

Nos. 49045-5-II & 49432-9-II (consolidated)
IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

PUGET SOUND ENERGY, INC., a Washington corporation,

Plaintiff/Appellant,

v.

CITY OF TACOMA, a municipal corporation;
and JOHN CARLTON, an individual,

Defendants/Respondents,

and

ARTHUR WEST, an individual,

Intervenor/Respondent.

**PSE'S RAP 18.2 MOTION FOR VOLUNTARY
WITHDRAWAL OF REVIEW**

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I. IDENTITY OF THE MOVING PARTY

Appellant Puget Sound Energy, Inc. (“PSE”) is the moving party.

II. STATEMENT OF RELIEF SOUGHT

PSE seeks to voluntarily withdraw the appellate review in consolidated cases No. 49517-1-II, *Puget Sound Energy v. City of Tacoma, et al.*, (the “*West case*”) and No. 49432-9-II, and *Puget Sound Energy Inc. v. WA Utilities and Transportation Comm.* (the “*Walker case*”).

III. FACTS RELEVANT TO THE MOTION

PSE proposes to build a Liquefied Natural Gas (“LNG”) facility at the Port of Tacoma (the “**Facility**”). In the course of obtaining regulatory approvals and permits for the Facility, PSE commissioned two reports about the Facility’s siting and hazards. The reports detailed, in part, the location of the Facility’s sumps, trenches, vapor barriers, LNG pipeline sendout, and liquefaction units and modeled scenarios in which a failure at the Facility would be most damaging. PSE provided copies of those reports to the City of Tacoma (the “**City**”) and the Washington Utilities and Transportation Commission (“**WUTC**”).

Before the reports were provided to the relevant agencies, the reports’ authors, Chicago Bridge & Iron (CB&I) and GEXCON had identified and marked the content as containing “**CEII**”—critical energy infrastructure information—pursuant to 18 C.F.R. § 388.113. “CEII, by definition, is exempt from disclosure pursuant to FOIA.” *CEII*, 121 FERC

¶ 1107, at 61496 (2007). Washington’s Public Records Act (the “PRA”), Chapter 42.56 RCW, exempts from mandatory disclosure information covered by “other statutes”—such as the Freedom of Information Act (“FOIA”)—that prohibit disclosure. RCW 42.56.070(1). And under RCW 42.56.420(1), as interpreted by this Court in *Nw. Gas Ass’n v. Wash. Utils. & Transp. Comm’n*, 141 Wn. App. 98, 106, 168 P.3d 443 (2007), vulnerability assessments and specific technical data that might assist potential saboteurs should be provided only to first responders, not to the general public.

Respondents John Carlton, Arthur West, and Dorothy Walker want more. They filed PRA requests with the City and the WUTC, seeking disclosure of the reports in their entirety. PSE filed suits below seeking to prevent the disclosures under several PRA exceptions, consistent with its obligation to preserve the CEII designation made by CB&I and GEXCON. The Superior Court denied the requests for injunctive relief, but stayed disclosure of the reports pending the outcome of the appeal of the dispute on the merits.

The News Tribune and its reporter Derrick Nunnally also filed a PRA request seeking the reports from the City. As in the *West* and *Walker* cases, the Superior Court stayed disclosure of the reports by the City pending the outcome of the appeal. This Court imposed another stay, ruling that PSE’s appeal presented “debatable” issues. “When the denial of a

motion for relief, such as the motion for injunction filed here, would destroy the fruits of the appeal, this court should grant the motion for relief under RAP 8.3 unless the appeal is totally devoid of merit. *Boeing v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986). ... Accordingly, PSE's motion is granted and *the City's fulfilment of Tacoma News's request for disclosure of the Records is enjoined pending further decision of this court.*" September 9, 2016 Ruling by Commissioner Schmidt in Case #49517-1-II (emphasis added). A similar stay was imposed in the *Walker* case. See Sept. 26, 2016 ruling by Commissioner Bearse in Case #49432-9-II. The three appeals were consolidated and set to be heard on an expedited basis. See Sept. 26, 2016 ruling by Commissioner Bearse in Cases #49045-5-II, #49517-1-II, and #49432-9-II.

On September 20, 2016, the News Tribune moved to be dismissed as respondent in Case #49517-1-II, stating that it had withdrawn its PRA document request addressed to the City. On September 21, 2016, the News Tribune published an article by Derrick Nunnally.¹ The article stated that the News Tribune had obtained copies of the reports from an undisclosed source and published both reports without appendices.

On October 5, 2016, PSE filed a notice of withdrawal of Case #49517-1-II, without prejudice to the merits of the consolidated appeals in

¹ <http://www.thenewstribune.com/news/local/article103328087.html>

the two remaining cases, #49045-5-II and #49432-9-II.

On October 10th, the Court deconsolidated and dismissed Case #49517-1-II. The same day the News Tribune published another article by Derrick Nunnally, which included both reports in their entirety, including appendices.² Another article published the same day stated that the News Tribune withheld “a two-part map” and the DVD animating the models, based on the opinion of an engineer the News Tribune consulted.³

The News Tribune concedes that the reports, vetted by its own experts, show that under all reasonable scenarios, a fire or explosion at the Facility will stay within its boundary. Yet Mr. Carlton and Mr. West have declined to withdraw their PRA requests addressed to the City. Ms. Walker has not withdrawn her PRA request to the WUTC either.

IV. AUTHORITY AND ARGUMENT

“It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803). However, as a result of the News Tribune’s securing copies of the reports without the necessary consent of CB&I and thereafter publishing the information, PSE’s efforts to prevent the disclosure of the CEII designation by CB&I under the PRA were rendered moot. PSE appreciates the time and

² <http://www.thenewstribune.com/news/local/article106865052.html>

³ <http://www.thenewstribune.com/news/local/article106855732.html#storylink=cpy>

attention the Court and its staff dedicated to this matter. Given the publication by the News Tribune, there is no further reason to request judicial intervention to prevent disclosure.

V. CONCLUSION

For the reasons stated, under RAP 18.2 PSE respectfully seeks to withdraw the appeals in case #49045-5-II & #49432-9-II.

DATED: October 14, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing document with the Clerk of the Court, and served a true and correct copy of same upon the following parties in the manner indicated below *via Email/PDF per counsels' agreement*:

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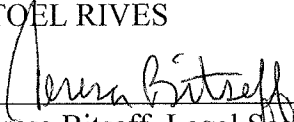
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DATED: October 14, 2016, at Seattle, Washington.

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