

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES &
TRANSPORTATION
COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.

Respondent.

DOCKET UE-072300

DOCKET UG-072301
(consolidated)

AMENDED

MOTION CHALLENGING
CONFIDENTIALITY OF PSE'S
RESPONSE TO PUBLIC COUNSEL
DATA REQUEST NO. 131

I. MOTION

The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) files this amended motion pursuant to WAC 480-07-160(4) and ¶ 28 of the Protective Order granted in this case.¹ Public Counsel now challenges the confidentiality of portions of Puget Sound Energy, Inc.'s (PSE) Response to Public Counsel Data Request No. 131.² This response consists of a report, prepared by KEMA Inc., evaluating the cost benefit of various storm-preparedness systems, specifically Outage Management and Geospatial Information Systems (OMS/GIS).

Public Counsel has consulted with counsel for PSE. PSE has stated that it is unwilling to remove the designation of any of the confidential information in the KEMA Report.

¹ *WUTC v. Puget Sound Energy*, Docket No. UE-072300/UG-072301, Order 02 (Protective Order with "Highly Confidential" Provisions) (hereinafter Protective Order). Paragraph 28 of the Order states in part:

[a]ny party may challenge another party's contention that information should be entitled to protection under this Order. The presiding officer will conduct an *in camera* hearing to determine whether the information shall be accorded protection under the terms of this Order. The party asserting confidentiality bears the burden of proving that confidential designation is proper.

² PSE's First Revised Response to Public Counsel Data Request No. 131 (dated April 10, 2008) is attached to this motion as CONFIDENTIAL Attachment A.

Accordingly, Public Counsel respectfully requests that the Commission inspect this information *in camera*, and hereby moves for an order declaring that the cost benefit information contained in the KEMA Report listed below is not entitled to confidential treatment.

II. MEMORANDUM

A. Background

On December 3, 2007, PSE filed a general rate case with the Washington Utilities and Transportation Commission (Commission).³ Additionally, PSE asked for, and was granted, a protective order with “highly confidential” provisions.⁴

On April 10, 2008, in response to Public Counsel Data Request No. 131, PSE provided a copy of a report prepared by KEMA.⁵ The Report contains an assessment of PSE’s current Outage Management and Geospatial Information Systems (OMS/GIS), recommendations for future improvements of these systems, and general cost/benefit analyses including conclusions on the overall potential benefits. Citing the Protective Order, PSE designated portions of the Report confidential.⁶

Public Counsel has conferred with PSE regarding these designations. Through these discussions, Public Counsel gained a better understanding of the Company’s need to keep certain specific cost information confidential and thus limits this challenge to general cost assumptions and information for which the public has a legitimate need, i.e. the information related to the overall potential benefits of OMS/GIS programs.

³ The Commission suspended the filing on December 12, 2007, and set the dockets for hearing. *See* Order 03 (Prehearing Conference Order), ¶2.

⁴ Protective Order, ¶1.

⁵ *See* PSE’s First Revised Response to Public Counsel Data Request No. 131 (dated April 10, 2008) CONFIDENTIAL Attachment A.

⁶ *Id.*

The information Public Counsel seeks to have the confidential designation lifted from is as follows:⁷

Page	Description/Title
1-6	Net Present Value (NPV) of OMS
1-5	Figure 1-1: OMS Cost and Benefit Trends
1-9	Figure 1-5: GIS Cost and Benefit Trends
1-9	NPV of OMS/GIS
1-9	Figure 1-6: Net Business Case of the Proposed Program
9-1	Figure 9-1: OMS Costs and Benefits
9-2	Figure 9-2: OMS Cost Benefit Analysis Summary
9-3	Figure 9-4: GIS Costs and Benefits
9-5	Figure 9-6: OMS/GIS Project Business Case Summary

B. Applicable Legal Standard

It is Washington’s declared public policy that government is conducted in public,⁸ adjudications are held openly,⁹ and records of public agencies are publicly accessible.¹⁰ These policies are subject only to specific, carefully drawn exceptions.¹¹ In limited circumstances, the Commission may issue a protective order, allowing confidential treatment of filed, commercial information.¹²

⁷ Note that PSE did *not* designate any portion of Figure 9-5 (GIS Cost Benefit Analysis Summary) as confidential, although it did so designate portions of its *OMS* counterpart, Figure 9-2. *See* PSE’s First Revised Response to Public Counsel Data Request No. 131 (dated April 10, 2008) CONFIDENTIAL Attachment A. (For the record, Public Counsel believes that Figure 9-5 should remain non-confidential.) This error suggests that confidentiality of this type of information is not crucial.

⁸ RCW 42.30.

⁹ Const. art. I, § 5.

¹⁰ RCW 42.56.040 *et seq.* The Commission has recognized these public policies. *See e.g. In re the Application of U.S. West, and Qwest Communications Int’l, For an Order Disclaiming Jurisdiction or, in the Alternative, Approving the U.S. West-Qwest Communications Int’l Merger*, Docket No. UT-991358, Eighth Supplemental Order, ¶¶78-79 (hereinafter *U.S. West Order*); and, *In the Matter of the Application of Quest Corporation*, Docket No. UT-021120, Sixth Supplemental Order, ¶14.

¹¹ Similar principles apply in state civil court proceedings. In *Rufer v. Abbott Laboratories*, the Washington State Supreme Court, sitting en banc, held that “any records that were filed with the court in anticipation of a court decision (dispositive or not) should be sealed or continue to be sealed only when the court determines . . . that there is a compelling interest which overrides the public’s right to the open administration of justice.” 154 Wn.2d 530, 549 (2005).

¹² WAC 480-07-420.

The Protective Order defines confidential information as “information that truly might compromise their ability to compete fairly or that otherwise might impose a business risk if disseminated.”¹³ WAC 480-07-165(2) further defines “confidential information” as information that meets any of the following criteria:

- a. Information protected from inspection or copying under an exemption from disclosure requirements under the Public Records Act, chapter 42.17 RCW.
- b. Information protected under the terms of a protective order in an adjudicative proceeding.
- c. Valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information, as provided in RCW 80.04.095.

RCW 80.04.095 provides that documents, otherwise subject to disclosure under the Public Disclosure Act,¹⁴ may be designated as confidential if they “contain valuable commercial information, including trade secrets or confidential marketing, cost, or financial information” “Cost or financial information” has been further defined as follows: (1) specific numerical data, comprising commercially valuable business information, disclosure of which will create a true business risk,¹⁵ or (2) calculations based on such data, or analyses performed by or on behalf of the company that might have current or future benefit to competitors or give an advantage to competitors, that might affect an as-yet-incomplete transaction, or that might affect future transactions.¹⁶

¹³ Protective Order, ¶4.

¹⁴ RCW 42.17.

¹⁵ See *U.S. West Order*, ¶¶12, 77-80 (rejecting U.S. West’s argument that disclosure of settlement agreements entered into with other phone companies who had intervened in the case would place them at a competitive disadvantage). See also, *In the Matter of the Application of Qwest Corporation Regarding the Sale and Transfer of Qwest Dex to Dex Holdings, LLC, a non-affiliate*, Docket No. UT-021120, Sixth Supplemental Order (hereinafter *Qwest Sale*).

¹⁶ See *Qwest Sale*, ¶¶12, 17. See also, *US West Communications, Inc. v. Office of Consumer Advocate*, 498 N.W. 2d 711 (1993).

The Commission generally discourages confidential designation of information.¹⁷ Thus, parties asserting a designation are required to scrutinize potentially confidential material, and strictly limit what they designate as confidential.¹⁸ If challenged, the party asserting confidentiality bears the burden of demonstrating that the confidential designation is proper.¹⁹ Moreover, the Commission may deny confidential designation where the public has a “legitimate need” for the information.²⁰ For example, the Commission has refused to allow confidential treatment of information that “concern[ed] matters that are of public import.”²¹

C. The Report’s Cost Benefit Analyses Are Not Entitled To Confidential Treatment Under the Standards Discussed Above

The sections of the Report discussing the overall benefit of potential OMS/GIS projects do not contain commercially sensitive cost information under the standards discussed above. KEMA prepared this report and calculated these numbers *not* for the purpose of providing estimates of specific costs associated with OMS/GIS implementation. Rather, what appears as “cost information” in the report is a series of assumptions comprising one step in a theoretical cost benefit analysis that, ultimately, reveals only the net benefit to PSE and its customers in investing in these systems. Any costs presented in these sections are limited to estimates and generally stated assumptions. For example, Figure 1-5 (GIS Cost and Benefit Trends) shows estimated fifteen-year trends for capital costs (in the hundreds of thousands) as compared to a line-graph illustrating the potential monetary benefits of GIS.²² Additionally, conclusions on the net benefits of OMS/GIS do not reveal commercially sensitive or proprietary information;

¹⁷ *U.S. West Order*, ¶75.

¹⁸ Protective Order, ¶4.

¹⁹ WAC 480-07-160(4). *See also, U.S. West Order*, ¶75.

²⁰ The Protective Order is meant only to prevent information from being available to “persons who have no legitimate need for such information.” *See Protective Order*, ¶1(b).

²¹ Docket No. UT-991358, Eighth Supplemental Order, ¶80.

²² PSE’s First Revised Response to Public Counsel Data Request No. 131 (dated April 10, 2008) CONFIDENTIAL Attachment A, p. 1-9.

the conclusions are presented as single dollar amounts illustrating the benefit to be derived over the next fifteen years.²³

PSE has expressed concerns that, if it were to solicit bids for OMS/GIS projects, bids from potential providers would gravitate to the level of cost outlined in the Report and thus put PSE at a disadvantage during negotiations. Public Counsel is mindful of this concern and thus, as discussed above, is not challenging the confidentiality of specific cost information. In light of the general nature of the information from which Public Counsel seeks to remove confidential designation, PSE's concern seems unwarranted. Potential providers would have to submit bids for specific costs and would have to perform their own, current evaluation of such costs. KEMA's estimates and assumptions of hypothetical overall costs are general, often for long time periods, and would have little bearing on specific program bids. Additionally, potential providers would still be competing against one another and would be aware that KEMA is not a potential provider.

D. Public policy requires that the KEMA Report be public.

The public has a "legitimate need" for access to the information contained in the KEMA report. Storm recovery is one of the major, if not the largest, issues in this case. PSE is asking to recover \$79.9 million from its ratepayers for damage related to the December 13, 2006 "Hanukkah Eve" windstorm over the next six years.²⁴ This amounts to \$13.3 million annually, or 7.4 percent of PSE's requested increase in annual revenue. However, PSE may only recover upon a showing that the costs were prudently incurred. KEMA's analysis of the potential cost

²³ *Id.*

²⁴ John H. Story Exhibit No. ____ (JHS-11), p. 11.31.

benefits of OMS/GIS is essential to determining whether these costs were prudent because it shows the costs and benefits of various storm-preparation options available to PSE. It is also critical to help the public evaluate whether PSE is adequately preparing for future storm events.

The extensive public attention garnered by this issue demonstrates its public importance. The “Hanukkah Eve” windstorm was one of the worst in recent history; 70 percent of PSE electric customers lost power and the storm has been blamed for 15 deaths.²⁵ The news media has reported substantially on the damage to PSE’s system, the company’s inadequate storm response and communications with the public, and the propriety of the Company’s request to recover storm damage costs from customers.²⁶ Moreover, PSE’s own customers have expressed concerns regarding PSE’s storm preparedness; the UTC Consumer Affairs Division has received approximately 10,000 written comments from PSE customers regarding this case, many of which mention storm preparation and damages.²⁷ As the Pacific Northwest looks toward another winter storm season, such concerns are only magnified by the secrecy shrouding the costs and benefits of OMS/GIS programs and can be addressed only if such data is publicly accessible.

²⁵ See Jack Broom, “Windstorm prompts PSE changes,” *Seattle Times*, December 14, 2007.

²⁶ See e.g., Sullivan, Jennifer. “New storm could prolong power woes.” *Seattle Times*, December 20, 2006; Tucker, Rob, “Big blow, big damage, big bills,” *The News Tribune*, Feb. 5, 2007; Pulkkinen, Levi and Case McNerthney, “Winter storms to leave costly Legacy: Utilities may raise rates to make up for extensive losses,” *Seattle Post-Intelligencer*, February 6, 2007.

²⁷ In an email to Public Counsel (dated April 2, 2008), one PSE customer wrote: “[w]hen we had that storm that did so much damage, I wondered why the utility companies had not been better prepared.” Another customer wrote (email to Public Counsel dated April 5, 2008): “If we always bail them out, where's their incentive to fix problems?”

III. CONCLUSION

For the foregoing reasons, Public Counsel respectfully requests issuance of an order stating that the specified portions of Confidential Attachment A to PSE's Response to Public Counsel Data Request No. 131 are not entitled to confidential designation.

DATED this 21st day of July, 2008.

ROBERT M. McKENNA
Attorney General

SARAH A. SHIFLEY
Assistant Attorney General
Public Counsel