the face of PMSA's discovery abuse, PSP has nevertheless timely responded to each of its data requests in good faith. PSP has also conferred in good faith with PMSA regarding discovery disputes when requested and has compromised or supplemented its discovery responses based on those conferrals where appropriate.

¹ A true copy of a November 7, 2022 letter from PSP's counsel expressing concern over PMSA's ongoing discovery abuse is attached as Exhibit A.

2. With respect to PSP's responses to data requests 471 through 545 directed to PSP's retained pension attorney Bruce McNeil and actuary Christopher Wood, PSP raised timely objections pursuant to WAC 480-07-400(3) and 480-07-405(b). Specifically, PSP objected that the requests were unduly burdensome and that "PMSA has had more than ample opportunity to engage its own pension and actuarial experts to address pension-related issues in this rate proceeding," yet inexplicably failed to do so. PSP likewise objected that the requests, many of which call explicitly for legal analysis and opinions, infringed on PSP's attorney-client privilege and work product protections. A copy of PSP's responses to PMSA DR Nos. 471-545 is attached as Exhibit B.
3. To the extent PMSA disputed the merits of PSP's timely objections, it never once raised the issue with PSP. PMSA never advised PSP that it considered PSP's responses to data requests 471 through 545 to be inadequate. PMSA never asked PSP to confer or demanded that PSP withdraw its objections or supplement its answers. Instead, PMSA did exactly what it falsely accuses PSP of doing: PMSA ignored Order 03 and involved the Commission in a discovery dispute by filing this motion to strike without making any attempt whatsoever to resolve the matter cooperatively with PSP.
4. PMSA's own motion concedes that it is not entitled to the relief it seeks:

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. . . . **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.

PMSA made its choice not to pursue conferral or a motion to compel voluntarily and should be held to it. PSP has at all times complied with the UTC's procedural rules

governing discovery in this case. In contrast, PMSA failed to pursue the required process for

adjudicating a discovery dispute. There is absolutely no basis on which to grant PMSA's Motion to Strike.

5. PSP did not violate any discovery rule or order. Rather, it responded to PMSA's data requests by timely raising appropriate objections under the WAC. Because there is no discovery violation, there are no grounds for sanctions under WAC 480-07-425(2).

II. BACKGROUND.

6. PSP filed this general rate case on June 29, 2022, supported by over 500 pages of testimony from 21 witnesses.
7. PMSA filed responsive evidence on February 10, 2023, including testimony from five witnesses.
8. For months, PMSA has harassed PSP with cumulative, burdensome and inappropriate discovery. To date, PMSA has served no less than **769** data requests.² PSP has responded to no less than 572 of PMSA's data requests, with the remaining 197 responses due this week.
9. In contrast, PSP has propounded a total of nine data requests to PMSA witnesses. PMSA objected to all nine data requests and refused to provide any substantive response to seven out of nine data requests.
10. Since at least as early as last November, the parties have conferred regarding various disputes arising from PMSA's abusive discovery practice. In the letter attached as Exhibit A, PSP describes its concerns regarding PMSA's disregard of the requirement contained in WAC 480-07-400(3) that data requests "must not be used for any improper purpose, such as to

² Many of PMSA's requests contain multiple subparts. DR 472, for example, contains 15 discrete subparts.

harass or to cause unnecessary delay or needless increase in the costs of litigation.” PSP’s letter concludes that:

PSP is willing to meet and confer with PMSA in good faith to determine whether its responses to certain DRs should be supplemented. That conferral, however, must also address PSP's concerns regarding PMSA's abuse of the discovery process. In particular, any conferral should address limiting the total number of DRs propounded by PMSA to 200, together with a commitment from PMSA to retract and cease propounding requests that are argumentative or that harm pilot confidentiality and morale.

11. In the approximately four and a half months since PSP’s November 7, 2022 letter, PMSA has propounded more than 600 additional data requests, many of which violate WAC 480-07-400(3).
12. Despite its concerns that PMSA has not conducted discovery in good faith, PSP has consistently accommodated requests by PMSA to confer when it believed PSP’s discovery responses are inadequate. The parties have always reached a compromise or otherwise resolved their disputes without involving the Commission through motion practice.
13. On January 6, 2023, more than six months after PSP’s June 29 filing initiating this rate case, PMSA served Data Request Nos. 471 through 545 directed to PSP expert witnesses Bruce McNeil and Christopher Wood. The requests sought legal analysis, opinion, and other work product that PMSA could (and should) have obtained through less burdensome means outside the discovery process, including from its own experts and attorneys.
14. On January 23, PSP timely served its responses and objections to Data Request Nos. 471 through 545 pursuant to WAC 480-07-405(6)(a). Exhibit B.
15. After receiving PSP’s responses and objections to Data Request Nos. 471 through 545, PMSA did not object to the adequacy of PSP’s responses, did not request to confer with PSP

regarding its responses and objections, and did not move to overrule PSP's objections or compel supplemental responses to these data requests.

16. On March 14, 2023, after sitting on its hands for nearly two months, PMSA moved to strike the testimony of pension attorney Bruce McNeil and actuary Christopher Wood.
17. PMSA does not explain in its motion why it waited until six months after PSP filed this rate case to serve Data Request Nos. 471 through 545.
18. PMSA does not explain in its motion why it did not request to confer with PSP regarding its objections or seek supplemental responses.
19. PMSA's motion references just three of the 74 data requests to which it now claims PSP failed to adequately respond. It is unclear from the motion whether PMSA disputes the validity of PSP's objections to all or any of the other 71 data requests directed to Mr. McNeil and Mr. Wood.
20. PMSA's motion identifies just two instances in Mr. Wood's testimony and one in Mr. McNeil's that PMSA claims contain information responsive to just three of its data requests. It is unclear from PMSA's motion whether it contends the remaining pages of Messrs. McNeil and Wood's testimony contain information it claims was responsive to its data requests. It is unclear which of the remaining 71 DRs PMSA claims were the subject of improper objection.
21. PMSA's motion does not identify what, if any, prejudice it claims to have suffered beyond the vague statement of its retained actuary, Chris Noble, that "some of the questions that [he] helped develop" were "intended to build a common understanding" regarding the proposed pension plan and its cost. PMSA does not explain how PSP's allegedly deficient responses

supposedly impaired his analysis, or even which data requests Mr. Noble “helped develop” or how responses to those requests would allegedly have affected his analysis.

22. PMSA does not dispute that PSP’s responses and objections to the data requests were timely served as required under WAC 480-07-405. Indeed, PMSA does not identify or cite to any specific discovery rule or order that it claims PSP has violated.
23. On this incredibly thin record, PMSA claims that Messrs. McNeil and Wood’s testimony should be excluded in their entirety or “at the very least,” with respect to their rebuttal as a proposed sanction for PSP’s vaguely alleged “discovery abuse.”
24. PMSA’s proposal, if granted, would exclude all of PSP’s expert testimony regarding the pension issue, which PMSA describes as PSP’s “single largest cost item” that is “directly relevant to the setting of any new rate.”

III. LEGAL STANDARD.

25. Pursuant to WAC 480-07-425(1)(a), parties “*must* make good faith efforts to resolve informally all discovery disputes.” (emphasis added). If informal attempts at resolution are unsuccessful, an aggrieved party may file a motion to compel. WAC 480-07-425(1)(b).
26. Pursuant to WAC 480-07-425(2) the Commission *may* impose sanctions if a party: (1) fails or refuses to comply with discovery rules; or (2) violates an order compelling discovery.

IV. ARGUMENT.

27. PMSA’s motion to strike should be denied for three reasons. First, PMSA’s motion should be denied because it has not and cannot identify any discovery rule or order that PSP supposedly violated. *Cf.* WAC 480-07-425(2) (authorizing discretion to impose sanctions in specific circumstances). PMSA does not assert that PSP’s objections were untimely or not authorized by rule. Rather, PMSA simply advances a generalized and belated grievance that

PSP’s objections should be overruled. That challenge could and should have been addressed through a motion to compel if informal attempts were unsuccessful. PMSA does not cite any authority for the novel and remarkable proposition that a party’s assertion of timely, unchallenged objections to discovery requests somehow amounts to sanctionable misconduct.

28. Second, PMSA itself violated the Commission’s discovery rules – specifically, WAC 480-07-425(1)(a) – by failing to make a good faith effort to resolve its apparent dissatisfaction with PSP’s responses and objections informally.

29. Rather than attempt to address its apparent opposition to PSP’s objections through good faith conferral, PMSA chose to lie in wait until after filing its response testimony in a “gotcha” attempt to exclude relevant evidence. This tactic should not be rewarded and, standing alone, compels denial of PMSA’s motion to strike. After all, as PMSA itself explains (apparently without irony) in its Second Motion to Strike, “[t]he concept of sandbagging is not complicated or nuanced—it is ethically and professionally wrong.” Washington courts and this Commission share this dim view of sandbagging behavior.” PMSA Sec. Mot. to Strike at ¶ 21 (quotation and footnote omitted).

30. Finally, even if PSP’s responses were improper (they were not), and even if PMSA had timely and successfully sought a ruling on PSP’s objections (it did not), exclusion of Messrs. McNeil and Wood’s testimony would be a drastic and inappropriate sanction. As PMSA acknowledges, PSP’s pension obligation is its single largest cost item, amounting to more than \$6 million in 2022 and projected to increase in 2023. The pension issue must be resolved in the adjudication of this rate case. PMSA’s proposed exclusionary remedy would accomplish nothing other than to significantly complicate and undermine the Commission’s

factfinding ability while achieving no discernible benefit or mitigating any articulable prejudice to any party.

III. CONCLUSION.

31. PMSA's First Motion to Strike should be denied.

Respectfully submitted this 21st day of March, 2023.

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