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BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AIR LIQUIDE AMERICA
CORPORATION, AIR PRODUCTS AND
CHEMICALS, INC., THE BOEING
COMPANY, CNC CONTAINERS,
EQUILON ENTERPRISES, LLC,
GEORGIA-PACIFIC WEST, INC.,
TESORO NORTHWEST CO., and THE
CITY OF ANACORTES,

Complainants,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKET NO. UE-001952
(consolidated)

In re: Petition of Puget Sound Energy, Inc.
for an Order Reallocating Lost Revenues
Related to any Reduction in the Schedule
48 or G-P Special Contract Rates

DOCKET NO. UE-001959
(consolidated)

PUGET SOUND ENERGY, INC.'S
OPPOSITION TO MOTION
CHALLENGING DESIGNATION OF
PSE'S RESPONSE TO
COMPLAINANTS' DATA REQUEST
1.03 AS HIGHLY CONFIDENTIAL

Complainants filed a motion that challenges Puget Sound Energy, Inc.'s ("PSE") designation of PSE's response to Complainants' Data Request 1.03 as Highly Confidential. PSE opposes the motion.¹

¹ Complainants previewed their motion earlier today (January 5, 2001) in a telephonic discussion with PSE's counsel and the Administrative Law Judge, and have just now filed a formal motion. PSE has prepared this Opposition in the very limited time available, pursuant to the Administrative Law Judge's direction.

1 The issue here is straightforward. At Complainants' request, the Commission
2 amended the December 19, 2000 Protective Order to add a new section, permitting
3 documents to be designated as Highly Confidential. See Third Supplemental Order
4 Amending Protective Order (December 29, 2000) at ¶ 4. The Commission issued the
5 amendment after PSE had produced written records of certain short-term energy transactions
6 – requested by Complainants as part of their discovery – and designated those records as
7 confidential under the Protective Order. Then, after the Commission amended the Protective
8 Order, Complainants asked PSE to produce the same energy transaction records, but in
9 electronic form. PSE did so, but designated the electronic version as Highly Confidential,
10 since (a) Highly Confidential treatment was then available, and (b) the electronic version
11 was properly considered Highly Confidential (as explained below). Now, and despite PSE's
12 designation, Complainants want to look at the electronic version without any restriction
13 whatsoever.

14
15 **1. WHY THE ELECTRONIC VERSION OF PSE'S DISCOVERY RESPONSES**
16 **IS HIGHLY CONFIDENTIAL**

17 PSE designated the electronic version² of the energy transactions as Highly
18 Confidential for several reasons. From a competitive standpoint, the records of the
19 transactions are extremely sensitive – perhaps some of the most sensitive corporate
20 information that PSE maintains – revealing with specificity the business strategies used by
21 PSE in energy trading on a day to day and hour to hour basis. This information must
22 absolutely not be released into the public arena. PSE's concern in this regard is particularly

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24 _____
25 ² Given the highly sensitive nature of the transaction records, PSE would have
26 designated the written records as Highly Confidential if such a designation had been
available at the time of production. For the reasons stated in this Opposition, PSE has even
more concern about the unauthorized disclosure of the electronic version.

1 acute here, in proceedings initiated by large, sophisticated business customers who have
2 been highly adversarial to PSE on many occasions over the years, and who will surely
3 extract every ounce of competitive advantage they can out of PSE’s energy transactions,
4 absent the safeguard of confidentiality. The Commission permitted the designation of
5 Highly Confidential information for this very reason. *See* Third Supplemental Order at ¶ 4
6 (Protective Order modified to add designation because of relationship between
7 Complainants and PSE).

8 PSE’s concern is also acute because of the nature of the electronic discovery
9 response. Such a response can be readily transformed, copied, and transmitted to many
10 different people, literally around the globe, with only a few keystrokes. An electronic
11 version of a highly sensitive written document is even more sensitive, because – without the
12 protections afforded by Highly Confidential status – it is too easy to release the electronic
13 version into the public arena.

14 Washington law confirms and respects a designation of confidentiality. The public
15 policy of this state is to provide strong protection to competitively-sensitive information.
16 *See* RCW 4.24.601 (legislature declared that protection of confidential commercial
17 information “promotes business activity and prevents unfair competition;” public policy
18 holds that the “confidentiality of such information be protected and its unnecessary
19 disclosure be prevented”). This policy is reflected in other statutes as well, including the
20 Uniform Trade Secrets Act, RCW 19.108 *et. seq.*, which provides a civil cause of action for
21 misappropriation of trade secrets. The remedies provided in the Act, including attorneys
22 fees and even exemplary damages, reflect the strength of the Legislature’s commitment to
23 protecting confidential information. *See* RCW 19.108.020-040; *see also* RCW 80.04.095
24 (confidential marketing, cost, and *financial information* filed with the Commission shall not
25 be subject to inspection).

1 Moreover, there is recent Commission precedent for the designation of competitively-
2 sensitive information not only as confidential, but as highly confidential -- the same
3 protection that PSE seeks here. In the merger proceedings involving PSE's predecessors
4 (Docket Nos. UE-951270 and UE-960195), the joint applicants moved to modify the
5 Commission's earlier protective order. At the July 31, 1996 hearing on the motion, the
6 applicants asked that three exhibits with highly sensitive data be specially designated to
7 facilitate restriction on disclosure. Citing RCW 4.24.601 and the decision in *Brown Bag*
8 *Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992), *cert. den. sub nom. BB Asset*
9 *Management v. Symantec Corp.*, 506 U.S. 869 (1992), the applicants argued that the
10 information should receive heightened confidential protection. The Commission agreed that
11 exhibits that are highly competitive-sensitive should be specially designated for purposes of
12 confidentiality. See Docket Nos. UE-951270 and UE-960195, Sixth Supplemental Order
13 Modifying Protective Order; Restricting Distribution of Exhibits Designated Top Secret
14 Exhibits (August 12, 1996) ("Merger Discovery Order"), at 3-4.³

15 In sum, there are very good reasons – supported by applicable law and Commission
16 precedent – why PSE designated the electronic version of the transaction records, in these
17 proceedings, as Highly Confidential. That is the backdrop against which Complainants'
18 Motion should be measured.

20 **2. THE COMPLAINANTS' ARGUMENTS ARE NOT WELL-FOUNDED**

21 The Complainants make two arguments. They suggest that, since Complainants
22 produced the written records with a designation just of "confidential," PSE has allegedly
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24 ³ As the title to the Merger Discovery Order indicates, the Commission in the merger
25 proceedings used a designation of "Top Secret," not "Highly Confidential." The practical
26 effect is the same, however – certain documents and information receive special protection
because of their very nature.

1 waived the right to designate the electronic version as Highly Confidential. *See* Motion at 1.
2 Complainants then claim that their consultant, Mr. Schoenbeck, will be inconvenienced by
3 the Highly Confidential designation.” *See* Motion at 2-3. Neither argument holds water.

4 The first argument has already been addressed. There was no Highly Confidential
5 designation available when PSE produced the written transaction records. When Highly
6 Confidential status became available, i.e. when the Commission issued the amendment to the
7 Protective Order, PSE appropriately claimed Highly Confidential status – just as its
8 predecessors in the merger proceedings had been permitted to do for other competitively-
9 sensitive information, back in 1996 when the Commission issued the Merger Discovery
10 Order (see above).

11 The second argument is misplaced. The test for the Commission is not Mr.
12 Schoenbeck’s convenience or his ease or difficulty in complying with the Commission’s
13 restrictions. It is, instead, whether the electronic version should be treated as Highly
14 Confidential. The issue is that simple. PSE asserts that the electronic production must be
15 considered Highly Confidential for the reasons stated herein. Whether that designation
16 makes Mr. Schoenbeck’s job more or less difficult is not appropriate for consideration here,
17 particularly when the discovery at issue is so competitive-sensitive to PSE.

18 Further, given the actions taken by Complainants to date, PSE has no confidence that
19 the electronic discovery response will be treated properly if it is not designated Highly
20 Confidential. In the past several days, PSE has obtained evidence that two of the
21 Complainants have, without permission and in violation of their service agreements, re-
22 wired their loads to shift load from Schedule 48 to meters served by other rate schedules.
23 This is highly objectionable. PSE is still investigating these actions; however, suffice it to
24 say that Complainants should not be entitled to the “benefit of the doubt.”

25 It is important to note that Complainants asked for the very restrictions that the
26 Commission imposed. They were the ones who sought heightened protection for their own

1 documents. *See* Third Supplemental Order at ¶ 3. Now they complain when the discovery
2 shoe is on the other foot, when they want to look at PSE's documents. But the Commission
3 did not enter its discovery orders just to benefit Complainants. PSE is entitled to the same
4 confidentiality protection – no more, no less -- that Complainants requested for themselves.

5 One last point. Pursuant to the Protective Order, if objections are made to a
6 confidential designation, and if such objections are sustained, the designation remains for
7 ten days to allow the party who designated the information to seek Commission or judicial
8 review. We reserve our rights to seek such review if an adverse determination is made –
9 thus the designation must remain for at least ten days.⁴

10 Dated: January 5, 2001.

11 Respectfully Submitted,

12
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⁴ This reservation of rights applies equally to the other highly confidential documents addressed in the opposition filed by PSE earlier today.