

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-220513

COMMISSION STAFF'S MOTION IN
LIMINE TO DENY ADMISSION OF
PUGET SOUND PILOTS' MARCH 24,
2023 SUPPLEMENTAL FILING

I. INTRODUCTION

1 Commission Staff (Staff) moves in limine to deny the admission of the supplemental testimony and exhibits filed by Puget Sound Pilots (PSP) on March 24, 2023. PMSA has indicated general support for a motion seeking to deny the admission of this evidence.

II. RELIEF REQUESTED

2 Staff respectfully requests that the Commission deny the admission of the supplemental testimony and exhibits filed by PSP on March 24, 2023. Staff additionally requests that the Commission consider any additional sanction it believes appropriate under the circumstances.

III. STATEMENT OF FACTS

3 The currently effective procedural schedule in this case was issued on November 23, 2022.¹ That procedural schedule set the discovery cutoff on March 22, 2023.² It does not include a supplemental testimony filing from PSP on March 24, 2023.³ On March 24, 2023,

¹ Docket TP-220513, *Notice of 2nd revised procedural schedule* (filed Nov. 23, 2022).

² *Id.* at 3.

³ *Id.* at 3.

PSP filed supplemental testimony and exhibits supported by PSP witnesses Benedixen, McCarthy, and Norris.

IV. LEGAL STANDARD

4 Under WAC 480-07-495(1), “[p]arties objecting to the introduction of evidence must state the grounds for the objection at the time the evidence is offered.” Commission rule suggests that filing supplemental testimony or exhibits requires Commission authorization.⁴ The Commission will typically deny the admission of evidence that is untimely, prejudicial to the other parties, and not filed in accordance with the procedural schedule.⁵ When ruling on evidentiary objections a presiding officer “will consider, but is not required to follow, the rules of evidence governing general civil proceedings in nonjury trials before Washington superior courts when ruling on the admissibility of evidence.”⁶ The rules governing civil proceedings in superior court allow for sanctions, including denying the admission of evidence, for violations of discovery orders that prejudice other parties.⁷

⁴ See WAC 480-07-460(1)(a)(i) (“Parties must seek leave from the presiding officer by written motion if they wish to file revised prefiled testimony or exhibits that include substantive changes. A party proposing such changes should submit the proposed revisions with its motion.”) *see also*, WAC 480-07-540 (“The commission will consider the company’s or petitioner’s initial filing and *any supplemental filings the commission authorized to be the company’s or petitioner’s full direct case* in support of its rate change request for purposes of deciding any prehearing motion to dismiss under WAC 480-07-380.”) Emphasis added, *see also*, WAC 480-07-510(1) (“The company’s initial filing and *any supplemental filings the commission authorizes* must include all testimony and exhibits the company intends to present as its direct case.” While WAC 480-07-510 does not apply to Pilotage GRCs, the quoted language suggests the Commission’s general treatment of supplemental testimony. Namely, that parties must seek the Commission’s permission before filing it.) Emphasis added.

⁵ See *e.g.*, Dockets UE-170033 and UG-170034, Order 07, p.3, ¶ 6 (“The State of Montana’s filing of Mr. Risken’s testimony as cross-answering testimony is procedurally flawed and untimely. To the extent his testimony touches on issues before the Commission in this proceeding, those issues were raised, or at least suggested, by PSE in its direct case. The opportunity to respond to such testimony was on June 30, 2017, as established by the Commission’s prehearing conference order, Order 03 in this proceeding, entered on February 15, 2017. Moreover, by waiting to file any testimony until the final round, Montana prejudiced all other parties in this proceeding by foreclosing their opportunity to respond in an orderly fashion in accordance with the procedural schedule established by Order 03.”) (Aug. 25, 2017).

⁶ WAC 480-07-495(1); RCW 34.05.452(2).

⁷ See *e.g.*, CR 37(b) (sanctions for failure to abide by discovery orders entered under CR 26(f)); CR 15(d) (supplemental pleadings allowed only with permission from the court.).

V. ARGUMENT

5 Parties are expected to motion for the Commission's leave to file supplemental testimony and exhibits outside of the deadlines explicitly included in the procedural schedule.⁸ This is not some quirk of Commission adjudications; a basic feature of modern American legal proceedings is that parties cannot simply file testimony and exhibits whenever they want.⁹ Based on the record in this docket, PSP appears to be aware of this requirement.¹⁰ The currently effective procedural schedule does not permit PSP to supplement the record, and the filing did not include a motion to supplement the record with testimony and exhibits.

6 Even if PSP's March 24th filing had been accompanied by a motion to supplement the record, Staff would have opposed that motion. The discovery cutoff in this case was March 22, 2023. The supplemental testimony and exhibits filed by PSP are being served on the other parties a week and a half before the evidentiary hearing. Regardless of the content of this supplemental filing, the timing alone justifies denying admission. It is no answer to say that certain information was only available at or around the time PSP made this supplemental filing.¹¹ PSP chose the timing of its initial filing. It has had ample opportunity to make its direct case. The Commission should deny the admission of this evidence because Staff and the other parties are prejudiced by this late and unauthorized filing.

⁸ See WAC 480-07-460(1)(a)(i); WAC 480-07-540; WAC 480-07-510(1).

⁹ See e.g., Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. Pa. L. Rev. 2197, 2198 (1989) (The 1938 Rules allowed the use of broad discovery to "end trial by ambush and surprise," and to "promote settlements").

¹⁰ See Docket TP-220513, *Petitioner Puget Sound Pilots' Motion for Leave to Supplement the Record*, (filed Aug. 2, 2022); *Respondent Puget Sound Pilots' Motion For Leave to Supplement the Record* (filed Sept. 9, 2022).

¹¹ It is also no answer to say that PSP announced its intention to violate the procedural schedule in rebuttal testimony.

7 First, the other parties are prejudiced because they no longer have a means of conducting discovery in the form of issuing data requests concerning the new information. Even though parties could cross examine the witnesses regarding this new evidence, Staff and other parties would be forced to do so without the benefit of data request responses regarding that evidence beforehand, a distinct disadvantage. Procedural schedules in adjudicative proceedings before the Commission generally provide sufficient time between the final round of prefiled testimony and the discovery cutoff deadline precisely to avoid this outcome.

8 Second, because this filing must be addressed through a motion in limine, it puts the other parties in a position where it is unclear whether this new evidence will be admitted into the record or not at the evidentiary hearing. PSP's improper filing forces all other parties to prepare for the hearing as if the March 24, 2023 filing will be admitted. If the Commission ultimately admits this evidence, then there is no cause to complain. However, if the Commission denies admission, then addressing this improper filing has cost the other parties valuable preparation time before the hearing.

9 Finally, the absence of an accompanying motion to supplement the record prejudices Staff since it only requires PSP to reveal its argument in favor of supplementing the record when this motion in limine is being considered, which will likely be on the first day of the evidentiary hearing. While a party bringing a motion to supplement the record would need to justify its request, by failing to file a motion, PSP improperly shifts that burden onto Staff by forcing it to bring the current motion. Whether intentional or not, the Commission should discourage this behavior.

10 Denying admission of the March 24, 2023 filing is the least severe sanction that is appropriate and available. Hypothetically, the hearing could be continued, and the

procedural schedule revised to allow discovery related to the new information. But this would be administratively burdensome on all parties, not just PSP. And given that the ultimate outcome of this general rate case is unknown, delaying the resolution of this docket could either be a financial benefit or a burden for PSP.

VI. CONCLUSION

11 Staff rarely brings this type of motion. In adjudications, Staff's standard practice is to focus its time and effort on addressing the substance of a proceeding and analyzing the consequential questions at issue. Procedural and evidentiary matters that have little impact on the Commission's ultimate ability to assess those questions are secondary concerns. However, there are unfortunate instances in which a party's conduct throughout the course of a proceeding makes such matters difficult to ignore. The relief requested by Staff is reasonable and appropriate in light of the circumstances. The Commission should grant Staff's motion.

DATED this 27th day of March 2023.

Respectfully submitted,

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