

BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket No. TP-220513

PMSA'S OPPOSITION TO PUGET
SOUND PILOT'S MOTION TO
COMPEL DISCOVERY

1. Intervenor Pacific Merchant Shipping Association (“PMSA”)¹ respectfully requests that the Commission deny the motion brought by Puget Sound Pilots (“PSP”) to compel production of PMSA membership lists and financial information on the basis that this motion was not substantially justified. PMSA properly responded and objected to PSP Data Requests (DRs) 1-8. PMSA’s member lists and financials are not at issue in setting pilotage tariffs. No testimony by any party has put them at issue. Further, this information is protected by associational privilege, and PSP fails to meet the three-part test for disclosure of such information.

I. STATEMENT OF RELEVANT FACTS

2. PSP filed the petition which initiated this general rate case on June 29, 2022. The Commission granted PMSA’s request to intervene, to which there was

¹ PSP’s motion is addressed to the “Pacific Merchant Shippers’ Association;” the correct name is Pacific Merchant Shipping Association.

no objection. Order 03, ¶¶ 4-5 (August 26, 2022).

3. Seven months later, and with less than two weeks left before the discovery cutoff, PSP issued PSP DRs 1-9 (Exh. A to PSP's motion). Citing no testimony or other basis, PSP DRs 1-8 requested PMSA membership lists and financial records. PMSA timely responded; PMSA's full response is Exhibit A hereto. PMSA objected to PSP DRs 1-8 based, *inter alia*, on infringement of its constitutional rights to freedom of association based on a potential chilling effect of the right to participate in public actions.

II. LEGAL ISSUES

4. A "person with a substantial interest" in pilotage rates includes "a vessel operator or other person utilizing the services of a licensed pilot and paying pilotage fees and charges for such services or an organization representing such vessel operators or persons." RCW 81.116.010(3)(b).
5. As set forth in Order 03 ¶ 50, all discovery in this case is "conducted under the Commission's discovery rules, WAC 480-07-400 – 425." These rules establish limits: "Discovery must seek only information that is relevant to the issues in the adjudicative proceeding or that may lead to information that is relevant." WAC 480-07-400(3).
6. When a data request addresses issues that go to the heart of a complaint in pre-filed testimony by the party subject to the data request or issues that require the pursuit of the confirmation of the legitimacy of claims made by the

party subject to the request or issues relevant to the theory of the case offered by the party subject to the request, then the requests relate to the scope of a party's witnesses' opinions and are properly subject to a motion to compel.²

7. The First Amendment of the United States Constitution establishes a freedom to associate which protects private associations from unnecessary discovery.³ Washington courts incorporate this protection into the discovery process under a three-part test. First, the association must show “*some probability* that the requested disclosure will harm its First Amendment rights.”⁴ *Eugster v. City of Spokane* explained that courts assume a “potential chilling effect” when discovery requests include membership lists and financial records because “the freedom of members to promote their views suffers” as a result.⁵ Once the first part is met, the burden shifts to the requester for the second part of the test. The requester must show “(1) relevance and materiality”—with specificity, not mere speculation—“and (2) reasonable efforts to obtain the information elsewhere.”⁶ For this latter requirement, the requester must show “that every

² See *Wash. Util. & Transp. Comm'n v. Points Recycling & Refuse*, TG-080913 (2009), Order 10.

³ *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958).

⁴ *Snedigar v. Hoddersen*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990) (emphasis in original).

⁵ *Eugster v. City of Spokane*, 121 Wn. App. 799, 806-08, 91 P.3d 117 (2004) (citations omitted).

⁶ *Id.* at 809 (citations omitted).

reasonable alternative source of information has been exhausted.”⁷ Only if all this has been established do courts “reach the third prong and balance the need for disclosure against the claim of privilege.”⁸ For associational materials such as membership lists and financial records, the law favors nondisclosure.⁹

III. ARGUMENT

8. Under the Commission’s discovery rules, PSP’s motion fails because the requests for PMSA’s membership list and financial records are not “relevant to the issues in the adjudicative proceeding or that may lead to information that is relevant.” WAC 480-07-400(3). Because relevance is part of the analysis under the three-part test for associational materials, the discussion below will address it in the context of that test. PSP’s motion utterly fails that test. PMSA properly objected to production of associational materials which are assumed to have a chilling effect on First Amendment rights. But PSP failed to satisfy the second part of the test since it has not shown that PMSA’s membership lists and financials are relevant to the issues in this case or that PSP made any effort to obtain the information from alternate sources. Third, even if it had, PSP cannot show that the need for disclosure of these materials outweighs the associational privilege. PSP also incorrectly rejects this governing test for addressing the privilege

⁷ *Id.* at 810 (citations omitted).

⁸ *Id.*

⁹ *Right-Price Recreation LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 825-26, 21 P.3d 1157 (2001).

of freedom of association in discovery and makes no effort to apply it in its motion despite PMSA's putting PSP on ample notice of the test in PMSA's objections to the PSP DRs (as shown in Exhibit A).

9. PMSA met its initial burden to assert an objection based on associational privilege, as shown in Exhibit A. PSP specifically sought PMSA's membership lists and financial records. These are within the class of information where a chilling effect should be presumed. Because this shows the probability of constitutional infringement, the information is protected unless PSP meets the second and third parts of the test. PSP argues that PMSA's assertions of this privilege are "conclusory" or "lack merit." Motion at ¶¶ 16, 18. PSP seems to misunderstand the exhortation in *Eugster*: the association need not show **actual** infringement of its First Amendment rights; **some probability** of infringement suffices for the privilege, and that probability is assumed where the requester asks for the association's membership lists and financial records.
10. In the second part of the test, PSP must show both (1) relevance and materiality of the membership lists and financial records based on specifics, not mere speculation; and (2) reasonable efforts to obtain information elsewhere. PSP here can only generally assert speculative theories of potential relevance that make little sense. PSP has made no showing whatsoever of any attempt to obtain information elsewhere.
11. The information PSP seeks—PMSA's membership roster and PMSA's

internal finances—are simply not at issue in the setting of pilotage rates. Just as a utility’s customers private finances are not at issue in setting a utility’s rate, the internal and private finances of the customers of the pilotage monopoly, or their representatives, have no bearing on what pilotage tariffs should be set at.

12. PSP’s motion offers several arguments for relevance of such information to this case. PSP makes not a single citation to testimony or other evidence, misstates the evidence, and otherwise fails to establish the relevance of PMSA’s membership lists and financial records in this case.

13. First, PSP claims PMSA has put its internal finances at issue because PMSA generally opposes pilot DNI on competitiveness grounds. Motion ¶ 5. Though PMSA witness Capt. Michael Moore testifies on the issue of competitiveness (Exh. MM-1T 169-172), he is emphatically clear in the scope and intent of his testimony on this issue: “it is imperative that the Commission stick to its cost causation principles to ensure that only the most essential and necessary costs and expenses are included in pilotage rates to ensure maximum competitiveness of Washington’s seaports.” This does not put PMSA’s membership roster or financials at issue.

14. PSP next claims PMSA’s member roster is relevant based on an incorrect claim that PMSA testimony addresses “the risk profile of **its** foreign-flagged membership” and that PSP needs to examine “PMSA’s claim that **its members**

pose little risk to Puget Sound.” Motion ¶ 6 (emphasis added). Once again PSP cites nothing. Two PMSA witnesses, Capt. Moore for PMSA and Kathy Metcalf for the Chamber of Shipping of America, testify regarding the risk and safety of vessels generally. But neither discusses PMSA members’ vessels specifically. On the contrary, both point to general statistics from the United States Coast Guard with respect to **all** vessels calling on the entire country and in the Puget Sound (Exh. MM-51 and Exh. KJM-4). Further, had vessel safety been the true objective of PSP’s discovery request, PMSA has already provided such information in an extensive cache of vessel safety statistics—all BPC pilotage-related incident information—in the testimony of Capt. Moore and Jordan Royer in both this case and in the prior pilotage rate case (docket TP-190976). PSP fails to explain how it would glean any information from a PMSA membership list that would assist in analyzing vessel safety statistics relevant to this case.

15. Further, PMSA’s interest in rates is generalized. Nothing in PMSA’s testimony relates to impacts specific to PMSA member vessels as opposed to non-PMSA member vessels. No items in PSP’s petition or the proposed tariff are conditioned on a vessel being owned or operated by a PMSA-member company or being serviced at a PMSA-member company marine terminal or the vessel’s cargo being carried inland by a PMSA-member company railroad. PSP’s service does not alter based on whether customers are PMSA members, nor could it ever do so legally, so PMSA-specific information is simply not useful to setting a

tariff.

16. PSP then claims PMSA's annual budget is necessary to potentially find evidence to impeach Capt. Moore for bias. Motion at ¶ 7. This is an odd claim. PMSA did not engage Capt. Moore as an expert witness. Capt. Moore's testimony at Exh. MM-1T and his CV at Exh. MM-2 clearly state that he is an employee and Vice President of PMSA. PSP argues that this request is similar to asking a party for the engagement terms for an outside expert. But Capt. Moore was not engaged as an expert for this case, and PSP seeks the party's entire annual budget rather than an engagement letter. PSP cites no precedent for requiring an association to provide its budget for purposes of proving bias of a party's employee as a witness. The notion that anyone would glean any information from the PMSA budget for this case by analyzing all PMSA's expenditures for activities for the entire U.S. West Coast, including the operations of its offices in Long Beach and Oakland, California, makes no sense.

17. Lastly, PSP claims that when "PMSA voluntarily elected to intervene in this rate case" that PMSA put its "membership roster or fee schedule . . . at issue." Motion ¶ 8. But the scope of PMSA's interest in this proceeding as already been addressed in the Commission's Order granting PMSA standing as an intervenor in this case under RCW 81.116.010(3)(b). Order 03, ¶¶ 4-5. PSP did not raise any objection to this finding, thus waiving any interest PSP might have had in such an inquiry. Even if PSP now desires to revisit this issue, it is untimely and

no longer relevant at this point of the proceeding.

18. In any event, without waiving any objections, PMSA provided PSP a copy of its current membership roster which is posted on its internet website. Exhibit A. This membership information is readily available to the public on the PMSA website and is updated from time to time. PSP has had continuous and unfettered access to this information regardless of its requests to PMSA in this case. As with all of PSP's requests, PSP has made no showing of any effort to obtain any of the requested information through alternate means, thus also failing the final requirement in the second part of the associational privilege test.
19. Even if PSP had made a sufficient showing in its desire to seek disclosure, the third part of the test requires weighing the need for disclosure against the claim of privilege. PMSA's membership and financial records are neither a factor in the tariff formula nor the subject of any testimony by any party. PSP improperly seeks a swath of private industry information across PMSA's entire U.S. West Coast operations. Further, PSP seeks proprietary information from PMSA while opposing any protective order in these cases. All this weighs against disclosure.
20. PSP has failed not only to recognize that there is a test for how to address issues surrounding the application of the freedom of association privilege in matters of discovery but also to meet any of its burdens under that test.

IV. CONCLUSION

21. PMSA's membership list and financial records are irrelevant to the substantive issues in this general rate proceeding. Moreover, because PMSA has asserted a constitutional privilege to protect this information, which is presumed to be protected under Washington law, PSP bears the burden of showing its specific relevance and materiality to the issues in this case and its efforts to obtain the information elsewhere. Having failed to do so, the Commission should deny PSP's motion in its entirety. Even bringing such a motion is not substantially justified.
22. Further, the Commission should be wary of any belated attempt by PSP to remedy its failure to apply the governing test by means of a reply, particularly since PMSA's objections to PSP's DRs provided ample notice of the governing caselaw establishing the high hurdles for seeking disclosure of privileged associational materials.

Respectfully submitted this 27th of March, 2023.

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