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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

December 4, 2003

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36745.0029

Ms. Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

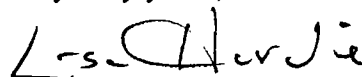
**Re: Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.
Docket No. UE-031725 (2003 Power Cost Only Rate Filing)**

Dear Ms. Washburn:

Enclosed please find the original and 20 Copies of Puget Sound Energy Inc.'s Response to Public Counsel Objection to Order No. 03 and Petition for Interlocutory Review. Please file the same and keep 19 copies, with an extra copy to be stamped and returned conformed.

Thank you again for your assistance in this matter. If you have any questions, please contact me at (206) 389-6142 or Lisa Hardie at (206) 389-4279.

Very truly yours,



Todd G. Glass

Lisa Hardie

Attorneys for Puget Sound Energy, Inc.

Cc: Service List Attached

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused to be served the foregoing via U.S. mail, postage prepaid to the following:

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Signed at Seattle, Washington this 4 day of December, 2003.

Lis D. Herli for
Todd G. Glass

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BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

Docket No. UE-031725

PUGET SOUND ENERGY, INC.'S
RESPONSE TO PUBLIC COUNSEL
OBJECTION TO ORDER NO. 03
AND PETITION FOR
INTERLOCUTORY REVIEW

In its Objection to Order No. 3 and Petition for Interlocutory Review (“Objection”), Public Counsel argues that its outside experts/consultants should not be required to sign the affidavit that outside experts/consultants for other parties must sign as a precondition to receiving access to highly confidential documents. On that basis, Public Counsel wants the Commission to modify the Protective Order (Order No. 2, ¶12) that it entered in this proceeding, which the presiding judge, after hearing Public Counsel’s arguments during the November 6, 2003 Prehearing Conference, subsequently found to be reasonable in Order No. 3, at ¶13.

Puget Sound Energy, Inc. (“PSE”) does not agree that the Protective Order should be modified. PSE sought the Protective Order to prevent the unrestricted disclosure of commercially-sensitive project information provided to PSE under confidentiality agreements. The Protective Order’s affidavit requirement does precisely that -- by imposing reasonable restrictions upon the parties and their outside consultants if they wish to review the commercially-sensitive materials. Public Counsel, however, wants to remove the affidavit requirement for its outside expert/consultants in order to accommodate their economic and other interests. But, removal of such a key provision would vitiate the very purpose of the highly

1 confidential provisions in the Protective Order. The Commission should decline Public
2 Counsel's invitation and retain the Protective Order in its current form.

3 **I. ARGUMENT**

4 **A. PSE Possesses a Vital Interest in Ensuring that the Parties and Their**
5 **Consultants Not Disclose Commercially-Sensitive Project Information.**

6 In its Motion for Protective Order dated October 24, 2003 ("Motion"), PSE
7 requested that the Commission include provisions that would govern the handling of
8 highly confidential information. PSE made this request due to concerns about the
9 potential disclosure of competitively-sensitive project information that PSE had
10 obtained from over 30 power project owners and developers during competitive
11 solicitations. Nearly all of the project owner/developers required PSE to sign
12 confidentiality agreements as a precondition to receiving this information.
13 Unauthorized release of such information without heightened protection in place could
14 harm the competitive interests of the project owner/developers who provided this
15 information to PSE, and could expose PSE to possible legal action by the project
16 owner/developers (for breach of the confidentiality agreements).¹

17 For these reasons, it is essential that individuals who receive sensitive project
18 information – including Public Counsel's outside experts/consultants – treat that
19 information as confidential to the maximum extent possible. PSE's interest on this
20 point is not one of mere "convenience" (as Public Counsel suggests).² As the
21 Commission found in the Protective Order, a higher order of protection is warranted for
22 certain documents in order to facilitate discovery relevant to issues in this proceeding.
23 The Commission further found that a "credible prima facie presentation" had been
24 made that "[such] documents present an *exceptionally high degree of danger to the*

25 _____
26 ¹ Motion at 4 note 3; *see also* Transcript ("Tr.") of Prehearing Conference in Docket
27 No. UE-031725, dated November 6, 2003, at 22 lines 12-22 (discussion of potential legal
28 action by project owner/developers if project information is disclosed absent procedural
safeguards).

² Tr. 17 line 9.

1 *interests that are protected in RCW 80.04.095.*³ That is the proper context in which
2 the Commission should evaluate Public Counsel’s Objection. The context is not, as
3 Public Counsel suggests it should be, how to accommodate its potential outside
4 expert/consultants that have “broader practices” “which include consulting for private
5 entities.”⁴

6
7 **B. Public Counsel’s Outside Expert/Consultants Should be Treated the Same
as Outside Expert/Consultants for Other Parties.**

8 The affidavit requirement in the Protective Order is eminently reasonable. A
9 party’s consultants must affirm that they will not participate in competitive
10 decisionmaking, “with respect to which the documents or information may be relevant,
11 by any company or business organization that competes, or potentially competes, with
12 the company or business organization from whom they seek disclosure of highly
13 confidential information.”⁵ This protection ensures that sensitive project information
14 that PSE provides to parties during the discovery process will not be used at a later time
15 to its competitive disadvantage or to the competitive disadvantage of the project
16 owner/developers from whom PSE originally obtained the information.

17 Public Counsel claims, though, that since it is a statutory party that does not
18 represent competitors, its consultants should be relieved from the affidavit requirement.
19 But Public Counsel’s conclusion does not follow from its premise. Public Counsel’s
20 status has no bearing on a outside expert/consultant’s use of highly confidential
21 information outside the scope of its engagement with Public Counsel. As the Presiding
22 Judge stated in the Prehearing Conference Order, “an outside consultant hired by
23 Public Counsel is *no different than an outside consultant hired by a private*
24 *party...[and] may be employed by competitors of a company that is required to provide*
25 *information under the Highly Confidential provisions of a protective order.”* Under

26
27 ³ Order No. 02 at ¶ 1(c) (emphasis added).

⁴ Objection at 4.

28 ⁵ Order No. 02 at ¶ 12(a).

1 these circumstances, “it is reasonable that *all outside consultants be required to meet*
2 *the same affidavit and other requirements regardless of whether they are employed by*
3 *a private party or a statutory party.*”⁶

4 Further examination of Public Counsel’s potential outside experts’ consulting
5 reveals that they are indeed more like other consultants for hire than like Public
6 Counsel -- a statutorily empowered and constrained advocate for the State’s ratepayers.
7 Public Counsel currently uses Mr. Jim Lazar of Microdesign Northwest and Ms.
8 Catherine Elder of RW Beck as outside experts/consultants in matters before the
9 Commission. Mr. Lazar’s resume provided to the Commission in Docket No. UE-
10 011411 (Feb. 6, 2002) lists five utilities and utility associations who buy power in the
11 Northwest as “recent consulting clients.” According to its website (www.rwbeck.com),
12 RW Beck has been providing energy consulting services to the public and private
13 sectors since 1942, including energy risk management, project development, and
14 valuation of generation assets. In these capacities, both Mr. Lazar and Ms. Elder are
15 undoubtedly called upon to assist and advise clients in strategic decisionmaking
16 relating to electric power in the Northwest.

17 Public Counsel states in its Objection that Mr. Lazar has refused to sign the
18 affidavit.⁷ But Public Counsel does not explain why. Presumably, Mr. Lazar has
19 refused to sign because the affidavit’s restriction regarding involvement in competitive
20 decisionmaking of competitors would limit his ability to provide energy consulting
21 services to other clients. The problem is that once Mr. Lazar and other
22 expert/consultants retained by Public Counsel see all of the detailed highly confidential
23 information proffered by PSE in this docket, it is simply not reasonable to assume that
24 such information will be so segregated intellectually that it will not be used in

25 ⁶ Order No. 03 at ¶ 13 (emphasis added); *see also* Tr. 18 line 6-7 (Statements by the
26 Presiding Judge that a restriction upon the outside use of highly confidential information “goes
27 to the very heart of the purpose of a protective order”).

28 ⁷ The objection does not indicate whether RW Beck is also unwilling to sign the
affidavit.

1 competitive decisionmaking for other clients during the next three years, during which
2 time many other market participants (consulting clients) will assess the buying and
3 selling opportunities relating to the same projects in the Northwest.

4
5 **C. The Affidavit Requirement Does Not Prevent Public Counsel From Hiring
6 Consultants for Use in This Proceeding.**

7 Public Counsel complains that the affidavit requirement is “burdensome.”⁸ But
8 PSE takes Public Counsel at its word that the requirement is only burdensome for
9 potential expert/consultants who have broader practices which include consulting for
10 private entities. Several reasons support this conclusion.

11 First, the affidavit requirement does not prevent Public Counsel from retaining a
12 consultant. As Public Counsel acknowledges, the requirement does not raise concerns
13 with consultants who performed work for the office in the past, and who restrict their
14 practices to public entities.⁹ Public Counsel offers no explanation as to why such
15 consultants cannot work for Public Counsel in this proceeding.

16 Consultants are in fact available to participate in this proceeding. One of the
17 intervenors - Industrial Customers of Northwest Utilities (ICNU) - was able to retain an
18 expert/consultant willing to sign the affidavit. Mr. Schoenbeck of Regulatory &
19 Cogeneration Services (RCS) has already signed the affidavit and received the highly
20 confidential information.

21 Finally, while the letter from Mr. Biewald, President of Synapse Energy
22 Economics Inc., states the affidavit would pose a “problem”, the letter does not
23 represent a refusal to sign.

24 **II. CONCLUSION**

25 PSE respectfully requests that the Commission preserve the Protective Order in
26 its current form. The Protective Order should retain the provisions that relate to highly

27 ⁸ Objection at 1.

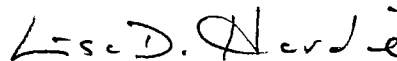
28 ⁹ Objection at 4.

1 confidential information, including the requirement that consultants first sign an
2 affidavit before they can obtain access to such information.

3 Nonetheless, PSE is willing to continue discussions with Public Counsel and
4 Staff regarding any potential revised affidavit language that accommodates Public
5 Counsel's concerns without compromising the protections that the Protective Order
6 affords to the highly confidential, commercially sensitive information.

7 DATED: December 4, 2003

Respectfully Submitted,

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