

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

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

Complainant,

v.

PUGET SOUND ENERGY, INC.

Respondent.

DOCKET NO. UE-031725

PUBLIC COUNSEL OBJECTION TO
ORDER NO 03; PETITION FOR
INTERLOCUTORY REVIEW

I. INTRODUCTION

Public Counsel, pursuant to WAC 480-09-460(2), files these objections to the Prehearing Conference Order (Order No. 03), entered on November 12, 2003, in this docket, and to certain provisions of the Protective Order (Order No. 02), entered October 29, 2003, affirmed by Order No. 03.

Public Counsel also seeks interlocutory review pursuant to WAC 480-09-760 (1)(b), on the grounds that, as set forth below, the terms of the highly confidential protective order substantially prejudice Public Counsel by impairing the office's ability to retain outside experts. This cannot be remedied after the case has concluded.

Public Counsel objects to the terms of the highly confidential protective order in this case because (1) other approaches are preferable and are in use by the Commission which provide adequate protection for highly confidential information; (2) by imposing the affidavit requirement on Public Counsel and Staff, the order departs from the Commission's prior interpretations of the "Staff/Public Counsel carve-out" creating uncertainty for parties; and (3) the affidavit requirement, as written, is unduly burdensome and will prevent Public Counsel from retaining outside experts knowledgeable in the field.

II. ARGUMENT

A. The Preferred Approach – Order with Use Restrictions per Docket UT-033044.

If a heightened level of confidentiality is to be provided for some information in Commission proceedings, Public Counsel believes that the preferred approach to protecting this information is to make clear in the order itself that (1) the information may only be provided to specified persons; (2) that it will be handled in accordance with the order, and (3) that it may only be used for purposes of the instant proceeding. Counsel and experts then sign a statement agreeing to provide by the terms of the order (typically the “Exhibit C” agreements). There is no need for an additional affidavit requirement of the type which Puget Sound Energy (PSE) has requested and received here and sought for the first time to apply to Public Counsel and Staff.

The Commission has adopted this very approach in the Protective Order in docket UT-033044, Order No. 02, entered October 21, 2003. No affidavit requirement was imposed on any expert. Experts were simply required to sign Exhibit C agreeing to abide by the terms of the order. The competitive information in that docket, and the number of participating competitors is arguably far more extensive than the sensitive data to be produced in this docket. Public Counsel submits that this is a workable alternative to the affidavit requirement here.

B. The Affidavit Requirement Has Not Previously Been Imposed on Staff or Public Counsel Due to Their Special Role in Commission Proceedings.

Public Counsel acknowledges that, in prior proceedings, the Commission has adopted highly confidential protective orders containing an affidavit requirement for outside experts, and other special requirements (limited numbers of outside counsel and experts). However, Public Counsel respectfully disagrees with the conclusion in Order No. 03 that these provisions have always been applicable to Staff and Public Counsel.

In the recent DEX proceeding, for example, when the virtually identical terms of the highly confidential protective order were in dispute, Public Counsel objected to the provisions and the Commission responded: “Public Counsel is unaffected by the terms of the amendment

[adding highly confidential provisions], yet asserts that it was substantially prejudiced by early entry of the amended order.”¹ Because the provisions did not apply, Public Counsel’s objections in that proceeding were referred to as “arguments of principle,” speaking up “for other parties in the proceeding whom it perceives may suffer ‘practical problems’ under the terms of the amendment.”²

Public Counsel also respectfully disagrees with Order No. 03’s reading of the procedural history of Docket UT-030614. In that case, Public Counsel expressly argued to the Commission that it should benefit from the “Staff/Public Counsel carve out” and be exempt from the highly confidential provisions “to the extent it imposes on Public Counsel requirements as to designation of outside counsel, experts, and administrative support ‘outside representation’ requirements *and affidavit requirements.*”³ The petition was granted in Order No. 12 in the docket. The fact that, as here, Public Counsel is not co-sponsoring a witness with another party, is separate from the question of how the order is applied once the “carve out” is made available to Public Counsel.

This “carve out” provision has recognized the role of Public Counsel as a statutory party, and a branch of the Attorney General’s office. The “carve out” also recognizes Staff’s unique role. Neither Staff nor Public Counsel represents competitors in Commission proceedings. Public Counsel is not arguing that its outside experts should be given access to the data with no restrictions. Public Counsel experts, as well as counsel and internal office staff, are bound by the terms of the protective orders to protect highly confidential data, to use it only for purposes of the proceeding, handling it strictly in accordance with the order provisions. This provides

¹ *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 UT-021120, Third Supplemental Order Amending Protective Order, ¶ 6. See also footnote one, explaining how for Public Counsel and Staff, confidential and highly confidential documents are treated the identically under the Protective Order.

² *Id.* ¶ 9.

³ Docket UT-030614, Public Counsel Petition for Reconsideration or Clarification of Order No. 08, p.1 (emphasis added) (see also discussion on p. 2 re exemption from the affidavit requirement as part of the “carve out”).

adequate protection. As a practical matter, the prior practice has, from the Public Counsel perspective, been equivalent to the “preferred approach” outlined above (or the UT 033044 approach), under which a written agreement by counsel and experts to abide by the restrictions in the order has been deemed adequate protection.

C. If Public Counsel and Staff Are Held To Be Subject To This Affidavit Requirement, These Provisions Are Unduly Burdensome and Should Be Modified.

Jim Lazar, Public Counsel’s current consultant in this case has advised the office that he is not willing to sign the Paragraph 12 affidavit. Although Mr. Lazar has signed and filed the “Confidential” information exhibit, unless our consultant has access to all the information, it may not be feasible to continue retaining him in this case.

Upon receipt of Order No. 03, Public Counsel provided the protective order and asked for comments from those outside consultants who have performed work for the office in recent years. Consultants who restrict their practices to public entities, such as consumer advocates and state commissions did not see that there was a direct effect on their work. A significant number have broader practices, however, which include consulting for private entities. These consultants raised concerns about the breadth of the restrictions in the affidavit and the vagueness of the terminology. We received thoughtful responses from consultants and firms from Boston, Washington D.C., Florida, California, and elsewhere with public and private clientele and extensive experience in other jurisdictions. As an example, a copy of a letter from Synapse Energy Economics, Inc., is attached. The letter makes several points echoed by the other responses we received:

- the consultants have not encountered a similar affidavit requirement elsewhere
- the language of the affidavit is too broad and undefined
- the three year time period of the restriction is too long

- consultants are comfortable signing protective agreements that limit use of the sensitive information to the particular docket but the affidavit language in this case is seen as burdensome and would pose a problem.

Based on these responses, it appears it will be difficult for Public Counsel to retain an outside expert willing to sign the affidavit in its current form.

Based on the comments received, in the event the Commission decides to impose the affidavit requirement on Staff and Public Counsel, Public Counsel suggests that modifications to the affidavit language could resolve the concerns raised. Public Counsel has initiated discussions with PSE and Staff about our objections. We will continue this discussion during the motion response period and may be able to present a mutually agreeable alternative approach to the Commission

RESPECTIFULLY SUBMITTED this 24th day of November, 2003.

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