

BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket TP-220513

**PUGET SOUND PILOTS' MOTION
TO COMPEL DISCOVERY**

MOTION

1. Pursuant to WAC 480-07-425(1)(b), Respondent Puget Sound Pilots (“PSP”) respectfully moves for an order compelling intervenor Pacific Merchant Shippers’ Association (“PMSA”) to respond fully to PSP’s Data Request Nos. 1 through 8.
2. Pursuant to WAC 480-07-425(1)(a), PSP conferred with counsel for PMSA regarding this motion but the parties were unable to resolve their dispute. Specifically, counsel for PMSA responded to counsel for PSP’s request to confer by telephone stating unequivocally that “[w]e will not be providing that information.”
3. Pursuant to WAC 480-07-405(3), a copy of PSP’s data requests and PMSA’s responses and objections are attached as Exhibit A.

///

///

///

///

MEMORANDUM

I. INTRODUCTION.

4. PSP has propounded just nine data requests on PMSA in this rate case, eight of which (DRs 1 through 8) are at issue in this motion.¹ PSP's data requests seek basic information including PMSA's membership roster (DR 1), information regarding the nature, amount and collection of fees that PMSA charges its members (DRs 2, 3 and 5 through 8), and PMSA's annual budget (DR 4). Apart from providing a partial list of its membership, PMSA refuses to respond to any of these eight data requests.
5. PSP's data requests are directly relevant to multiple issues that PMSA has put at issue in this rate case, and its refusal to provide the requested information undermines PSP's ability to prepare for the upcoming evidentiary hearing and cross-examine PMSA's witnesses. For example, PMSA opposes funding an appropriate level of pilot DNI on grounds that increasing port costs will supposedly drive away shipping traffic. Yet PMSA refuses to disclose the port fees that it charges its members, whether and how those fees have increased over time, and how they are assessed.
6. Likewise, PMSA witnesses argue that the risk profile of its foreign-flagged membership is low and that PSP has overstated concerns about bad practices such as the use of single-vessel shell entities that externalize environmental liability and risk to the public. Yet PMSA has provided only a partial list of its membership while selectively holding back the identities of its remaining (presumably most problematic) members, effectively precluding PSP from investigating these entities' safety records and challenging PMSA's claim that its members pose little risk to Puget Sound.

¹ For context, PSP's nine data requests amount to less than 1.2% of the 769 data requests that PMSA has propounded on PSP.

7. Lastly, PMSA refuses to provide its annual budget. This information is no different than discovery of information regarding the amount of fees charged to a party by an expert witness, and is directly relevant to challenging the credibility of PMSA Vice President Captain Michael Moore. The information is discoverable because it is likely to yield evidence relevant to impeachment for bias.
8. PMSA's objections to PSP's requests are meritless. There is no First Amendment protection over basic information related to a trade association's membership roster or fee schedule, particularly where PMSA voluntarily elected to intervene in this rate case and put that information at issue. The remainder of PMSA's objections, including that the requested information is "privileged" or that PSP's requests are "untimely" or "not reasonably calculated to lead to the discovery of admissible evidence," are standard boilerplate that is wholly divorced from the facts of this case and PSP's requests.
9. PSP's data requests call for discoverable information that is plainly within the scope of discovery under WAC 480-07-400(3). The motion should be granted and PMSA ordered to make a full response in advance of the March 29 exhibit submission deadline.

II. BACKGROUND.

10. PSP filed this general rate case on June 29, 2022, supported by over 500 pages of testimony of 21 witnesses.
11. PMSA filed responsive evidence on February 10, 2023, including testimony from five witnesses.
12. On March 10, 2023, PSP propounded Data Request Nos. 1 through 9 on PMSA. PMSA responded on March 17, 2023.

///

III. LEGAL STANDARD.

13. The scope of discovery is broad and includes “information that is relevant to the issues in the adjudicative proceeding or that may lead to the production of information that is relevant.” WAC 480-07-400(3). A data request is not objectionable on grounds that the information sought is inadmissible so long as the information “appears reasonably calculated to lead to discovery of admissible evidence.” *Id.*
14. “The burden of establishing entitlement to nondisclosure rests with the party resisting discovery.” *Fellows v. Moynihan*, 175 Wash. 2d 641, 649, 285 P.3d 864, 868 (2012).

IV. ARGUMENT.

15. As explained in paragraphs 5 through 7 above, PSP’s data requests call for basic information regarding PMSA’s membership and operations that are directly relevant to multiple issues injected into the rate case by PMSA including the credibility and bias of its lead witness, the risk profile of its members, and the credibility of its claims that increased port costs affect where ships call. The requests are well within the scope of WAC 480-07-400(3), and as the party resisting discovery, PMSA bears the burden to establish entitlement to non-disclosure.
16. PMSA has not come close to meeting that burden. First, PMSA’s objections on First Amendment grounds (asserted in response to all eight DRs at issue) lack merit. The lead case PMSA cites in support of its objection, *Eugster v. City of Spokane*, 121 Wn. App. 799, 807, 91 P.3d 117 (2004), involved review of an order quashing subpoenas directed to third parties that called for detailed information regarding political activity. Noting the importance of associational privacy, “particularly where a group espouses dissident beliefs,” the court

affirmed the trial court’s finding that allowing the subpoenas “would have a chilling effect on our system’s democratic process.”

17. *Eugster* does not support PMSA’s position. Unlike in that case, PMSA is not the recipient of a third party subpoena that would pry into its political activity. Rather, PMSA intervened voluntarily in this proceeding *on behalf of its members*. PMSA cannot now claim it is entitled to withhold the identities of those members, or information regarding its fees and operations that are relevant to issues it raised after being granted intervention.

18. Nor is there any reason to think that allowing discovery would have a “chilling effect” on the democratic process, or that PMSA or its members are at risk due to their “dissident beliefs.”² As PMSA acknowledges, the initial burden to establish the association privilege is on the party asserting the privilege to show “some probability that the requested disclosure will harm its First Amendment rights.” *Eugster*, 121 Wash. App. at 807. PMSA’s conclusory statement that “PMSA asserts that there is some probability that this requested disclosure will harm its’ and its members’ protected rights,” is unsupported, implausible, and falls far short of meeting its burden under *Eugster*.

19. PMSA’s remaining objections are boilerplate and warrant little comment. The information requested is relevant. The data requests are not untimely. The information sought is not privileged. PSP has not “waived” or “resolved” the issues that relate to the requested discovery. And PSP is not required to prove that it has scoured and exhausted “any other source of relevant information” as a precondition to PMSA’s duty to produce basic information about its organization in discovery.

///

² The fact that PMSA publishes a partial list of its members further demonstrates the lack of any risk of chilling effect and the absurdity of PMSA’s privilege claim.

III. CONCLUSION.

20. The information sought in PSP Data Requests 1 through 8 is discoverable. PMSA has not met its burden to establish entitlement to non-disclosure. Accordingly, PSP's motion to compel should be granted and PMSA ordered to produce a complete response in advance of the March 29 exhibit submission deadline.

Respectfully submitted this ____ day of March, 2023.

HAGLUND KELLEY LLP

s/ Michael E. Haglund

Michael E. Haglund, OSB No. 772030

Julie Weis, WSBA No. 43427

Eric J. Brickenstein, OSB No. 142852

HAGLUND KELLEY LLP

2177 SW Broadway

Portland, OR 97201

Telephone: (503) 225-0777

Facsimile: (503) 225-1257

Email: mhaglund@hk-law.com

jweis@hk-law.com

ebrickenstein@hk-law.com

Attorneys for Respondent