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2 **BEFORE THE**
3 **WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

4 WASHINGTON UTILITIES AND
5 TRANSPORTATION COMMISSION,

6 Complainant,

7
8 v.

9 PUGET SOUND ENERGY, INC.,

10 Respondent.

Docket No. _____

PUGET SOUND ENERGY, INC.'S
MOTION FOR PROTECTIVE ORDER
WITH "HIGHLY CONFIDENTIAL"
PROVISIONS

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13 Puget Sound Energy, Inc. ("PSE") requests that the Commission enter a
14 protective order in this proceeding. PSE further requests that the protective order
15 include provisions that will govern the handling of "highly confidential" information.
16 The provisions that PSE requests are found in the attached Exhibit A. A full version of
17 PSE's proposed form of protective order is attached to this Motion as Exhibit B.

18
19 **I. ARGUMENT**

20 **A. The Settlement Stipulation in PSE's Recent Rate Case Includes a**
21 **Mechanism By Which PSE May Initiate a Proceeding to Add New**
22 **Resources and True Up Its Power Cost Rate**

23 The Settlement Stipulation in PSE's 2001-2002 general rate case includes a
24 mechanism by which PSE may initiate a proceeding to add new resources and true up
25 its Power Cost Rate.¹ Pursuant to this Stipulation, PSE has filed an Application for
26 Adjustment of Power Cost Rate ("PCORC Application") concurrently with this

27 ¹ See Settlement Terms for the Power Cost and Adjustment Mechanism ("PCA
28 Settlement"), Exhibit A to Settlement Stipulation approved as modified by the Commission on
June 20, 2002 (12th Supp. Order in Docket Nos. UE-011570/UG-011571), at § C.8.

1 Motion. The PCORC Application proposes the addition of a new resource to PSE's
2 portfolio of generation resources and other adjustments to PSE's Power Cost Rate.

3 Under the terms of the PCA Settlement, PSE's PCORC Application must
4 contain testimony and exhibits, including: (1) PSE's current or updated least cost plan;
5 (2) a description of PSE's need for an additional resource or resources; (3) an
6 evaluation of alternatives to the resource addition under various scenarios; (4)
7 adjustments to PSE's Fixed Rate Power Cost Component; and (5) adjustments to PSE's
8 Variable Rate Power Cost Component.² Under subsection (3), therefore, PSE must
9 submit testimony and analysis with the PCORC Application that evaluate and compare
10 possible alternatives to the generation resource addition.

11 **B. The Requested Protective Order Will Allow PSE And Other Parties to**
12 **Protect Sensitive Competitive Information During the PCORC Proceeding**

13 PSE has redacted confidential information from the Application because (1) a
14 protective order is not yet in place in this proceeding, and (2) the default process for
15 filing such information (under RCW 80.04.095 and WAC 480-09-015) does not
16 adequately protect the information under the present circumstances. However, PSE
17 will file the information and complete the Application soon after the Commission
18 enters a protective order that includes the "highly confidential" provisions.

19 In late 2002, PSE sent out solicitations to over seventy power project owners
20 and developers. The solicitations requested various types of resource proposals
21 involving generation assets and purchased power agreements. PSE also conducted an
22 extensive analysis of self-build options.

23 In order to evaluate and compare the various proposals that PSE received, PSE
24 asked the project owner/developers to provide detailed information concerning the
25 resources' operational and financial characteristics. To obtain this information,
26 however, PSE was required to sign confidentiality agreements with nearly all the

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28 ² See PCA Settlement at § C.8.

1 responding companies. Such confidentiality agreements are standard practice in the
2 industry – to protect proprietary information relating to the various resources. Such
3 information is highly confidential to the project owner/developers because they
4 compete with other companies in the energy markets for power sales, long term sales,
5 contracts, financing, transmission rights, and general business opportunities. The
6 unrestricted dissemination of such project information would create a very real risk of
7 competitive harm to the project owner/developers who provided this information to
8 PSE with the expectation of confidentiality.

9 Much of this proprietary information is important to the PCORC Application.
10 Some of the information relates to the acquisition PSE is making, and other information
11 relates to projects that PSE decided not to pursue. Both sets of information comprise a
12 key part of PSE’s evaluation of resource alternatives – which PSE must include under
13 the terms of the PCA Settlement.

14 The confidentiality agreements, however, prohibit PSE from releasing certain
15 competitively-sensitive information without heightened protections and, in specific
16 cases, a Commission protective order. This is the case with several of the generation
17 assets that PSE considered acquiring. For each of these projects, the owner/developer
18 required PSE to sign a confidentiality agreement. The confidentiality agreements
19 provide generally that the confidentiality obligations therein do not apply to
20 information that the recipient must disclose by action of any governmental authority,
21 provided that notice is given to the discloser so it may seek a protective order or other
22 appropriate relief regarding such information.

23 Under these circumstances, the default process for filing confidential documents
24 with the Commission -- under authority of RCW 80.04.095 and WAC 480-09-015 --
25 does not adequately protect the information that PSE received from the project
26 owner/developers. Using this process, if PSE were to designate documents as
27 confidential, but a party then asked to review those same documents, PSE’s only
28 recourse (short of disclosing the documents themselves) would be to attempt to obtain a

1 protective order from the superior court. PSE is concerned that the project
2 owner/developers would regard a filing under the default process – absent any other
3 protections -- as insufficient to protect their interests under the confidentiality
4 agreements with PSE.³ By contrast, a protective order by the Commission offers pre-
5 approved procedural safeguards that RCW 80.04.095 and WAC 480-09-015 do not
6 provide.

7 Although superior to the default process, the Commission’s standard protective
8 order is still deficient in one important respect -- it does not prevent disclosure of
9 confidential information to competitors. It is very possible that project
10 owner/developers, other parties, consultants, and experts with competitive interests
11 may intervene or otherwise seek to participate in the PCORC proceeding. Protection of
12 such information from disclosure to such competitors is exactly why the Commission
13 has used the “highly confidential” designation in prior proceedings. *See precedent*
14 *listed below.*

15 Consequently, to help ensure that confidential information is not disclosed to
16 competitors, PSE requests that the Commission enter a protective order with the
17 “highly confidential” language.

18 **C. Entry of the Proposed Protective Order Will Facilitate the Parties’**
19 **Agreement to Expedite the PCORC Proceeding**

20 Entry of the proposed protective order is necessary to effectuate the agreement
21 of the parties to the PCA Settlement on the timing of a PCORC proceeding. The PCA
22 Settlement makes clear that one objective of the Settlement is to have a new Power
23 Cost Rate in effect by the time a new resource goes into service. In order to
24 accomplish this goal, the parties to the PCA Settlement agreed to an expedited four-
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26 ³ It is not inconceivable that release of the confidential information without a protective
27 order in place will expose PSE to legal action by the project owner/developers (for breach of
28 the confidentiality agreements). Entry of PSE’s proposed protective order, with provisions for
“highly confidential” information, will significantly reduce this risk.

1 month process to review the PCORC Application.⁴ While the Commission itself is not
2 bound to act upon the PCORC Application within this four-month period, PSE will
3 seek the Commission's assistance in expediting the proceeding and furthering the goals
4 of the PCA Settlement.

5 By entering the requested protective order, the Commission will facilitate
6 discovery and provide the parties with a pre-approved mechanism by which to handle
7 issues regarding competitively sensitive documents. The Commission's action would
8 be consistent with the parties' agreement in the PCA Settlement to complete the
9 PCORC proceeding in an expedited manner. But without the requested protective
10 order in place, the proceeding will be significantly delayed -- since PSE will be unable
11 to profile relevant information.

12 II. THE PROPOSED PROTECTIVE ORDER

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14 PSE's proposed protective order includes not only the standard "confidential"
15 designation,⁵ but also heightened protection for "highly confidential" information. This

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17 ⁴ See PCA Settlement, § C.11.

18 ⁵ On October 7, 2003, in Docket No. UE-031389, the Commission added the following
19 modifying language to a standard protective order that PSE had requested "to accommodate a
20 need for additional protection of information relating to actual energy transactions":

21 **Purpose of Access and Use; Confidentiality.** No Confidential Information
22 distributed or obtained pursuant to this protective order may be requested,
23 reviewed, used or disclosed, directly or indirectly, by any party, expert or
24 counsel or any other person having access pursuant to this order, except for
25 purposes of this proceeding. Persons having access to the Confidential
26 Information pursuant to this order must request, review, use or disclose
27 Confidential Information only by or to persons authorized under this Order, and
28 only in accordance with the terms specified in this Order. Without limiting the
foregoing, persons having access to Confidential Information shall not use any
Confidential Information to design, develop, provide, or market any product,
service, or business strategy that would compete with any product of the party
asserting confidentiality.

27 See Order No. 03 in Docket No. UE-031389, at §§ 1, 6. PSE will be providing the same type
28 of sensitive energy market transactions and hedging information in this docket, so PSE
(Footnote Continued)(Footnote Continued)

1 additional protection is necessary to allow PSE to disclose information obtained under
2 its confidentiality agreements. If the order includes the additional protection, then
3 companies that provided confidential information to PSE will know that their
4 information will not be disclosed to their competitors. But the absence of such
5 protection will require disclosure to occur, which in turn may trigger legal action by the
6 parties whose information is disclosed.

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

19 Similarly, the Commission has established ample precedent for the entry of a
20 protective order with a “highly confidential” designation. *See, e.g.*, Docket No. UT-
21 991358, *Application of U S WEST, Inc. and Qwest Communications International, Inc.*,
22 (6th Supp. Order at 2-4); Docket No. TO-011472, *WUTC v. Olympic Pipe Line Co.*
23 (7th Supp. Order at 2-4); Docket No. UE-001952, *Air Liquide America Corp. et al. v.*
24 *Puget Sound Energy, Inc.* (3rd Supp. Order at 2-5). Generally, the Commission has
25 amended its standard protective order to allow for the designation of highly
26 confidential documents under the following circumstances: (1) the parties to the docket

27 requests that the protective order in this proceeding include the same modified language. *See*
28 Proposed Protective Order, Exhibit B at § 12, *Purpose of Access and Use; Confidentiality.*

1 are competitors or potential competitors; (2) the information relevant to the case may
2 be sensitive competitive information that would be of value to competitors if released;
3 (3) a disclosing party may suffer harm if forced to disclose certain information without
4 heightened protection; and (4) the entry of the protective order will facilitate discovery.

5 These considerations are reflected in the protective orders themselves, which
6 state (in uniform language) that “parties to this proceeding are competitors or potential
7 competitors;” that disclosure of highly confidential information will impose “a
8 significant risk of competitive harm to the disclosing party;” and that parties should
9 designate as highly confidential only information that “truly might impose a serious
10 business risk if disseminated” without heightened protection. *See* Docket No. UT-
11 991358, (6th Supp. Order at 2); Docket No. TO-011472 (7th Supp. Order at 2); Docket
12 No. UE-001952 (3rd Supp. Order at 2).

13 Entry of the requested protective order in this proceeding will not prejudice any
14 potential parties. The “highly confidential” provisions are not new – the Commission
15 has included them many times before in protective orders, under similar circumstances
16 where competitive interests are at stake. Further, the protective order that PSE requests
17 will afford all parties the right to challenge the confidentiality of any documents sought
18 to be protected.⁶ Thus, the entry of the requested protective order would not
19 predetermine the status of a particular document, but would simply allow PSE to
20 complete the PCORC Application and allow the parties to protect sensitive competitive
21 or proprietary information as appropriate during the proceeding.

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28 ⁶ *See* Proposed Protective Order, Exhibit B at § 29, *Right to Challenge Confidentiality*.

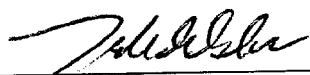
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III. CONCLUSION

PSE respectfully requests that the Commission enter the form of protective order that is attached to this Motion at Exhibit B.

DATED: October 24, 2003

Respectfully Submitted,



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1 **EXHIBIT A – PROPOSED “HIGHLY CONFIDENTIAL” LANGUAGE**

2 PSE requests that the following language be added to the protective order:⁷

3 **Intervenors in this proceeding may include competitors, or potential**
4 **competitors. Moreover, information relevant to the resolution of this**
5 **case is expected to include sensitive competitive information. Any**
6 **parties may receive discovery requests that call for the disclosure of**
7 **highly confidential documents or information, the disclosure of**
8 **which imposes a significant risk of competitive harm to the disclosing**
9 **party. Parties may designate documents or information they**
10 **consider to be of that nature as “Highly Confidential” and such**
11 **documents or information will be disclosed only in accordance with**
12 **the provisions of this Section.**

13 **Parties must scrutinize carefully responsive documents and**
14 **information and limit the amount they designate as highly**
15 **confidential information to only information that truly might impose**
16 **a serious business risk if disseminated without the heightened**
17 **protections provided in this Section. The first page and individual**
18 **pages of a document determined in good faith to include highly**
19 **confidential information must be marked by a stamp that reads:**
20 **“Highly Confidential Per Protective Order in WUTC Docket No.**
21 **_____.” Placing a “Highly Confidential” stamp on the first page of**
22 **a document indicates only that one or more pages contains highly**
23 **confidential information and will not serve to protect the entire**
24 **contents of a multipage document. Each page that contains highly**
25 **confidential information must be marked separately to indicate**
26 **where highly confidential information is redacted. The unredacted**
27 **versions of each page containing highly confidential information, and**
28 **provided under seal, also must be marked with the “Highly**
Confidential . . .” stamp and should be submitted on paper distinct in
color from non-confidential information and “Confidential
Information” as described in Part ___ of this Protective Order.

29 **Parties other than Public Counsel and Staff who seek disclosure of**
30 **highly confidential documents or information must designate one**
31 **outside counsel and no more than one outside consultant, legal or**

32 _____
33 ⁷ This proposed language has been approved by the Commission for use in other
34 dockets, including Docket No. UT-991358, *Application of U S WEST, Inc. and Qwest*
35 *Communications International, Inc.*, (6th Supp. Order at 2-4); Docket No. TO-011472, *WUTC*
36 *v. Olympic Pipe Line Co.* (7th Supp. Order at 2-4); Docket No. UE-001952, *Air Liquide*
37 *America Corp. et al. v. Puget Sound Energy, Inc.* (3rd Supp. Order at 2-5).

1 otherwise, to receive and review materials marked "Highly
2 Confidential . . ." In addition to executing the appropriate
3 Agreement required by this Protective Order for "Confidential
4 Information" each person designated as outside counsel or consultant
5 for review of "Highly Confidential" documents or information must
6 execute an affidavit, under oath, certifying that:

7 a. They do not now, and will not for a period of five
8 years, involve themselves in competitive decision
9 making by any company or business organization that
10 competes, or potentially competes, with the company or
11 business organization from whom they seek disclosure
12 of highly confidential information.

13 b. They have read and understand, and agree to be
14 bound by, the terms of the Protective Order in this
15 proceeding and by this Amendment to the Protective
16 Order.

17 Any party may object in writing to the designation of any individual
18 counsel or consultant as a person who may review highly confidential
19 documents or information. Any such objection must demonstrate
20 good cause, supported by affidavit, to exclude the challenged counsel
21 or consultant from the review of highly confidential documents or
22 information. Written response to any objection must be filed within
23 three days after service of the objection.

24 Designated outside counsel will maintain the highly confidential
25 documents and information and any notes reflecting their contents in
26 a secure location to which only designated counsel has access. No
27 additional copies will be made. If another person is designated for
28 review, that individual must not remove the highly confidential
documents or information, or any notes reflecting their contents,
from the secure location. Any testimony or exhibits prepared that
reflect highly confidential information must be maintained in the
secure location until removed to the hearing room for production
under seal and under circumstances that will ensure continued
protection from disclosure to persons not entitled to review highly
confidential documents or information. Counsel will provide prior
notice (at least one business day) of any intention to introduce such
material at hearing, or refer to such materials in cross-examination
of a witness. Appropriate procedures for including such documents
or information will be determined by the presiding Administrative
Law Judge following consultation with the parties.

EXHIBIT B -- PROPOSED PROTECTIVE ORDER

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**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

Docket No.: _____

**PROTECTIVE ORDER WITH
"HIGHLY CONFIDENTIAL"
PROVISIONS**

The Commission finds that a protective order to govern disclosure of proprietary and confidential information is necessary in this proceeding. The Commission provided the parties an opportunity to comment on the proposed protective order, considered their comments, and finds as follows:

a. It is likely that proprietary and confidential information will be required to resolve the issues in this proceeding;

b. Absent a protective order, a significant risk exists that confidential information might become available to persons who have no legitimate need for such information and that injury to the information provider could result.

The Commission finds that it is necessary to create a separate designation and a higher order of protection for documents asserted by parties to be highly confidential. This is consistent with the Commission's practice in prior cases involving assertions that certain documents require heightened protection to facilitate discovery.

Accordingly, the Commission enters the following protective order to govern the discovery and use of proprietary and confidential documents in this proceeding:

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ORDER

A. General Provisions

Confidential Information. All access, review, use, and disclosure of any material designated by a party to this proceeding as confidential (referred to in this Order as "Confidential Information") is governed by this Order and by WAC 480-09-015. The Commission expects Confidential Information to include only numbers, customer names, and planning details. The Commission requires the parties to delete such information from the primary exhibits and provide these "confidential deletions" under separate cover in the manner described below. The Commission may reject a filing or any other submission that fails to segregate Confidential Information, or categorizes clearly public information as confidential.

Parties must scrutinize potentially confidential material, and limit the amount they designate "Confidential Information" to only information that truly might compromise their ability to compete fairly or that otherwise might impose a business risk if disseminated without the protections provided in this Order. The first page and individual pages of a document determined in good faith to include Confidential Information must be marked by a stamp that reads: "Confidential Per Protective Order in WUTC Docket No. _____." Placing a Confidential Information stamp on the first page of an exhibit indicates only that one or more pages contains Confidential Information and will not serve to protect the entire contents of the multipage document. Each page that contains Confidential Information must be marked separately to indicate where confidential information is redacted. Confidential Information shall be provided on colored paper with references to where each number, customer name, or planning detail is redacted in the original document.

Confidential and Redacted Versions. Because the parties and the Commission are manipulating data and handling a number of open cases, and because confidentiality is more significant than it has been in the past, we must require **complete confidential and redacted versions of testimony, exhibits, and briefs.**

This extends to electronic versions, as well, and requires that **all diskettes and all electronic mail** specify whether the file is confidential, redacted, or public.

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10 If a witness has a confidential portion of her testimony, the sponsoring party must provide a complete redacted version of the testimony and a complete confidential version, with confidential pages on color paper.

11 It also means that you must submit (at least) two diskettes and E-mails one with the electronic version of the confidential text and one with the electronic version of the redacted text.

- a. You MUST identify the confidential diskettes with prominent red markings and the word "confidential" in addition to the contents and the docket number. The others must be prominently labeled "redacted" or "public".
- b. You MUST identify each confidential digital file with a C in the file name and MUST have the legend "CONFIDENTIAL PER PROTECTIVE ORDER IN WUTC DOCKET NO. _____" prominently displayed on the first page (i.e., the page that appears on the computer screen when the file is opened).

12 **Purpose of Access and Use; Confidentiality.** No Confidential Information distributed or obtained pursuant to this protective order may be requested, reviewed, used or disclosed, directly or indirectly, by any party, expert or counsel or any other person having access pursuant to this order, except for purposes of this proceeding. Persons having access to the Confidential Information pursuant to this order must request, review, use or disclose Confidential Information only by or to persons authorized under this Order, and only in accordance with the terms specified in this Order. Without limiting the foregoing, persons having access to Confidential Information shall not use any Confidential Information to design, develop, provide, or market any product, service, or business strategy that would compete with any product of the party asserting confidentiality.

Disclosure of Confidential Information

13 **Persons Permitted Access.** No Confidential Information will be made available to anyone other than Commissioners, Commission Staff, the presiding officer(s), and counsel for the parties for this proceeding, including counsel for Commission Staff, and attorneys' administrative staff such as paralegals. However, access to any Confidential Information may be authorized by counsel, solely for the purposes of this proceeding, to those persons designated by the parties as their experts in this matter. Except for the Washington Utilities and Transportation Commission Staff, no such expert may be an officer, director, direct employee, major shareholder, or principal of any party or any competitor of any party (unless this restriction is waived by the

1 party asserting confidentiality). Any dispute concerning persons entitled to
2 access Confidential Information must be brought before the presiding officer for
3 resolution.

4 ¹⁴ **Nondisclosure Agreement.** Before being allowed access to any
5 Confidential Information designated for this docket, each counsel or expert must
6 agree to comply with and be bound by this Order on the form of Exhibit A
7 (counsel and administrative staff) or B (expert) attached to this Order. Counsel
8 for the party seeking access to the Confidential Information must deliver to
9 counsel for the party producing Confidential Information a copy of each signed
10 agreement, which must show each signatory's full name, permanent address, the
11 party with whom the signatory is associated and, in the case of experts, the
12 employer (including the expert's position and responsibilities). The party
13 seeking access must also send a copy of the agreement to the Commission and,
14 in the case of experts, the party providing Confidential Information shall
15 complete its portion and file it with the Commission or waive objection as
16 described in Exhibit B.

17 ¹⁵ **Access to Confidential Information.** Copies of documents
18 designated confidential under this Order will be provided in the same manner as
19 copies of documents not designated confidential, pursuant to WAC 480-09-480.
20 Requests for special provisions for inspection, dissemination or use of
21 confidential documents must be submitted to the presiding officer if not agreed
22 by the parties. The parties must not distribute copies of Confidential
23 Information to, and they must not discuss the contents of confidential documents
24 with, any person not bound by this Order. Persons to whom copies of
25 documents are provided pursuant to this Order warrant by signing the
26 confidentiality agreement that they will exercise all reasonable diligence to
27 maintain the documents consistent with the claim of confidentiality.

28 **Highly Confidential Information**

¹⁶ **Intervenors in this proceeding may include competitors, or
potential competitors. Moreover, information relevant to the resolution of
this case is expected to include sensitive competitive information. Any
parties may receive discovery requests that call for the disclosure of highly
confidential documents or information, the disclosure of which imposes a
significant risk of competitive harm to the disclosing party. Parties may
designate documents or information they consider to be of that nature as
"Highly Confidential" and such documents or information will be disclosed
only in accordance with the provisions of this Section.**

¹⁷ **Parties must scrutinize carefully responsive documents and
information and limit the amount they designate as highly confidential**

1 information to only information that truly might impose a serious business
2 risk if disseminated without the heightened protections provided in this
3 Section. The first page and individual pages of a document determined in
4 good faith to include highly confidential information must be marked by a
5 stamp that reads: "Highly Confidential Per Protective Order in WUTC
6 Docket No. _____." Placing a "Highly Confidential" stamp on the first
7 page of a document indicates only that one or more pages contains highly
8 confidential information and will not serve to protect the entire contents of
9 a multipage document. Each page that contains highly confidential
10 information must be marked separately to indicate where highly
11 confidential information is redacted. The unredacted versions of each page
12 containing highly confidential information, and provided under seal, also
13 must be marked with the "Highly Confidential . . ." stamp and should be
14 submitted on paper distinct in color from non-confidential information and
15 "Confidential Information" as described in Part ___ of this Protective
16 Order.

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18 ¹⁸ Parties other than Public Counsel and Staff who seek disclosure
19 of highly confidential documents or information must designate one outside
20 counsel and no more than one outside consultant, legal or otherwise, to
21 receive and review materials marked "Highly Confidential . . ." In
22 addition to executing the appropriate Agreement required by this
23 Protective Order for "Confidential Information" each person designated as
24 outside counsel or consultant for review of "Highly Confidential"
25 documents or information must execute an affidavit, under oath, certifying
26 that:

27 a. They do not now, and will not for a period of five years, involve
28 themselves in competitive decision making by any company or
business organization that competes, or potentially competes, with
the company or business organization from whom they seek
disclosure of highly confidential information.

b. They have read and understand, and agree to be bound by, the
terms of the Protective Order in this proceeding and by this
Amendment to the Protective Order.

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20 Any party may object in writing to the designation of any
21 individual counsel or consultant as a person who may review highly
22 confidential documents or information. Any such objection must
23 demonstrate good cause, supported by affidavit, to exclude the challenged
24 counsel or consultant from the review of highly confidential documents or
25 information. Written response to any objection must be filed within three
26 days after service of the objection.

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Designated outside counsel will maintain the highly confidential documents and information and any notes reflecting their contents in a secure location to which only designated counsel has access. No additional copies will be made. If another person is designated for review, that individual must not remove the highly confidential documents or information, or any notes reflecting their contents, from the secure location. Any testimony or exhibits prepared that reflect highly confidential information must be maintained in the secure location until removed to the hearing room for production under seal and under circumstances that will ensure continued protection from disclosure to persons not entitled to review highly confidential documents or information. Counsel will provide prior notice (at least one business day) of any intention to introduce such material at hearing, or refer to such materials in cross-examination of a witness. Appropriate procedures for including such documents or information will be determined by the presiding Administrative Law Judge following consultation with the parties.

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The designation of any document or information as "Highly Confidential . . ." may be challenged by motion and the classification of the document or information as "Highly Confidential" will be considered in chambers by the Presiding Administrative Law Judge, or by the Commission.

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At the conclusion of this proceeding, and the exhaustion of any rights to appeal, designated outside counsel must return all highly confidential documents and information provided during the course of the proceeding, and must certify in writing that all notes taken and any records made regarding highly confidential documents and information have been destroyed by shredding or incineration.

23

Highly confidential documents and information will be provided to Staff and Public Counsel under the same terms and conditions of this Protective Order as govern the treatment of "Confidential Information" provided to Staff and Public Counsel and as otherwise provided by the terms of the Protective Order other than this Section.

Use of Confidential Information in This Proceeding

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Reference to Confidential Information. If reference is to be made to any Confidential Information by counsel or persons afforded access to this information during any part of this proceeding including, but not limited to, motions, briefs, arguments, direct testimony, cross-examination, rebuttal and

1 proposed offers of proof, any public reference (i.e., any reference that will not
2 be placed in a sealed portion of the record) shall be either solely by title or by
3 exhibit reference. Any other written reference shall be segregated and marked
4 "Confidential Information," and access to it shall be given solely to persons who
5 are authorized access to the information under this Order. References to the
6 Confidential Information must be withheld from inspection by any person not
7 bound by the terms of this Order.

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11 25 In oral testimony, cross-examination or argument, public references to
12 Confidential Information must be on such prior notice as is feasible to the
13 affected party and the presiding officer. Unless alternative arrangements exist to
14 protect the Confidential Information as provided below, there must be minimum
15 sufficient notice to permit the presiding officer an opportunity to clear the
16 hearing room of persons not bound by this Order or take such other action as is
17 appropriate in the circumstances.

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19 26 **Protected Use by Agreement.** Any party who intends to use any
20 Confidential Information in the course of this proceeding, including but not
21 limited to testimony to be filed by the party, exhibits, direct and cross-
22 examination of witnesses, rebuttal testimony, or a proffer of evidence, shall give
23 reasonable notice of such intent to all parties and to the presiding officer, and
24 attempt in good faith to reach an agreement to use the Confidential Information
25 in a manner which will protect its trade secret, proprietary, or other confidential
26 nature. The parties shall consider such methods as use of clearly edited versions
27 of confidential documents, characterizations of data rather than disclosure of
28 substantive data, and aggregations of data. The goal is to protect each party's
rights with respect to Confidential Information while allowing all parties the
latitude to present the evidence necessary to their respective cases.

19 27 If the parties cannot reach agreement about the use of Confidential
20 Information, they must notify the presiding officer, who will determine the
21 arrangements to protect the Confidential Information to ensure that all parties
22 are afforded their full due process rights, including the right to cross-examine
23 witnesses.

24 28 **Right to Challenge Admissibility.** Nothing in this Order may be
25 construed to restrict any party's right to challenge the admissibility or use of any
26 Confidential Information on any ground other than confidentiality, including but
27 not limited to competence, relevance, or privilege.

28 29 **Right to Challenge Confidentiality.** Any party may challenge
another party's assertion of confidentiality with respect to any information
asserted to be entitled to protection under this Order. The Presiding officer will
conduct an *in camera* hearing to determine the confidentiality of information.

1 The burden of proof to show that such information is properly classified as
2 confidential is on the party asserting confidentiality. Pending determination, the
3 assertedly Confidential Information shall be treated in all respects as protected
4 under the terms of this Order. If the presiding officer determines the challenged
5 information is not entitled to protection under this Order, the information
6 continues to be protected under this Order for ten days thereafter to enable the
7 producing party to seek Commission or judicial review of the determination,
8 including a stay of the decision's effect pending further review.

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10 **30 Admission Of Confidential Information Under Seal.** The portions
11 of the record of this proceeding containing Confidential Information will be
12 sealed for all purposes, including administrative and judicial review, unless such
13 Confidential Information is released from the restrictions of this Order, either
14 through the agreement of the parties or pursuant to a lawful order of the
15 Commission or of a court having jurisdiction to do so.

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17 **31 Return of Confidential Information.** At the conclusion of this
18 proceeding every person who possesses any Confidential Information (including
19 personal notes that make substantive reference to Confidential Information),
20 must return all Confidential Information to the party that produced it, or must
21 certify in writing that all copies and substantive references to Confidential
22 Information in notes have been destroyed, within thirty days following the
23 conclusion of this proceeding, including any administrative or judicial review.
24 These provisions apply to all copies of exhibits which contain Confidential
25 Information and for that reason were admitted under seal. The only exceptions
26 are that exhibits may be preserved by counsel as counsel records, and a complete
27 record, including Confidential Information, will be preserved by the Secretary of
28 the Commission as part of the Agency's official records.

32 Freedom of Information Laws. Until the Commission or any court
having jurisdiction finds that any particular Confidential Information is not of a
trade secret, proprietary, or confidential nature, any federal agency that has
access to and/or receives copies of the Confidential Information must treat the
Confidential Information as within the exemption from disclosure provided in
the Freedom of Information Act at 5 U.S.C. § 552 (b)(4); and any Washington
state agency that has access to and/or receives copies of the Confidential
Information must treat the Confidential Information as being within the
exemption from disclosure provided in RCW 42.17.310(1)(h) and (q).

33 Notice of Compelled Production In Other Jurisdictions. If a
signatory to this protective order is compelled to produce confidential
documents in any regulatory or judicial proceeding by the body conducting the
proceeding, the signatory must provide notice to the party that provided the
confidential information. Such confidential information must not be produced

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for at least five days following notice, to permit the party that provided such information an opportunity to defend the confidential nature of the material before the regulatory or judicial body that would compel production. Disclosure after that date, in compliance with an order compelling production, is not a violation of this Order.

Modification. The Commission may modify this Order on motion of a party or on its own motion upon reasonable prior notice to the parties and an opportunity for hearing.

Violation of this Order. Violation of this Order by any party to this proceeding or by any other person bound by this Order by unauthorized use or unauthorized divulgence of Confidential Information may subject such party or person to liability for damages and shall subject such party to penalties as generally provided by law.

DATED at Olympia, Washington, and effective this _____ day of _____, ____.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner