

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 In the Matter of the Proposal by)
4 PUGET SOUND POWER & LIGHT)
COMPANY)
5) DOCKET NO. UE-951270
to Transfer Revenues from PRAM)
6 Rates to General Rates.)
-----)

7 In the Matter of the Application)
of)
8)
9 PUGET SOUND POWER & LIGHT)
and)
WASHINGTON NATURAL GAS COMPANY) DOCKET NO. UE-960195
10) VOLUME 2
For an Order Authorizing the) Pages 124 - 159
11 Merger of WASHINGTON ENERGY)
COMPANY and WASHINGTON NATURAL)
12 GAS COMPANY with and into PUGET)
SOUND POWER & LIGHT COMPANY, and)
13 Authorizing the Issuance of)
Securities, Assumption of)
14 Obligations, Adoption of)
Tariffs, and Authorizations)
15 in Connection Therewith.)
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17 A pre-hearing conference in the above matter
18 was held on July 31, 1996, at 10:06 a.m. at 2430
19 Chandler Court SW, Olympia, Washington before
20 Administrative Law Judges MARJORIE R. SCHAER and JOHN
21 PRUSIA.

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23
24 Cheryl Macdonald, CSR
25 Court Reporter

1 The parties were present as follows:

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3 WASHINGTON UTILITIES AND TRANSPORTATION
4 COMMISSION STAFF, by ROBERT CEDARBAUM, Assistant
5 Attorney General, 1400 South Evergreen Park Drive
6 Southwest, Olympia, Washington 98504.

7 FOR THE PUBLIC, ROBERT F. MANIFOLD,
8 Assistant Attorney General, 900 Fourth Avenue, Suite
9 2000, Seattle, Washington 98164.

10 PUGET SOUND POWER & LIGHT COMPANY, by JAMES
11 M. VAN NOSTRAND, Attorney at Law, 411 - 108th Avenue
12 NE, Bellevue, Washington 98004.

13 WASHINGTON NATURAL GAS COMPANY, by MATTHEW
14 R. HARRIS, Attorney at Law, 6100 Columbia Center, 701
15 Fifth Avenue, Seattle, Washington 98104.

16 NORTHWEST INDUSTRIAL GAS USERS, by PAUL
17 PYRON, Attorney at Law, 101 SW Main, Suite 1100,
18 Portland, Oregon 97204.

19 INDUSTRIAL CUSTOMERS OF NORTHWEST
20 UTILITIES, by CLYDE H. MACIVER, Attorney at Law, 601
21 Union Street, 4400 Two Union Square, Seattle,
22 Washington 98101.

23 WASHINGTON WATER POWER COMPANY, by DAVID
24 MEYER, Attorney at Law, 1200 Washington Trust
25 Building, Spokane, Washington 99204.

26 PUBLIC POWER COUNCIL, by SHELLY RICHARDSON,
27 Attorney at Law, 1300 SW Fifth Avenue, Suite 2300,
28 Portland, Oregon 97201.

29 SEATTLE STEAM COMPANY, by FREDERICK O.
30 FREDERICKSON, Attorney at Law, 33rd Floor, 1420 Fifth
31 Avenue, Seattle, Washington 98101.

32 WASHINGTON PUD ASSOCIATION, by JOEL MERKEL,
33 Attorney at Law, 1910 One Union Square, 600 University
34 Street, Seattle, Washington 98101.

35 CITY OF SEATTLE, by WILLIAM H. PATTON,
36 Director Utilities Section, 10th Floor Municipal
37 Building, 600 Fourth Avenue, Seattle, Washington 98104.

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APPEARANCES (Cont'd.)

CITY OF TACOMA DEPARTMENT OF PUBLIC UTILITIES, by GLENNA MALANCA, Senior Assistant City Attorney, PO Box 11007, Tacoma, Washington 98411.

PUD NO. 1 OF SNOHOMISH COUNTY, by ERIC E. FREEDMAN, Associate General Counsel, 2320 California Street, Everett, Washington 98201.

NORTHWEST CONSERVATION ACT COALITION and NATURAL RESOURCES DEFENSE COUNCIL, by DEBORAH S. SMITH, Attorney at Law, 401 North Last Chance Gulch, Helena, Montana, 59601.

IBEW LOCAL 77, by LEWIS ELLSWORTH, Attorney at Law, 27th Floor, One Union Square, 600 University Street, Seattle, Washington 98101.

1 P R O C E E D I N G S

2 JUDGE SCHAEER: The hearing will come to
3 order. This is a pre-hearing conference in docket No.
4 UE-951270, which is a proposal by Puget Sound Power
5 and Light Company seeking approval to transfer rates
6 from PRAM rates to general rates, and docket No.
7 UE-960195, which is the application of Puget Sound
8 Power and Light Company and Washington Natural Gas
9 company for an order authorizing the merger of
10 Washington Energy Company and Washington Natural Gas
11 Company with and into Puget Sound Power and Light
12 Company and authorizing the issuance of securities,
13 assumption of obligations, adoption of tariffs and
14 authorizations in connection therewith.

15 This is a pre-hearing conference that was
16 set by a notice of pre-hearing conference dated July
17 10, 1996. It's taking place on July 31, 1996
18 in Olympia, Washington. The hearing is being held
19 before administrative law judges Marjorie R. Schaer
20 and John Prusia. Let's start by taking appearances
21 beginning with the company, please.

22 MR. VAN NOSTRAND: On behalf of applicant
23 Puget Sound Power and Light Company, James M. Van
24 Nostrand.

25 MR. HARRIS: On behalf of Washington

1 Natural Gas, Matthew R. Harris.

2 MS. MALANCA: City of Tacoma department of
3 public utilities, Glenna Malanca.

4 MR. ELLSWORTH: For IBEW local 77, Lewis
5 Ellsworth.

6 MS. SMITH: On behalf of Natural Resources
7 Defense Council/Northwest Conservation Act Coalition,
8 Deborah Smith.

9 MR. FREDERICKSON: On behalf of intervenor
10 Seattle Steam Company, Frederick O. Frederickson.

11 MR. PATTON: Representing the city of
12 Seattle, William H. Patton.

13 MR. MACIVER: On behalf of ICNU, Clyde H.
14 MacIver.

15 MR. FREEDMAN: On behalf of Public Utility
16 District No. 1 of Snohomish County, Eric Freedman.

17 MS. PYRON: On behalf of the Northwest
18 Industrial Gas Users, Paula E. Pyron.

19 MR. MEYER: David Meyer for the Washington
20 Water Power Company.

21 MR. MANIFOLD: Robert F. Manifold, public
22 counsel.

23 MR. MERKEL: Joel Merkel for the Washington
24 PUD Association.

25 MS. RICHARDSON: Representing the Public

1 Power Council, Shelly Richardson.

2 MR. CEDARBAUM: Robert Cedarbaum
3 representing the Commission staff.

4 JUDGE SCHAER: Thank you. As I stated
5 while we were off the record, the purpose of this
6 pre-hearing conference is to get organized for the
7 cross-examination hearings and to deal with any
8 preliminary matters, and one of the first things I
9 would like each party to do is to write out time
10 estimates for your cross-examination, and I am going
11 to ask where parties have consolidated
12 cross-examination that you prepare one consolidated
13 estimate, and please indicate for me which counsel
14 will cross-examine each witness. So I don't know if
15 you all have a list of witnesses available to you or
16 if you want to just take a few minutes to do this or
17 if you want me just to tell you what I want and have
18 you bring those to me by the end of this hearing. Any
19 feedback from counsel?

20 MR. CEDARBAUM: Might be more time
21 effective if we were to give that to you at the end of
22 the hearing.

23 JUDGE SCHAER: So by the end of this
24 morning's hearing before you leave the hearing room,
25 if you would, please, I'm going to want that time

1 estimate from each counsel.

2 MR. PATTON: Do you have an extra list of
3 the witnesses?

4 JUDGE SCHAEER: I have a list that I have
5 written out by hand that I probably can find a Xerox
6 for when we take a break. I did not bring extra lists
7 of witnesses.

8 MR. PATTON: Do you want this just for
9 today or the entire --

10 JUDGE SCHAEER: I would like it for the
11 entire set of hearings.

12 Next I would like to discuss distribution
13 of exhibits. Prefiled exhibits for the company
14 witnesses were given numbers for identification at the
15 first pre-hearing conference. When we get into the
16 hearing I would like the parties to be prepared to
17 distribute all of their exhibits for a witness at the
18 time that the witness is called to the stand. We will
19 number them all for identification at that point as a
20 group and then let them be offered at the appropriate
21 time as you go through your questioning. Does any
22 counsel have problems doing that?

23 MR. CEDARBAUM: That's witness by witness?

24 JUDGE SCHAEER: Witness by witness. I know
25 some other judges have tried doing all of the

1 witnesses for a day in the morning and some other
2 things that haven't worked terribly well, but I think
3 I would like to do it by witness so we have one mass
4 distribution for each witness, we get everything
5 numbered, and then when we get started we can go
6 through the questioning in as efficient a manner as
7 possible.

8 MS. RICHARDSON: Insofar as
9 cross-examination is limited to prefiled testimony,
10 do you need that prefiled testimony to be resubmitted
11 as an exhibit?

12 JUDGE SCHAEER: No. I would assume that any
13 exhibit that's been marked for identification already
14 as part of company's case, we can assume (inaudible).

15 MS. RICHARDSON: Thank you.

16 JUDGE SCHAEER: One of the preliminary
17 matters before the Commission is the motion to compel
18 by the IBEW, and our review of those requests finds
19 that the disputed requests fall into two rough groups,
20 one which attempts to measure the impact of the merger
21 on customer safety and customer service, and one which
22 focuses on who among employees or contractors is
23 performing the work involved, and part of those
24 requests are going to be required to be answered and
25 part are not. Commission will require the joint

1 applicants to respond to requests No. 10, 11, 19, 31,
2 35 and 36. The motion to compel responses to requests
3 No. 15, 20, 25, 33 and 34 will be denied.

4 These requests were made on June 25, Mr.
5 Van Nostrand, Mr. Harris. Are answers available in
6 the hearing room or how quickly can those be
7 provided? I would like them to be provided sometime
8 this week.

9 MR. VAN NOSTRAND: That can be done.

10 JUDGE SCHAEER: Mr. Ellsworth, which
11 witnesses were you planning to use the data request
12 responses for in your cross-examination?

13 MR. ELLSWORTH: Probably only Mr. Story.

14 JUDGE SCHAEER: Mr. Story. I believe that
15 you expect that Mr. Story will be on this week or do
16 you expect that he will be on Monday or Tuesday?

17 MR. VAN NOSTRAND: Monday or Tuesday, Your
18 Honor.

19 JUDGE SCHAEER: I'm going to ask you to
20 provide those responses by noon on Friday of this week
21 so that Mr. Ellsworth has an opportunity to use them
22 to prepare for his cross of Mr. Story next week.

23 The next item I would like to take up is
24 the joint applicant's motion for modification of
25 protective order. Have all parties received a copy of

1 that motion?

2 MS. RICHARDSON: No, Your Honor. Not all
3 parties. Shelly Richardson on behalf of Public Power
4 Council. I have briefly been able to review the
5 motion this morning, but it was not served on me at
6 our office yesterday, and I appreciate that the motion
7 was filed on July 29th but I haven't been served yet.

8 UNIDENTIFIED VOICE: I haven't seen it yet
9 either.

10 MR. FREEDMAN: I don't believe it was
11 served on Snohomish either.

12 JUDGE SCHAEER: Do you have copies of that
13 motion available with you?

14 MR. HARRIS: We have the motion and we can
15 get copies for everybody that has not yet received a
16 copy.

17 JUDGE SCHAEER: Let's take a moment and get
18 those distributed to anybody who needs to have them
19 and doesn't, and let's maybe take 10 or 15 minutes for
20 people who haven't seen the motion yet to review it.
21 The rest of you can take the time to work on your time
22 estimates. So if you need a copy of the motion right
23 now, please put your hand up.

24 (Recess).

25 JUDGE SCHAEER: Let's be back on the record,

1 and at this point in the hearing we're going to take
2 up a discussion of a motion by the joint applicants to
3 modify the protective order. Mr. Harris, did you have
4 any oral comment that you wanted to make in addition
5 to your written motion?.

6 MR. HARRIS: Yes, I do. The written
7 motion, Your Honor, addresses a specific concern that
8 we have with the protective order itself that we think
9 would allow parties to circumvent some of the
10 protections in the protective order by going directly
11 to other parties and seeking disclosure of
12 confidential information that way. All we want
13 through this motion is an opportunity to dispute a
14 party's right to receive certain confidential
15 information. We can't do that if the parties go to
16 other parties to receive that information, so that's
17 what this motion addresses.

18 When we're finished addressing this motion
19 we would like to have an opportunity then to discuss
20 hearing room procedures and how that will work with
21 some of this confidential information.

22 JUDGE SCHAER: I'm going to take those up
23 as two separate motions. I think it will help all of
24 us to keep it a little bit clear -- I know it will
25 help me keep it a little bit clearer. The motion that

1 you have filed with the Commission seeks two things.
2 One is a definition in the order that brings in the
3 need to know standard that was discussed in the
4 Commission's last order, and the second is a
5 requirement that persons requesting confidential
6 information from the company come to the company for
7 that information and that they cannot obtain your
8 confidential information from another party. Are
9 there parties that wish to respond to the motion?

10 MR. MANIFOLD: Just a clarification on that
11 second point. Is that an accurate statement of your
12 second point? Is it only confidential information
13 that you're concerned with parties getting from other
14 parties?

15 MR. HARRIS: That's correct.

16 MR. MANIFOLD: Sorry for interrupting.

17 MR. CEDARBAUM: I also have a clarification
18 as well. My understanding of the motion is that
19 there's statutory parties, which I'm not quite sure
20 where that term came from, but as I understand it
21 that means staff and public counsel, and as far as the
22 motion is concerned there's no change to staff's
23 ability to receive confidential information by the
24 changes that you're proposing in the protective order.

25 MR. HARRIS: That's correct.

1 MR. MACIVER: Your Honor, I would like a
2 clarification as well. It's my understanding on that
3 need to know standard, the first part of the motion
4 that I have been advised by counsel for the joint
5 applicants that that will not be applied to the
6 interventions of pure customers such as Industrial
7 Customers of Northwest Utilities which are my clients
8 in this proceeding. And that this motion does not
9 affect the rights to discover of ICNU in this
10 proceeding.

11 JUDGE SCHAEER: Is that a correct
12 understanding, Mr. Harris?

13 MR. HARRIS: I think that is how things
14 will work in practice. I don't think the motion
15 actually reaches that issue. All the motion asks for
16 is the need to know standard be inserted in the
17 protective order and then that you seek the
18 information, the confidential information, directly
19 from us. It's our anticipation that as our customers
20 that we won't have difficulty supplying that
21 information to you, but if the question is would you
22 be able to go to other parties and seek confidential
23 information then the answer would be no, it applies
24 the same to everybody. We just want everybody to come
25 to us and ask us for the confidential information so

1 we have an opportunity to limit its distribution where
2 appropriate.

3 MR. MACIVER: Point I'm making is on the
4 seventh page of the motion they specifically state,
5 number one, application of a need to know standard to
6 persons other than statutory parties, and then number
7 two, go direct to the source of the confidential
8 information for that information. My point of
9 clarification and possibly objection is, I would
10 object to having a standard applied to ICNU's
11 intervention that is different from the standard
12 applied to public counsel, and if public counsel is a
13 statutory party and as such has a different standard
14 applied to it when seeking discovery then the ICNU, we
15 would object. If the standard is the same we would
16 not object.

17 MS. PYRON: For Northwest Industrial Gas
18 Users, I would echo the same concerns that have been
19 raised by Mr. MacIver. We feel that as pure customers
20 we should be treated the same as public counsel and
21 the statutory parties. We don't have a problem with
22 limitation of access to copies of the confidential
23 information coming through the applicants, and we are
24 concerned with protection of some of the confidential
25 information itself as pertains to the Industrial Gas

1 Users' proprietary interests and some of that
2 customer-specific information being kept confidential.
3 And in that respect (inaudible) maintaining the
4 confidentiality of the information. Our area of
5 concern is in other than statutory parties making sure
6 that we're not excluded from discovery on the same
7 basis as public counsel or any other pure customer.

8 JUDGE SCHAEER: Mr. Harris, I can understand
9 why you would want the second paragraph that you have
10 asked for on page 7. That makes any party wanting
11 your clients' confidential information come to you
12 rather than being able to obtain it from another party
13 who has obtained it, and that allows you the
14 opportunity to object to providing that information if
15 you have some concern that they're not an appropriate
16 party to receive that information.

17 I am not as certain that the first
18 paragraph is necessary simply because you already have
19 the language in the Commission's last order indicating
20 that where there is -- where there are competitors and
21 the Commission will look at that and will apply a need
22 to know standard. I'm not certain that having the
23 first paragraph in the order does anything for you. I
24 think you're still going to say no to the information
25 you don't want to give out. The other parties if they

1 disagree with you are still going to bring a motion to
2 compel before the Commission. And the Commission is
3 still going to be making a judgment as to whether they
4 need that information and whether it's appropriately
5 protected and whether or not it should be provided.
6 So I am just not certain we need to be drawing the
7 lines this morning between customers who aren't
8 statutory parties and competitors and others. Do you
9 see a real need for that first paragraph if the second
10 paragraph were implemented?

11 MR. HARRIS: No. It was offered as
12 clarification, and if it's going to cause us a problem
13 now we'll take it up as the information is requested,
14 and as long as we're able to assert the need to know
15 standard, we're fine with that.

16 JUDGE SCHAEER: My guess is that whether
17 that's in or out I'm going to be seeing the same
18 discovery disputes about the same issues.

19 MR. HARRIS: I think that's exactly right.

20 JUDGE SCHAEER: And you're going to have the
21 ability to argue the same thing, but perhaps we could
22 move forward more smoothly this morning if we didn't
23 try to draw that line at this hearing.

24 Does any party have a problem with that
25 second paragraph being implemented? Mr. Manifold?

1 MR. MANIFOLD: Yes, two things. One I
2 wanted to clarify that public counsel, I presume, is
3 considered to be a statutory party.

4 MR. HARRIS: Yes.

5 MR. MANIFOLD: Secondly, there's an
6 implementation detail, and that is that as this
7 paragraph reads neither I nor my consultants could
8 discuss confidential information with staff or a staff
9 consultant or another party or their consultant who
10 had independently received that confidential
11 information, and there are times when that would be
12 useful and necessary and, for instance, in the context
13 of settlement discussions, vital. So I would ask or
14 suggest that it be modified to make that possible.

15 MR. HARRIS: We wouldn't have any problem
16 with that course.

17 JUDGE SCHAEER: Any other party have any
18 concern about that second paragraph being implemented
19 with the modification suggested by Mr. Manifold?

20 MS. MALANCA: Which would be what? To
21 strike "nor shall we discuss their contents"?

22 JUDGE SCHAEER: Probably be an additional
23 sentence saying that experts or counsel who have
24 independently received confidential information can
25 both have it through the company, may discuss it with

1 each other. We're going to do some wordsmithing
2 prettier than that, but something along that line.

3 MS. MALANCA: So Mr. Manifold could not
4 discuss something with me unless we could verify that
5 I've independently received that information. I have
6 some difficulty with that.

7 JUDGE SCHAEER: And your difficulty is what,
8 ma'am?

9 MS. MALANCA: Could it not be easier to
10 implement and serve the same purpose to strike the
11 words "nor shall they discuss the contents with" or
12 somehow deal with the confidentiality issues? If I've
13 signed a confidential agreement but have not sought
14 the discovery why should I not be able to discuss with
15 other parties?

16 JUDGE SCHAEER: Well, I believe that the
17 goal of this provision is to require parties who are
18 obtaining access to confidential information to obtain
19 that information from the companies so that the
20 companies have an opportunity where they feel it is
21 appropriate to object to provision of that
22 information, and that is why they are asking that any
23 of their confidential information that you obtain you
24 obtain from them and not from public counsel,
25 Commission staff or some other party who has obtained

1 that confidential information.

2 MS. MALANCA: I suppose I don't have a
3 problem with it as long as the confidential
4 information is clearly indicated. There could be some
5 that is not confidential that would be difficult to --

6 JUDGE SCHAEER: I believe that it's been
7 clearly established that this pertains only to
8 confidential information that has been properly
9 labeled as such under the provisions of Commission
10 protective order.

11 MR. MERKEL: Representing the Washington
12 PUD Association, we're in the position of being both
13 customers and competitors, and the ones who are
14 customers are not competitors, generally. They're
15 the water utilities, and I would object to not having
16 -- to be put in a position to not having access to the
17 same information that other customer groups have,
18 number one. I think the real issue, however, is the
19 need to know standard itself, which I think is being
20 abused in this case.

21 We, the PUD Association, submitted data
22 requests asking simply for copies of responses
23 provided to other parties. Didn't ask any separate
24 questions, and were met with a blanket response that
25 you can't have anything because it's all confidential.

1 You don't have a need to know. Even though we have
2 signed the confidentiality agreement and, as I
3 understand it, could not disclose any information to
4 anyone but experts, and I don't work for any
5 competitor myself. I work for the Association. So I
6 guess saying you have to go to the company rather than
7 to other parties doesn't really change the ultimate
8 issue. The ultimate issue is, is the need to know
9 standard being applied properly or is it being applied
10 as a way of delaying any discovery to the point where
11 it's useless as far as preparing our direct case.

12 It's already become useless as far as this
13 cross-examination is concerned. Anticipating that the
14 request will be made that when confidential
15 information is discussed in cross-examination
16 competitors or their representatives would have to
17 leave the room, I think that becomes a very -- if that
18 is the request -- a very impractical and burdensome
19 process which will slow us all down, and I don't see
20 the need for it since we've all signed confidential
21 agreements.

22 JUDGE SCHAEER: We aren't discussing that
23 issue yet. What we're discussing right now is whether
24 anyone here has an objection to this paragraph 2 on
25 page 7 of the motion being included in the motion with

1 the modification suggested by Mr. Manifold, and I am
2 going to rule that that should be included in the
3 protective order in this matter. I am going to
4 instruct Mr. Harris to work with Mr. Manifold and
5 other interested counsel on wording of the
6 modification that you would like to see included. I
7 am going to instruct parties to follow this from this
8 oral ruling until such time as a modified written
9 order comes out. If you want to seek confidential
10 information from Puget or Washington Natural or any
11 other party you must ask that party for the
12 information rather than asking another party who had
13 already obtained the information. And you may discuss
14 such information only with someone else who has
15 correctly obtained it from the company or party whose
16 confidential information it is, and that's going to be
17 our rule going forward in this proceeding.

18 MS. RICHARDSON: One clarification, Your
19 Honor.

20 JUDGE SCHAER: Certainly.

21 MS. RICHARDSON: The paragraph that has
22 just been adopted in the paragraph order specifically
23 refers to confidential information. Does it have an
24 impact on information that's not been designated as
25 confidential and the trade of that information among

1 parties without having gone through applicants?

2 JUDGE SCHAER: None whatsoever.

3 MS. RICHARDSON: Thank you.

4 MR. MERKEL: Did you address in your ruling
5 the issue of a party that is both, consists of both
6 competitors and customers?

7 JUDGE SCHAER: I did not incorporate the
8 first paragraph into the order, only the second. I am
9 going to leave the individual discovery disputes to be
10 brought to the Commission by parties at the time that
11 they arise. I'm going to leave it to the party
12 holding confidential information to refuse to disclose
13 it when they believe that's appropriate and leave it
14 to the party who didn't get the information to bring a
15 motion to compel when they believe it's appropriate,
16 and the Commission will deal with those motions as
17 they arise. To date none have been brought to us.

18 So are there other preliminary matters
19 which need to be taken up? I believe you indicated
20 you had another matter, Mr. Harris.

21 MR. HARRIS: The second part of this -- and
22 it's the issue alluded to by counsel for the PUD
23 Association -- is what will happen during the hearing
24 when we reach some of this confidential information.
25 This is, as I think everybody here would acknowledge,

1 a unique proceeding in many ways. You only have to
2 look around the room to get an understanding of that.
3 It's not just the number of the parties but it's the
4 nature of the parties, too, and it's the nature of the
5 issues that are at stake here, and given the nature of
6 the issues and the nature of the parties, we are very,
7 very concerned about protecting our confidential
8 information, and there is a class, a smaller class of
9 information, than the information that we have
10 designated as confidential under the protective order.
11 There is a subset of that information that is very
12 sensitive to competitive concerns, and we're concerned
13 about that ending up in the hands of our competitors,
14 in the hands of parties other than the statutory
15 parties and other than our customers. We acknowledge
16 the problem of the Association that has both customers
17 and competitors, but there's nothing we can do about
18 that. Once the information reaches the Association it
19 reaches competitors by definition. Now --

20 JUDGE SCHAEER: Now, let me ask you about
21 that statement. Are there competitors of yours that
22 have signed confidential agreements as experts for the
23 Association?

24 MR. HARRIS: I know there are counsel for
25 competitors that have signed the confidentiality

1 agreement. I don't know without looking at my list
2 whether there are experts, too, but we're concerned
3 about the information even reaching counsel in this
4 case, and I would like to use an example of the type
5 of information that we're concerned about.

6 In response to staff request No. 38 we
7 produced a presentation that we made to our rating
8 agencies which contains our most sensitive financial
9 projections for the next five years for each of the
10 two companies independently and to the company as it
11 would exist if it were merged. That information is
12 information that is not circulated internally at the
13 companies. It's information that is disclosed to
14 rating agencies only after they sign nondisclosure
15 agreements and only for the purpose of evaluating our
16 future debt ratings.

17 It is true inside information under SEC
18 regulations, and it's the type of information that
19 would be very damaging to us if it ended up in the
20 hands of our competitors. Now, we want everybody in
21 this room to have the information they need to go
22 forward with this proceeding. We're not -- our intent
23 is not to prevent that from happening, but we are
24 concerned about this very small subset of information
25 that is proprietary and highly confidential, and it's

1 the type of information that may come up even this
2 afternoon with Mr. Torgerson. The question, though,
3 is whether counsel should be allowed to stay while
4 this information is being discussed while questions
5 are being asked about this sort of information.

6 We don't believe allowing counsel to stay,
7 even if counsel has signed the nondisclosure
8 agreement, solves our problem. Even if the
9 information is not disclosed explicitly to somebody's
10 client, and we have no doubt that it would not be
11 disclosed explicitly, and we have every belief that
12 people will honor the nondisclosure statement, it
13 still creates an issue for us. And the Ninth Circuit
14 recently considered this very issue in a case called
15 Brown Bag Software vs. Symantec. The cite is 960 F2d
16 1465. And in that case the court made a number of
17 points in not allowing this sort of information
18 and highly proprietary information to be disclosed to
19 counsel for the other side even though counsel was
20 willing to sign nondisclosure agreement, protective
21 order and the like.

22 Court made a couple of key points. First
23 the key risk to consider is the risk possessed by
24 disclosure of this sort of information to competitors,
25 and that's what we're worried about here. The risk

1 arises whether counsel is in-house counsel or retained
2 counsel, the same problem arises. It's entirely
3 proper to credit counsel's good faith and integrity,
4 that's not what's at issue here, and the court
5 acknowledges that too, but even so the court
6 recognized the problem of disclosure to counsel in
7 that case.

8 And the court made a few comments. The
9 court questioned whether counsel could lock up trade
10 secrets in his mind safe from inadvertent disclosure
11 once he had read the documents, the key documents.
12 The court also said knowledge of these sorts of trade
13 secrets or proprietary information, quote, would place
14 counsel in the untenable position of having to refuse
15 his employer legal advice on a host of contract and
16 employment and competitive marketing decisions lest he
17 improperly or indirectly revealed Symantec's trade
18 secrets.

19 With this small class of information we're
20 talking about we're very concerned about that, that it
21 could influence future decisions, future advice,
22 perhaps without counsel even realizing it. So what
23 we're asking for is when we reach this sort of
24 information that we clear the hearing room of everyone
25 except for statutory parties and our customers, and

1 when we're talking about customers we're talking about
2 pure customers not customers that are competitors
3 also.

4 We think it's clear that the Commission has
5 authority to do this. We also think it's clear that
6 there's a policy of protecting this sort of
7 information in Washington. The legislature recently
8 passed a statute, RCW 4.24.601 and they made a finding
9 in there that protecting this sort of information,
10 quote, promotes business activity and prevents unfair
11 competition. Well, that's exactly what we're trying
12 to prevent here because we think that if that sort of
13 information ends up in the hands of our competitors,
14 even if it's only used indirectly, it raises the
15 potential of unfair competition.

16 So we want to make the hearing run as
17 smoothly as possible, and we have tried to narrow this
18 to the smallest possible class of information and
19 we've tried not to exclude people that need to be
20 there, but we think consistent with the Commission's
21 need to know standard that we need a procedure like
22 this given the nature of this hearing and the nature
23 of the information that's going to be examined.

24 JUDGE SCHAEER: The Commission likes to,
25 when possible, remain in public hearing, remain on the

1 record with unsealed transcript. And in order to
2 obtain that result, it encourages parties who are
3 questioning and parties who are answering to work
4 together on questioning regarding confidential
5 information so that questions and answers can be
6 structured in such a way that information can be
7 provided without going into a level of detail or
8 without revealing information publicly that needs to
9 remain confidential.

10 As an example there are times when
11 confidential exhibits may be distributed only to those
12 who have a need to see those exhibits and questioning
13 can be about line 7, column G, and if that number is
14 -- what relationship that number bears to some other
15 number in line 8, column F, or something of that
16 nature. A lot of this can be worked around. It's not
17 that common that you actually have to disclose
18 confidential information in questioning and answering.
19 Have you been working with the parties that are going
20 to be questioning or have you had any discussions
21 about this with them to see if together you can
22 structure questions so that we don't have to face this
23 problem?.

24 MR. HARRIS: We haven't been notified yet
25 by any parties, at least not until this morning, that

1 they intended to question on confidential information,
2 and I will say right now we're happy to take this up
3 as it arises during the hearing if we want to defer it
4 and see if we get through the hearing without having
5 to resolve this issue. We have been told, though,
6 that this rating agency presentation that we're so
7 concerned about is going to be a subject addressed in
8 Mr. Torgerson's examination and perhaps during lunch
9 today we can work out how we can do that without
10 getting to the level of detail or to the information
11 that is causing us so much concern. I'm not
12 optimistic about that, though.

13 MR. CEDARBAUM: If I could pipe in. The
14 staff does have cross-examination of Mr. Torgerson
15 involving some of this confidential information, and
16 in preparation of that cross we have made an effort to
17 do exactly what you said, to only go into areas that
18 were absolutely necessary and to discuss them in a
19 generic enough way that we wouldn't -- we hoped we
20 wouldn't have the transcript reveal confidential
21 information. But given the state of what this issue
22 we're talking about, I don't know if there's any
23 discussion that can be made about some of this
24 material with the parties in the room that Mr. Harris
25 is concerned about. We have exhibits. We have

1 questions that deal generally with what those exhibits
2 show, but even that generic, general type of a
3 question may not be -- it may cross the line in a
4 situation where all the parties were allowed to stay
5 in the room and we were talking about this there
6 would be an issue, so I can go back and try to rework
7 it again, but my guess is that at 1:30 when Mr.
8 Torgerson takes the stand we're going to be
9 interpreting this need to know provision, and that may
10 come up again during the hearing.

11 JUDGE SCHAEER: Well, as I've indicated, the
12 Commission, even absent the need to know issue,
13 Commission prefers to not have to have confidential
14 information discussed in such a way that we have to
15 clear the hearing room, seal a portion of the
16 transcript and make that portion of what's going on
17 confidential, so we always encourage parties to do
18 what it sounds like you have been doing and to -- to
19 the extent possible not get into this kind of detail
20 on the record.

21 MR. CEDARBAUM: And I think -- we've made
22 that attempt and will continue to do so, but I don't
23 think my cross-examination should be limited, once
24 I've made that effort, to have it limited to where I
25 can't get into these areas. I don't know if the

1 question is going to raise the red flag or not no
2 matter how general I make it. I guess I will wait for
3 Mr. Harris or Mr. Van Nostrand to instruct the witness
4 not to answer, but I can't do any better than that.

5 JUDGE SCHAEER: Well, I think what we're
6 going to have to do is wait until the issue arises to
7 see whether -- if we're faced with the decision of
8 whether or not we're going to have to clear the
9 hearing room and go into confidential mode on our
10 operations then I think at that point we can have a
11 discussion that will include who should be allowed to
12 remain in the room during that period of time. I hope
13 we don't get to that. I hope we can -- you need to
14 get together over the lunch hour and work this out
15 so that we can move forward in open public hearing,
16 but if we do get to that, I don't think that there's
17 any benefit from me making a ruling now on who is
18 going to have to leave the room. I think at that
19 point it's something that we will discuss with the
20 commissioners before a decision is made. Is there
21 anyone else who wanted to comment?

22 MS. RICHARDSON: If I might just clarify
23 before we leave this topic, I appreciate the concerns
24 that applicants have with respect to the proprietary
25 nature of some of their information, but I am also

1 mindful of the statement in the fourth supplemental
2 order in this proceeding where Your Honor is
3 clarifying my understanding, at any rate, of what was
4 meant by the signing of the confidentiality agreement
5 by counsel for parties to this proceeding, and what I
6 perceive from this dialogue that's occurred is that --
7 and I hope I'm wrong, but I'm hearing that there is an
8 underlying assumption that counsel for parties will be
9 among those excluded if a confidential issue comes up
10 notwithstanding the fact they may have entered into
11 the confidential -- the protective order in this
12 matter that was described in the fourth supplemental
13 order. Am I mistaken, I hope?

14 JUDGE SCHAEER: I think you are mistaken. I
15 am not ruling on that now. I've been asked to say
16 that they will be required to leave, and I am saying
17 that I hope that issue doesn't arise and if it does
18 it's something that I think is going to need to be
19 taken up at that point and the commissioners are going
20 to need to be included in that discussion before we
21 reach any kind of a decision that would reach to the
22 point of excluding counsel. That's not something I am
23 willing to say should happen at this point.

24 MS. RICHARDSON: Okay, thank you.

25 MR. ELLSWORTH: I have a question that may

1 relate to the first motion that you first discussed.
2 One of the problems we're having is we don't know
3 what's been marked confidential. Like a number of
4 parties, we put out an all-encompassing request for
5 other parties' data requests. Subsequently we went
6 back and cut that down substantially, and we're not
7 getting responses to most of our requests, but I don't
8 know what we've asked for that's confidential. Now
9 that we have this nonsharing order in place, I think
10 it would be very useful to know what data requests to
11 the various parties have been labeled confidential by
12 the companies so that if we in talking to the parties
13 there's not inadvertent disclosure somehow, and I
14 don't know how we might want to handle that.

15 JUDGE SCHAEER: I'm hearing you say that you
16 have sent requests to the joint applicants saying
17 send us copies of the other parties' data requests.

18 MR. ELLSWORTH: At one point there were
19 about 300 data requests outstanding from all the
20 various parties. We went through those 300 and asked
21 specifically for 50 or 60 of them that we thought were
22 within the scope of our intervention. Some of those
23 the company may have considered confidential, but we
24 don't know which of the ones we haven't gotten
25 responses to are being withheld because they are

1 confidential or which ones we are just not getting
2 that aren't confidential. If we have a data request
3 that hasn't been marked confidential we can go to
4 any party and see if we can look at it to see if
5 it contains confidential information or not, but there
6 could be some inadvertent violation of your order
7 about the sharing, and it would be nice if there were
8 some sort of master list that the companies could say
9 we marked public counsel's requests so-and-so as
10 confidential so everybody knows that those are subject
11 to your order, and if we want them we have to go
12 directly to the company to get them.

13 JUDGE SCHAER: Do you have such a list?

14 MR. HARRIS: We will provide that list. I
15 don't know if we have one generated now but we can
16 generate one quickly.

17 MR. ELLSWORTH: That would be very helpful.

18 JUDGE SCHAER: So you will get that to
19 every party by noon on Friday with your other
20 information.

21 MR. HARRIS: Sure.

22 JUDGE SCHAER: Are there any other
23 preliminary matters that need to be taken up before we
24 start the hearing this afternoon?

25 MS. RICHARDSON: You had asked us to come

1 prepared to tell you with respect to the time
2 estimates of various witness.

3 JUDGE SCHAEER: This morning before you
4 leave this room, any party who hasn't done so, please
5 write down your time estimates for witnesses and leave
6 those with me so that I can compile them onto a master
7 grid before we start this afternoon.

8 MR. MERKEL: Is this the last opportunity
9 to indicate that you wish to cross-examine a witness
10 or can a request be made at a later time?

11 JUDGE SCHAEER: A request can be made at a
12 later time. What we're trying to do at this point is
13 just get some sense of how many -- how much time we
14 have, how many witnesses, see how we're doing with the
15 amount of hearing time that we have available, and
16 have some sense of how our schedule is going to
17 proceed. If you want to put in a place saver of ten
18 minutes on something that you're not sure about and
19 then later tell me you have no questions, that's
20 greeted with a smile rather than a frown, so feel free
21 to do that as well.

22 MR. PATTON: You're not going to hold
23 people to their time estimates?

24 JUDGE SCHAEER: If you start to go way over
25 your time estimate we get very grumpy city see.

1 MR. PATTON: So when you say (inaudible)
2 the purpose is to stay within the time estimate?

3 JUDGE SCHAEER: Be as honest as you can
4 about it. Don't tell me 15 minutes and go for three
5 hours. You know what happens when you raise
6 expectations and then dash them. That's when you have
7 revolutions, other bad things in world history.

8 Is there anything else then that we need to
9 take up this morning? If not we're going to go off
10 the record and we'll reconvene at 1:30 in the
11 Commission's hearing room across the street. Please
12 don't leave without giving me your estimates. Thank
13 you.

14 (Hearing adjourned at 11:05 a.m.)

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