

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET NO. UE-031725
TRANSPORTATION COMMISSION)	
)	ORDER NO. 02
Complainant,)	
)	
v.)	PROTECTIVE ORDER WITH
)	"HIGHLY CONFIDENTIAL"
PUGET SOUND ENERGY, INC.)	PROVISIONS
)	
Respondent.)	
)	
.....)	

1 The Commission finds, in response to a motion filed by PSE and the Commission’s evaluation of the circumstances of this proceeding, that a protective order to govern disclosure of proprietary and confidential information is necessary in this proceeding. The Commission enters this order with the understanding that it will provide the parties an opportunity to comment on the protective order, and will carefully consider any arguments that may be presented for and against requests to modify the order. The Commission may also modify the order on its own motion, based on the needs of the parties and the proceeding, after opportunity for parties to comment. The Commission 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.

- c. The Commission finds that it is necessary to create a separate designation and a higher order of protection for certain 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, and it is based on a credible prima facie presentation that those documents present an exceptionally high degree of danger to the interests that are protected in RCW 80.04.095.
- d. The Commission finds that the short time available for completion of this docket and the consequent immediate need for parties to gain access to relevant information render the immediate entry of this order in the public interest, recognizing that parties may comment upon and propose changes when party status is granted.

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

ORDER

A. General Provisions

3 **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 pre-filed testimony, exhibits, briefs, and all other documents filed with the Commission, and provide these "confidential deletions" in complete versions of the documents, 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.

4 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. UE-031725.”** 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 yellow or buff-colored paper with references to where Confidential Information is redacted in the original document.

5 **Confidential and Redacted Versions.** Parties must file **complete confidential and redacted versions of testimony, exhibits, and briefs with the Commission.** This includes electronic versions, and requires that **all diskettes** and **all electronic mail** specify whether the file is confidential, redacted, or public.

1. 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 yellow or buff-colored paper.
2. Parties 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. Parties **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. Parties 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. UE-031725” prominently displayed on the first page (i.e., the page that appears on the computer screen when the file is opened).

6 **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 or service of the party asserting confidentiality.

B. Disclosure of Confidential Information

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

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

- 9 **Access to Confidential Information.** Copies of documents designated confidential under this Order will be provided in the same manner as copies of documents not designated confidential, pursuant to WAC 480-09-480. Requests for special provisions for inspection, dissemination or use of confidential documents must be submitted to the presiding officer if not agreed by the parties. The parties must neither distribute copies of Confidential Information to, nor discuss the contents of confidential documents with, any person not bound by this Order. Persons to whom copies of documents are provided pursuant to this Order warrant by signing the confidentiality agreement that they will exercise all reasonable diligence to maintain the documents consistent with the claim of confidentiality.

C. Highly Confidential Information

10 **Designation and Disclosure of Highly Confidential Information.** 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. Parties to this proceeding 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 “Highly Confidential” and such documents or information will be disclosed only in accordance with the provisions of this Section.

11 Parties must scrutinize carefully responsive documents and information and limit the amount they designate as Highly Confidential Information to only information that truly might impose a serious business risk if disseminated without the heightened protections provided in this Section. The first page and individual pages of a document determined in good faith to include Highly Confidential Information must be marked by a stamp that reads: **“HIGHLY CONFIDENTIAL PER PROTECTIVE ORDER IN WUTC DOCKET NO. UE-031725.”** Placing a “Highly Confidential” stamp on the first page of a document indicates only that one or more pages contains Highly Confidential Information and will not serve to protect the entire contents of a multipage document. Each page that contains Highly Confidential Information must be marked separately to indicate where Highly Confidential Information is redacted. The unredacted versions of each page containing Highly Confidential Information, and provided under seal, also must be marked with the “Highly Confidential . . .” stamp and should be submitted on light blue paper.

12 Parties other than Public Counsel and Staff who seek access to or disclosure of Highly Confidential documents or information must designate one outside counsel and no more than one outside consultant, legal or otherwise, to receive

and review materials marked “Highly Confidential . . .” In addition to executing the appropriate Agreement required by this Protective Order for “Confidential Information” each person designated as outside counsel or consultant for review of “Highly Confidential” documents or information must execute an affidavit, under oath, certifying that:

- a. They do not now, and will not for a period of three years, involve themselves in competitive decision making, with respect to which the documents or information may be relevant, 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, including this Section of the Protective Order.

13 Any party may object in writing to the designation of any individual counsel or consultant as a person who may review Highly Confidential documents or information. Any such objection must demonstrate good cause, supported by affidavit, to exclude the challenged counsel or consultant from the review of Highly Confidential documents or information. Written response to any objection must be filed with the Commission within five days after receipt of the objection. If, after receiving a written response to a party’s objection, the objecting party still objects to disclosure of the Highly Confidential Information to the challenged individual, the Commission shall determine whether the Highly Confidential Information must be disclosed to the challenged individual.

14 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,

EXCEPT FOR USE DURING HEARING AND THEN SUCH COPIES SHALL ALSO BE SUBJECT TO THE PROVISIONS OF THIS ORDER. 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 include or reflect Highly Confidential Information must be maintained in the secure location until filed with the Commission or 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 officer following consultation with the parties.

- 15 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 officer(s).
- 16 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.
- 17 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.

D. Use of Confidential Information in This Proceeding

18 Unless specifically addressed in this Section, Part D of this order applies to
Confidential Information and to Highly Confidential Information.

19 **Reference to Confidential Information.** If counsel or persons afforded access to
Confidential Information refer to such information orally or in writing during
any part of this proceeding, any public reference (i.e., any reference that will not
be placed in a sealed portion of the record) shall be solely by title, exhibit
reference, or some other description that will not disclose the substantive
Confidential Information contained in the document. Any other written
reference shall be segregated and marked "Confidential Information," and access
to it shall be given solely to persons who are authorized access to the information
under this Order. References to the Confidential Information must be withheld
from inspection by any person not bound by the terms of this Order.

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

21 **Protected Use by Agreement.** Any party who intends to use any Confidential
Information in the course of this proceeding, including but not limited to
testimony to be filed by the party, exhibits, direct and cross-examination of
witnesses, rebuttal testimony, or a proffer of evidence, shall give reasonable
notice of such intent to all parties and to the presiding officer, and attempt in
good faith to reach an agreement to use the Confidential Information in a manner
which will protect its trade secret, proprietary, or other confidential nature. The

parties shall consider such methods as: (1) use of clearly edited versions of confidential documents, (2) characterizations of data rather than disclosure of substantive data, and (3) 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.

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

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

24 **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. The burden of proof to show that such information is properly classified as confidential is on the party asserting confidentiality. Pending determination, the assertedly Confidential Information shall be treated in all respects as protected under the terms of this Order.

25 The presiding officer may challenge a party's assertion of confidentiality by notice to all parties.

26 If the presiding officer determines the challenged information is not entitled to protection under this Order, the information continues to be protected under this Order for ten days thereafter to enable the producing party to seek Commission

or judicial review of the determination, including a stay of the decision's effect pending further review.

- 27 **Admission Of Confidential Information Under Seal.** The portions of the record of this proceeding containing Confidential Information will be sealed for all purposes, including administrative and judicial review, and must not be examined by any person except under conditions of this Order, unless such Confidential Information is released from the restrictions of this Order, either through the agreement of the parties or pursuant to a lawful order of the Commission or of a court having jurisdiction to do so.
- 28 **Return of Confidential Information.** Within thirty (30) days after the conclusion of this proceeding, including any administrative or judicial review, every person who possesses any Confidential Information (including personal notes that make substantive reference to Confidential Information and transcripts of any depositions to which a claim of confidentiality is made), must return all Confidential Information to the party that produced it, or at the producing party's election, must certify in writing that all copies and substantive references to Confidential Information in notes have been destroyed. These provisions apply to all copies of exhibits that contain Confidential Information and for that reason were admitted under seal. The only exceptions are that exhibits may be preserved by counsel as counsel records, and a complete record, including Confidential Information, will be preserved by the Secretary of the Commission as part of the Agency's official records.
- 29 **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 for at least ten days following notice, to permit the party that provided the 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.

30 **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.

31 **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 or Highly Confidential Information may subject such party or person to liability for damages and shall subject such party to penalties as generally provided by law, including, but not limited to, the provisions of RCW 80.04.380-.405

DATED at Olympia, Washington, and effective this 29th day of October 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

EXHIBIT A (ATTORNEY AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET NO. UE-031725
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as attorney in
this proceeding for _____ (party
to this proceeding) agree to comply with and be bound by the Protective Order
entered by the Washington Utilities and Transportation Commission in Docket
No. UE-031725, and acknowledge that I have reviewed the Protective Order and
fully understand its terms and conditions.

Signature

Date

Address

EXHIBIT B (EXPERT AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET NO. UE-031725
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as expert witness, consultant, or advisor in this proceeding for _____ (a party to this proceeding) hereby agree to comply with and be bound by the Protective Order entered by the Washington Utilities and Transportation Commission in Docket No. UE-031725 and acknowledge that I have reviewed the Protective Order and fully understand its terms and conditions.

Signature

Date

Employer

Permanent Address

Position and Responsibilities

* * *

The following portion is to be completed by the responding party and filed with the Commission within 10 days of receipt. Failure to do so will constitute a waiver and the above-named person will be deemed an expert, consultant, or advisor having access to Confidential Information under the terms and conditions of the protective order.

_____ No objection.

_____ Objection. The responding party objects to the above-named expert, consultant, or advisor having access to Confidential Information. The objecting party shall file a motion setting forth the basis for objection and asking exclusion of the expert, consultant, or advisor from access to Confidential Information.

Signature

Date

EXHIBIT C (HIGHLY CONFIDENTIAL INFORMATION AGREEMENT)

AGREEMENT CONCERNING HIGHLY CONFIDENTIAL INFORMATION
IN DOCKET NO. UE-031725
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as

- In-house attorney
- In-house expert
- Outside counsel
- Outside expert
- Small company employee or in-house expert

in this proceeding for _____ (a party to this proceeding) hereby agree to comply with and be bound by the Protective Order entered by the Washington Utilities and Transportation Commission in Docket No. UE-031725 and acknowledge that I have reviewed the Protective Order and fully understand its terms and conditions.

Signature

Date

Employer

Permanent Address
Responsibilities

Position and

* * *

The following portion is to be completed by the responding party and filed with the Commission within 10 days of receipt. Failure to do so will constitute a waiver and the above-named person will be deemed a person having access to Highly Confidential Information under the terms and conditions of the protective order.

_____ No objection.

_____ Objection. The responding party objects to the above-named person having access to Highly Confidential Information. The objecting party shall file a motion with the Commission, supported by affidavit, setting forth the basis for objection and asking exclusion of the person from access to Highly Confidential Information.

Signature

Date