

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND	)	
TRANSPORTATION COMMISSION	)	
	)	DOCKET NO. UE-050870
Complainant,	)	
	)	
v.	)	NOTICE CLARIFYING DISCOVERY
	)	PRACTICE UNDER ORDER NO.
PUGET SOUND ENERGY, INC.	)	03—PROTECTIVE ORDER; NOTICE
	)	OF TELECONFERENCE (Set for
Respondent.	)	August 23, 2005, at 1:30 p.m.)
.....	)	

1 Discovery practice before the Commission frequently involves requests for disclosure of commercially sensitive information. In some instances the information requested in discovery could do competitive harm to the Company or to third parties if disclosed, unless appropriate conditions are specified in a protective order. Such is the case in this proceeding, which involves, among other things, review of a pending transaction by which Puget Sound Energy (PSE) would acquire the Hopkins Ridge wind generation project. This proposed acquisition is the second in PSE’s ongoing, multi-year strategy to acquire the resources it needs to meet its public service obligations.<sup>1</sup> The ongoing nature of PSE’s resource acquisition program is underscored by the fact that on July 29, 2005, PSE filed a draft, all-source Request for Proposals (RFP) in Docket No. UE-051162, which calls for another round of proposals from third parties to supply electric resources to PSE.

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<sup>1</sup> The Commission previously reviewed, and approved by order entered in Docket No. UE-031725 on April 7, 2004, PSE’s acquisition of a 49.85% interest in Fredrickson I, a gas-fired generation facility located near Spanaway, Washington. The review of the Fredrickson transaction was in PSE’s first power cost only rate case (PCORC), a form of proceeding authorized by the Commission in its final order in PSE’s general rate proceeding, Docket Nos. UE-011570 and UG-011571, in June 2002. This is the Company’s second PCORC.

- 2 To facilitate the early and full exchange of documents among parties and to avoid the need for discovery conferences to resolve disputes over the production of commercially sensitive documents that otherwise would inevitably occur, the Commission has developed, recognizes in its procedural rules, and often enters in its proceedings a so-called standard form of protective order. *WAC 480-07-420 and -423*. This form of order provides a degree of protection for documents proffered under a “Confidential Information” designation. *WAC 480-07-423(1)(a)*.
- 3 The Commission also recognizes in its procedural rules that certain information is of a particularly sensitive nature and requires heightened protection from disclosure among the parties to a proceeding who may be competitors, or who may represent competing vendors with whom parties transact business. Thus, the Commission’s rules provide for amendment of the standard form of protective order, on an appropriate showing, to allow for the designation of certain information as “Highly Confidential.” *WAC 480-07-423(1)(b)*. Highly confidential information is afforded such protection as is appropriate considering its nature, the identity of the parties to the proceeding, the persons to whom disclosure is proposed, and the needs of the case. Variability in these factors from case to case, and the presence of other factors that are pertinent in individual cases, has resulted in different treatment of highly confidential information under protective orders entered in different cases.
- 4 The Commission entered Order No. 03—Protective Order on June 24, 2005, following extended discussion of its terms and operation in this proceeding during the first prehearing conference on June 22, 2005, and among the parties during a 30-minute recess from that conference. The reason for this extended discussion, both on and off the record, was to allow the parties to express their conflicting views concerning the appropriate treatment during discovery of highly confidential information.
- 5 PSE argues in its still-pending Motion for Amended Protective Order with Highly Confidential Provisions that:

[T]he 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.

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.

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.

\* \* \*

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.*

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.<sup>2</sup>

- 6 Several interested persons appeared and were granted leave to argue in support of PSE's Motion. Specifically, the Commission heard argument from Northwest Independent Power Producers Coalition (NIPPC), RES North America, Zilkha Renewable Energy, and enXco.<sup>3</sup> Mr. Hall, representing three power development companies that participated in PSE's recent RFP, argued:

As part of Puget's RFP, these companies provided Puget with detailed extensive information about the cost structure of the wind projects. They provided information about capital costs, O&M costs, and site-specific wind data. No doubt access to detailed confidential cost-related information gave Puget a strong advantage during negotiations. The question now is what to do with that confidential data after the RFP. Protecting the integrity of the confidential information after the RFP is concluded is important both to those bidders that were selected and to those that were not selected and who will have to rebid the same projects. That also sends an important message to developers who are considering bidding in subsequent RFP's.<sup>4</sup>

Mr. Kahn, NIPPC's Executive Director, made similar arguments.<sup>5</sup> Written comments filed by these interested persons, and by Summit Energy NW, LLC, also were to similar effect.

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<sup>2</sup> PSE Motion at ¶¶ 7,8,18, and 19. We note that PSE's Motion meets all of the requirements stated in WAC 480-07-423(1)(b), including a sworn Declaration in support by Eric M. Markell, the Company's Senior Vice President Energy Resources.

<sup>3</sup> These interested persons, and Summit Power NW, LLC, filed written comments as well.

<sup>4</sup> TR. 40:21 – 41:11.

<sup>5</sup> TR. 39:9 – 40:10.

7 ICNU opposes PSE's Motion, arguing in its Response that:

The Commission should deny PSE's Motion because: 1) the Company has not justified the need for authority to designate information as highly confidential; and 2) the restrictions that PSE seeks to place on outside counsel and consultants who seek access to highly confidential information are overly broad, unduly burdensome, and vague. PSE's request for authority to designate information as highly confidential is based primarily on speculation about the risk of competitive harm to third-party respondents to the Company's Requests for Proposals ("RFP") and the potential impact of any such harm on future RFPs. These claims are insufficient to justify the highly confidential designation.

In addition, as indicated in Attachment A to this Response, Don Schoenbeck, the consultant who appeared for ICNU in both PSE's 2003 PCORC and the Company's last general rate case, is unwilling to sign PSE's proposed "Highly Confidential Information Agreement" (Exhibit C to PSE's proposed amended protective order), because the unreasonable restrictions in that agreement would effectively prohibit Mr. Schoenbeck, for a period of three years, from providing the consulting services he has provided in the past. If the Commission adopts an amended protective order with highly confidential provisions, it should include in the order the language agreed to by the parties, and required by the Commission, in the 2003 PCORC protective order. The agreement from the 2003 PCORC provided sufficient protection for the information that PSE designated highly confidential in that proceeding, and it is sufficient for the purposes of this proceeding as well.<sup>6</sup>

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<sup>6</sup> ICNU Response at ¶¶ 4 and 5 (footnote omitted). Both Mr. Schoenbeck and ICNU's outside counsel in this case expressed concerns over the fact that they are in the class of persons PSE seeks to exclude from access (*i.e.*, persons involved in development of energy projects or resources, or their consultants or advisers). PSE argues at TR. 38:18 – 39:4 that this is precisely the problem:

If ICNU is representing cogens and Mr. Schoenbeck is representing cogens, they are also getting into this process. So some of the highly confidential information that has been masked in this case is the detailed information about other cogen

- 8 Public Counsel also filed an Answer opposing PSE's Motion and offered argument at prehearing. Public Counsel asserts that the restriction on employment is unnecessary and contends that a restriction that limits use of the information to this proceeding is adequate. In response to this last point, PSE and its supporters contend it is unreasonable to believe that a consultant or attorney will be uninfluenced by information that might be learned in this proceeding when giving advice to competing energy project developers in the near-term future.
- 9 Staff took no position on PSE's Motion, but stated at prehearing its recognition of legitimate interests and concerns on both sides of the question. Staff supported efforts from the Bench to craft provisions for the treatment of highly confidential information that all parties would find acceptable.
- 10 Unfortunately, the parties were not able to compose their differences during the prehearing conference. In light of this, and considering the fact that ICNU previously had stated its uncertainty concerning whether it wished to participate actively on the Hopkins Ridge acquisition issue to which most of all of the highly confidential information apparently pertains, the Commission adopted Staff's useful suggestion that the Commission should enter its standard form of protective order without any amendment concerning the treatment of any documents designated Highly Confidential Information. This, as Staff pointed out, would allow ICNU and its consultant to review all of the non-confidential documents and documents designated as Confidential Information. As Staff suggested, this would assist ICNU to determine whether it actually needs access to any of the information designated by PSE as highly confidential information. Staff counsel summarized his understanding of the parties' off-the-record

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projects that we are asking the company purchase resources from them, and the company is going out for another request for proposals, according to the Commission's rules, to be filed in July and then go forward in a few months. I just think it's troubling to think that folks who are advising other potential participants in that process would have access to this information.

discussion as follows: “If at a time Public Counsel and ICNU determine that they need access to the highly confidential information, that issue will be T'd up and brought back to you.”<sup>7</sup>

- 11 Although ICNU objected to this suggestion and asked for an immediate ruling, on learning no decision would issue orally from the Bench, ICNU agreed to undertake review of non-confidential and confidential documents as discussed above.<sup>8</sup> In other words, the question whether ICNU’s counsel and outside consultant would have access to documents designated as Highly Confidential Information was left open.
- 12 Consistent with the discussion at the prehearing conference, Order No. 03 expressly reserved the question of the treatment of Highly Confidential documents as follows:

The Commission enters this order with the understanding that one or more parties may seek to amend the protective order to provide for the designation and treatment of “Highly Confidential” documents as provided in WAC 480-07-420 and -423. The Commission will carefully consider any arguments that may be presented for and against requests to modify the order. The Commission may also modify the order on its own motion, based on the needs of the parties and the proceeding, after opportunity for parties and interested persons to comment.<sup>9</sup>

The Protective Order includes provisions concerning the treatment of “Confidential Information,” but does not include any provisions concerning the treatment of highly confidential information. In addition, the body of the Protective Order—in language familiar to all parties who regularly appear before the Commission—conditions access to Confidential Information by requiring those who seek access to first execute standard agreements uniformly attached to

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<sup>7</sup> TR. 48:9-12.

<sup>8</sup> TR. 48:22.

<sup>9</sup> Order No. 03 at ¶ 1.

the Commission standard form of protective order as “Exhibit A (Attorney Agreement)” and “Exhibit B (Expert Agreement).”<sup>10</sup>

- 13 The Protective Order does not address “Exhibit C (Highly Confidential Information Agreement),” which is a form of nondisclosure agreement that is appended to all Commission protective orders that include provisions concerning the designation and treatment of “Highly Confidential” information. Given that Order No. 03 does not include such provisions, Exhibit C should not have been attached to Order No. 03. This form of nondisclosure agreement, however, was inadvertently appended to Order No. 03 when it was served.
- 14 On July 8, 2005, counsel for ICNU, Mr. Van Cleve and Mr. Perkins, and ICNU’s outside expert, Mr. Schoenbeck, filed with the Commission the form Exhibit C that was inadvertently attached to the Protective Order. According to PSE, “[c]ounsel for ICNU has since asserted that PSE must disclose all highly confidential materials” that PSE has filed or produced in discovery.
- 15 On July 18, 2005, PSE filed a letter with the Commission describing these circumstances and objecting to Messrs. Van Cleve, Perkins, and Schoenbeck having access to materials currently designated as Highly Confidential.<sup>11</sup> PSE renewed its Motion for Amended Protective Order with Highly Confidential Provisions. Finally, PSE requested that the Commission consider favorably its comments at prehearing in support of its Motion and the comments of NIPPC, and various power developers who appeared at prehearing “because an overwhelming majority of the information marked highly confidential in this proceeding is proprietary information belonging to them or like developers.”
- 16 ICNU’s filing of executed copies of the standard form Exhibit C that is necessary and appropriate only in connection with protective orders that are amended to

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<sup>10</sup> *Id.* at ¶ 8.

<sup>11</sup> PSE’s designation of certain documents as Highly Confidential not only is entirely consistent with the discussion at prehearing, the Protective Order includes an express finding that supports such designation. Order No. 03 at ¶ 1.



provide for the treatment of Highly Confidential Information is an act that has no significance in the context of this proceeding and the currently effective Protective Order for the reasons discussed above and at the prehearing conference.<sup>12</sup> Neither ICNU nor any outside consultant employed by Public Counsel is entitled under the current Protective Order to review documents designated as highly confidential.

- 17 The Commission took no action on PSE's renewed motion, considering such action unnecessary unless and until one or more parties filed with the Commission correspondence or a motion asserting a need for access to highly confidential information. No such correspondence or motion has been filed. However, Public Counsel left a voicemail message for the presiding ALJ during the first week of August suggesting a need for the Commission to address PSE's pending motion in the near term. In response, the presiding ALJ scheduled a teleconference for August 9, 2005, in which all parties participated. Several interested third parties also took part in the teleconference.
- 18 Based on the discussion on August 9, 2005, the presiding ALJ determined that the parties seeking discovery had not made sufficient efforts to tailor their requests for highly confidential information, or to work with PSE to determine whether their respective needs for information could be satisfied via agreed procedures that would also satisfy the need to protect certain information. The ALJ also determined that the parties should be given an additional opportunity to undertake such efforts, devoting sufficient time and resources to the matter to support a conclusion that they had made a good faith effort to resolve it. Thus, the opportunity remains open for the requesting parties to identify specifically what information they consider necessary to develop their theory of the case and to work with PSE to determine whether their needs for information can be satisfied either without an amendment to the Protective Order or pursuant to an

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<sup>12</sup> The Commission notes that on July 19, 2005, Public Counsel filed executed copies of Exhibit C, discussed above, for various counsel and analysts. These documents, like those filed by ICNU on July 8, 2005, have no significance in the context of this proceeding and the currently effective Protective Order.

agreed amendment. This is the best opportunity for the parties to satisfy their respective interests and concerns. This is the preferred result. If that result is not achieved, the Commission will determine the matter for the parties considering the arguments presented.

- 19 To ensure prompt and adequate attention is given to this matter, a second informal teleconference will be held on August 23, 2005, at 1:30 p.m. using the Commission's teleconference bridge line (360-664-3846). The parties should be prepared to report in detail concerning the efforts they have made to resolve these discovery matters. If disputes remain following the parties' good faith efforts, these should be brought formally to the Commission's attention via one or more motions to compel. The Commission will convene a formal discovery conference to resolve any such motions.

DATED at Olympia, Washington, and effective this 11<sup>th</sup> day of August 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS  
Administrative Law Judge