

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

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION

Complainant,

v.

PUGET SOUND ENERGY, INC.

Respondent.

DOCKET NO. UE-050870

PUBLIC COUNSEL ANSWER IN  
OPPOSITION TO PSE MOTION  
FOR AMENDED PROTECTIVE  
ORDER WITH HIGHLY  
CONFIDENTIAL PROVISIONS

**I. INTRODUCTION**

1. Public Counsel opposes the form of protective order proposed by Puget Sound Energy (PSE). Public Counsel would agree to entry of an order containing the use restrictions agreed to between Public Counsel and PSE in last year's Power Cost Only Rate Case (2004 PCORC) proceeding, *WUTC v. PSE, UE-031725*, Order No. 05, and sees no purpose in revisiting that decision.

**II. ARGUMENT**

**A. The PSE Motion Unnecessarily Resurrects Protective Order Issues Resolved in the 2004 PCORC Docket.**

2. In the 2004 PCORC, Public Counsel and PSE vigorously debated in competing motions and legal memoranda the proper terms of a highly confidential protective order. In that case also PSE initially sought and received overly broad and vague restrictions similar to those proposed here. Ultimately, after objection, an agreement was reached on more carefully crafted terms, and in Order No. 05, the Commission adopted that agreement as an amendment to the protective order.

The use restriction adopted there required experts to state that:

They do not now, and will not for a period of three years, use highly confidential documents or information contained in highly confidential documents obtained in this docket, to advise, counsel, or consult on the design, development, marketing, pricing, sale or procurement, of any product, service, or energy generation facility, for any company or business organization that competes, or is actively considering competing, with the company or business organization producing the information. *WUTC v. PSE*, UE-031725, Order No. 05, ¶ 4.

It is important to note also that Public Counsel's agreement to the order language in the 2004 was a significant compromise. Due to their special roles, neither the Commission Staff, nor Public Counsel had previously been subject to the special restrictions otherwise imposed on outside experts. There was recognition that neither Staff nor Public Counsel represents the interests of competitors or potential competitors and their consultants were not subject to special affidavit or certification issues. This was known as the "Staff/Public Counsel carve-out" provision in the standard protective order language. *See e.g., In the Matter of the Petition of Qwest Corporation*, UT-030614, Order No. 12 (clarifying the Public Counsel could receive confidential information under the same "carve out" provision as Staff). By agreeing to the language in the 2004 PCORC order, Public Counsel allowed a modification of this position in the interests of compromise because the restriction was a reasonably crafted "use" restriction. Now PSE seeks to push the boundary further towards restricted access to information.

3. It is beyond the scope of this memorandum to detail the extensive history of the debates before the Commission on this issue in other proceedings. It is worth noting as a matter of context that there has been a constant increase in pressure from regulated companies for ever more extensive and burdensome restrictions on access to information by experts and consultants, including more recently those of Public Counsel and Staff, contrary to the strong public policy in favor of open and public governmental proceedings. Public Counsel is not willing to agree to any further erosion of that policy of openness by agreeing to PSE's proposed order.

**B. There Is No Substantive Difference Between The 2004 and 2005 PCORCs That Warrants Adoption of A More Expansive Protective Order.**

4. Apparently not content with that resolution, PSE is again asserting the need for overly broad restrictions in the protective order. The confidentiality issues at stake in this proceeding, however, are not substantively different from those presented in the 2004 PCORC docket. PSE argued then:

PSE made this request due to concerns about the potential disclosure of competitively-sensitive project information that PSE had obtained from over 30 power project owners and developers during competitive solicitations. Nearly all of the project owners/developers required PSE to sign confidentiality agreements as a precondition to receiving this information. Unauthorized release of such information without heightened protection in place could harm the competitive interests of the project owner/developers who provided this information to PSE, and could expose PSE to possible legal action by the project owner/developers (for breach of the confidentiality agreements). PSE Response to Public Counsel Objection to Order No. 03, UE-031725, p. 2.

The material which is to be protected here as 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.” PSE Motion, ¶ 6. PSE asserts “[t]here is a highly significant risk of competitive harm to PSE and/or the project owners or developers that submitted their commercially sensitive information to PSE[.]” from disclosure to competitors or potential competitors. PSE Motion, ¶ 4. This is essentially the same claim as that in the 2004 PCORC. There is no reason why these essentially identical interests cannot be protected by the agreed terms of the order in Docket UE-031725.

**C. PSE’s Proposed Language is Overly Broad and Vague.**

5. As a general proposition, any restrictions on the open and public nature of state regulatory proceedings should be carefully and narrowly tailored. If a heightened level of confidentiality is to be provided for some information in Commission proceedings, the preferred approach is for an order which states: (1) the information may only be provided to specified

persons; (2) that it will be handled in accordance with the order; and (3) the information may only be used for purposes of the instant proceeding.

6. PSE's proposed language here goes well beyond a clear "use restriction." Paragraph 14 (a) of the proposed order imposes a restriction even where there is only a possibility that information "*may* be relevant" or that the consultant may advise a company which "*potentially competes*." Paragraph 14 (b) is even broader and more vague. It bars any one who now or in the next three years provides consulting services to any owner or developer of natural gas or electric energy project or resources. This is effectively a total bar to any private sector, and even some public sector, employment for a consultant for a three year period.

7. In the 2004 PCORC proceeding, Public Counsel polled its consultants regarding such restrictions and reported the results to the Commission. In general, consultants who worked for both public and private entities raised concerns about the breadth of the restrictions and vagueness of the terminology. The restrictions were seen as more burdensome than those found in most jurisdictions. Public Counsel concluded it would be difficult to retain an expert witness willing to sign an agreement with this type of restriction. *See generally*, Public Counsel Objection to Order No. 03, Petition for Interlocutory Review, UE-031725, pp. 4-5. The fundamental practical problem here is the imposition of unworkable and unduly burdensome restrictions on experts and consultants and the resulting interference with the ability of Public Counsel and other intervenors to effectively participate in Commission proceedings. PSE has not cited a single instance of improper use or disclosure of confidential or highly confidential material by any expert, consultant, or counsel in any energy or telecommunication proceeding in Washington that would warrant the need for this type of broad restriction.

### III. CONCLUSION

8. For the foregoing reasons, Public Counsel respectfully requests that the Commission deny PSE's motion for a protective order, and instead enter an order inserting the use restriction from Order No. 05 in Docket No. UE-031725 into paragraph 14 of PSE's proposed order.

Dated this 21st day of June, 2005.

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