

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

Docket No. _____

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

1. Puget Sound Energy, Inc. ("PSE" or "the Company") files this Motion for Amended Protective Order with Highly Confidential Provisions in conjunction with its Power Cost Only Rate Case ("PCORC") Filing dated June 7, 2005. PSE's representatives for purposes of this proceeding are:

Karl R. Karzmar
Director, Regulatory Relations
Puget Sound Energy, Inc.
P.O. Box 97034
Bellevue, WA 98009-9734
Email: karl.karzmar@pse.com
Ph: (425) 456-2797
Fax: (425) 462-3119

Kirstin S. Dodge, WSBA #22039
Jason Kuzma, WSBA #31830
Perkins Coie LLP
10885 NE Fourth Street, Suite 700
Bellevue, WA 98004-5579
Email: kdodge@perkinscoie.com
jkuzma@perkinscoie.com
Ph: (425) 635-1400
Fax: (425) 635-2400
Attorneys for Puget Sound Energy, Inc.

PSE'S MOTION FOR HIGHLY
CONFIDENTIAL PROTECTIVE ORDER

1

[BA051540.001]

Perkins Coie LLP
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: (425) 635-1400
Fax: (425) 635-2400

I. RELIEF REQUESTED

2. PSE respectfully requests through this motion that the Commission issue an amended standard protective order that includes the following "highly confidential" provisions:
- The Company will be permitted to designate information as "highly confidential" in its testimony, exhibits, responses to data requests, and briefing in this proceeding.
 - Only the Commission Staff and Public Counsel will have access to such "highly confidential" information.
 - Any further release of "highly confidential" information to experts for Commission Staff or Public Counsel, or to any other parties who intervene in the June 7, 2005 PCORC Filing proceeding, will be subject to a showing that such persons or entities are not current or potential owners or developers of energy resources or consultants or advisors to such owners or developers; and
 - For all persons or parties having access to "highly confidential" information, copying and handling of such information shall be limited in order to reduce the risk of inadvertent disclosure of that information.
3. The Company is submitting as Exhibit A to this motion a proposed form of amended protective order with highly confidential provisions.

II. STATEMENT OF FACTS

4. On June 7, 2005, the Company filed proposed revisions to its Power Cost Rate, Schedule 95, to reflect increases in the Company's overall normalized power supply costs, along with prefiled direct testimony and exhibits in support of its proposed revisions. The Company marked information contained on a number of pages of these testimonies and exhibits "confidential" or "highly confidential".
5. The Commission's standard form of protective order should be sufficient to protect the materials in PSE's filing that have been marked "confidential." Such materials include information about the Company's short-term electric portfolio management and strategies. Public release of

such materials is not appropriate, as they should not be viewed by persons or entities engaged in wholesale energy market trading. However, it is not anticipated that any entities that should not see such materials will intervene in this PCORC proceeding. Moreover, the Commission's standard protective order prohibits the use of such information outside the scope of a particular proceeding.

6. By contrast, the material that PSE has marked "highly confidential" requires enhanced protections from disclosure. As detailed in the Declaration of Eric M. Markell In Support of PSE's Motion for Amended Protective Order with Highly Confidential Provisions, submitted with this motion, the information that PSE has marked "highly confidential" is highly sensitive commercial information that was provided to the Company by third parties that participated in PSE's recent competitive bidding process under WAC Chapter 480-107. The Company's confidentiality agreements with third parties that provided such information to the Company, which were approved by the Commission as part of PSE's Requests for Proposals in Docket No. UE-031353, require the Company to seek a highly confidential protective order to protect such information.

7. The Company has also designated as "highly confidential" information that reveals sensitive PSE analyses or negotiating strategies with respect to ongoing resource acquisitions and/or negotiations or related litigation.

8. Such materials should not be viewed at all by persons involved in development of energy projects or resources, or their consultants or advisers. There is a highly significant risk of competitive harm to PSE and/or the project owners and developers that submitted their

commercially sensitive information to PSE if parties who are competitors or potential competitors of each other, or who are counterparties or potential counterparties to PSE with respect to such transactions, are able to access the information PSE has designated "highly confidential" merely by intervening in this PCORC proceeding.

9. The "highly confidential" documents that the Company filed and delivered to counsel for Commission Staff and Public Counsel on June 7, 2005, are protected from any further disclosure by the Commission or the Office of the Attorney General pursuant to RCW 80.04.095 and WAC 480-07-160. However, a protective order with "highly confidential" provisions should be entered in this proceeding as soon as possible in order to permit appropriate review of the materials by experts for the Commission Staff and/or Public Counsel, as well as by any intervenors that are not involved in ownership or development of energy resources.

III. STATEMENT OF ISSUES

10. This Motion for Amended Protective Order with Highly Confidential Provisions presents the following issues:

- Should the Commission enter a protective order that protects commercially sensitive information submitted to PSE by project owners or developers from disclosure or dissemination to current or potential owners or developers of energy resources who are competitors or potential competitors of each other? and
- Should the Commission enter a protective order that protects PSE's sensitive negotiating strategies and analyses regarding power resources from disclosure or dissemination to current or potential owners or developers of energy resources who are competitors or potential competitors of each other, or who are current or potential counterparties to transactions with PSE?

IV. EVIDENCE AND AUTHORITY RELIED UPON

11. In support of the relief requested in this motion, the Company relies upon the Declaration of Eric M. Markell In Support of PSE's Motion for Amended Protective Order with Highly Confidential Provisions, which has been submitted with this motion. Mr. Markell's declaration describes the information that PSE seeks to protect with the "highly confidential" designation and the harms that would result from disclosure of such information.
12. The Company further relies on the prefiled direct testimonies of its witnesses in this PCORC Filing that contain materials marked "highly confidential." These testimonies and exhibits explicitly show the content and context of information that the Company seeks to protect with this motion.
13. Authority for the Company's requested relief is found in WAC 480-07-423(1), which provides for entry of a protective order with "highly confidential" provisions to protect information if the lack of enhanced restrictions on access to such information "imposes a highly significant risk of competitive harm." WAC 480-07-423(1)(b).
14. Washington law generally confirms and respects the type of heightened protection made available in WAC 480-07-423(1)(b). The public policy of this state is to provide strong protection to competitively-sensitive information. *See* RCW 4.24.601 (Legislature declared that protection of confidential commercial information "promotes business activity and prevents unfair competition"; it is consistent with the State's public policy that the "confidentiality of such information be protected and its unnecessary disclosure be prevented"). This policy is reflected in other statutes as well, including the Uniform Trade Secrets Act, RCW 19.108 *et seq.* ("the Act"), which provides a civil cause of action for misappropriation of trade secrets. The remedies

provided in the Act, including attorneys' fees and exemplary damages, reflect the strength of the Legislature's commitment to protecting confidential information. *See* RCW 19.108.020-040; *see also* RCW 80.04.095 (confidential marketing, cost, and financial information is not subject to public inspection).

15. There is ample Commission precedent for the entry of a protective order with a "highly confidential" designation, including the protective order the Commission entered in PSE's 2003 PCORC proceeding. *See WUTC v. PSE*, Docket No. UE-031725, Order No. 02 (Oct. 29, 2003). *See also Application of U S WEST, Inc. and Qwest Communications International, Inc.*, Docket No. UT-991358, Sixth Supp. Order, at 2-4; *WUTC v. Olympic Pipe Line Co.*, Docket No. TO-011472, Seventh Supp. Order, at 2-4; *Air Liquide America Corp. et al. v. Puget Sound Energy, Inc.*, Docket No. UE-001952, Third Supp. Order, at 2-5. Generally, the Commission has amended its standard protective order to allow for the designation of highly confidential documents under the following circumstances: (1) the parties to the docket are competitors or potential competitors; (2) the information relevant to the case may be sensitive competitive information that would be of value to competitors if released; (3) a disclosing party may suffer harm if forced to disclose certain information without heightened protection; and (4) the entry of the protective order will facilitate discovery.

16. These considerations are reflected in the "highly confidential" protective orders themselves, which state that "parties to this proceeding are competitors or potential competitors"; that disclosure of highly confidential information will impose "a significant risk of competitive harm to the disclosing party"; and that parties should designate as highly confidential only information that "truly might impose a serious business risk if disseminated" without heightened

protection. *See* Docket No. UT-991358 (6th Supp. Order at 2); Docket No. TO-011472 (7th Supp. Order at 2); Docket No. UE-001952 (3rd Supp. Order at 2).

17. The material PSE seeks to protect is precisely the type of information that is intended to be eligible for "highly confidential" protections in WAC 480-07-423(1)(b). Furthermore, as is evident from the prefiled direct testimonies submitted on June 7, 2005, the Company has gone to great lengths to minimize the amount of information designated "highly confidential." The Company anticipates proceeding in the same manner with respect to additional materials designated "highly confidential" in its responses to data requests, additional testimonies and exhibits, and in briefing in this proceeding.
18. The Company is not seeking to restrict access by Commission Staff or Public Counsel to "highly confidential" information beyond the protections contained in the Commission's standard protective order for "confidential" information. However, the Company believes that any external experts for Commission Staff and Public Counsel should be required to show that they are not involved in or providing advice to owners or developers of energy resources prior to being provided with access to the "highly confidential" information. *See* Exhibit A, § 14.
19. The Company asks that any intervenors in this proceeding, including their principals, attorneys and experts, be required to make the same showing prior to being permitted access to the "highly confidential" information. Unlike prior "Highly Confidential" protective orders, the Company is not seeking to limit at the outset the number of counsel or consultants that a party may wish to have view the Highly Confidential Information – as long as all such persons make the requisite certification that they are not involved in activities for which such information might provide an inappropriate competitive advantage. *See* Exhibit A, § 14.

20. Finally, the Company requests that copying and access to all "highly confidential" information be restricted as set forth in PSE's proposed order to reduce the risk of inadvertent disclosure of "highly confidential" information. *See* Exhibit A, § 16. Such restrictions are consistent with the restrictions that were imposed with respect to "highly confidential" information in PSE's last general rate case, Docket Nos. UG-040640 et al. *See* Docket No. UG-040640, Order No. 04 (May 20, 2004). In particular, they recognize that staff for authorized counsel or consultants will need to have access to confidential information for purposes of case preparation. *See* Exhibit A, § 17.

V. CONCLUSION

21. For the reasons set forth above, PSE respectfully requests that the Commission enter an amended standard protective order in this case with enhanced protection of highly confidential information, in the form provided as Exhibit A to this motion.

DATED this 7th day of June, 2005.

Respectfully submitted,

PERKINS COIE LLP

By 

Kirstin S. Dodge, WSBA #22039

Jason Kuzma, WSBA #31830

Attorneys for Puget Sound Energy, Inc.