

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

Docket No. _____

PUGET SOUND ENERGY, INC.'S
MOTION FOR AMENDED
PROTECTIVE ORDER WITH HIGHLY
CONFIDENTIAL PROVISIONS

1. Puget Sound Energy, Inc. ("PSE" or "the Company") files this Motion for Amended Protective Order with Highly Confidential Provisions in conjunction with its general rate case filing dated February 15, 2006 ("2006 GRC"). PSE's representatives for purposes of this proceeding are:

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PSE'S MOTION FOR HIGHLY
CONFIDENTIAL PROTECTIVE ORDER

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I. RELIEF REQUESTED

2. PSE respectfully requests through this motion that the Commission issue an amended standard protective order that includes the following "highly confidential" provisions:

- The Company will be permitted to designate information as "highly confidential" in its testimony, exhibits, responses to data requests, and briefing in this proceeding, as well as at hearing.
- Only the Commission Staff and Public Counsel will have access to such "highly confidential" information.
- Any further release of "highly confidential" information to experts for Commission Staff or Public Counsel, or to any other parties who intervene in the 2006 GRC, will be subject to a showing that such persons or entities are not current or potential owners or developers of energy resources: (i) that have been or could potentially be offered to PSE for its electric portfolio; (ii) that are competing or could potentially compete with other projects that are or could be offered to PSE for its electric portfolio. Restrictions on access to "highly confidential" information should also extend to employees of owners or developers of such energy resources, as well as to consultants or advisors to such owners or developers (including their attorneys) to the extent such persons are consulting or advising on matters for which the "highly confidential" information would be relevant; and
- For all persons or parties having access to "highly confidential" information, copying and handling of such information shall be limited in order to reduce the risk of inadvertent disclosure of that information.

3. The Company is submitting as Exhibit A to this motion a proposed form of amended protective order with highly confidential provisions.

II. STATEMENT OF FACTS

4. On February 15, 2006, the Company filed revised tariff schedules to affect an increase in its base prices to its electric and gas customers, along with prefiled direct testimony and exhibits in support of its proposed revisions. The Company marked information contained on a number of pages of these testimonies and exhibits "confidential" or "highly confidential".

5. The Commission's standard form of protective order should be sufficient to protect the materials in PSE's filing that have been marked "confidential." Such materials include information about the Company's short-term electric portfolio management and strategies. Public release of such materials is not appropriate, as they should not be viewed by persons or entities engaged in wholesale energy market trading. However, it is not anticipated that any entities that should not see such materials will intervene in this 2006 GRC proceeding. Moreover, the Commission's standard protective order prohibits the use of such information outside the scope of a particular proceeding.

6. By contrast, the material that PSE has marked "highly confidential" requires enhanced protections from disclosure. As detailed in the Declaration of Eric M. Markell In Support of PSE's Motion for Amended Protective Order with Highly Confidential Provisions, submitted with this motion, the 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 2003-2004 competitive bidding process under WAC Chapter 480-107 (the "2004 RFP Process"). 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.

7. In addition, the Company has marked a limited subset of additional information as "highly confidential" that was not submitted by project developers or owners, but that is highly commercially sensitive to PSE. Such information includes references to the Company's

negotiating strategies, detailed results of cost analyses performed by the Company, and detailed cost information about resources considered outside the 2004 RFP process, including the PSE-owned Baker River Hydroelectric Project and the new long-term purchase power agreement that PSE has just entered into with Public Utility District No. 1 of Chelan County. Release of such information to owners or developers of project resources, to the counterparties to the Company in those transactions, or to potential counterparties for additional such transactions, would harm the Company and its customers because it would undercut the Company's negotiating position.

Mr. Markell's declaration provides further details in support of the Company's concerns.

8. The Company's concerns are significant and pressing, given the Company's ongoing need to acquire additional electric resources to serve its customers. The Company has already begun analyzing project proposals that were recently submitted to the Company in response to its 2006 RFP process under WAC Chapter 480-107. Discussions and negotiations with project developers will be ongoing over the next year or more regarding what may well be the next set of PSE resource acquisitions.

9. The Company respects the concerns that have been expressed by other parties that the "highly confidential" designation should not be applied lightly. PSE has been careful in its 2006 GRC filing to minimize the amount of information designated "highly confidential." For example, the Company is releasing as public information its analyses of the net present value benefits to PSE's electric portfolio of the various resources presented in the case. PSE does not believe that counterparties could "back into" commercially sensitive information from those figures, and they are helpful for other parties to understand why the Company agreed to the terms of each acquisition. In addition, the Company has sought to provide explanations in the text of

its filing of the relative attractiveness of the various resources as to each other and other alternatives available to the Company. In some cases, "approximate" figures have been provided publicly, with the "highly confidential" commercial information provided in parenthesis after the public figure. Taken all together, the Company believes that the public can understand and other parties can productively participate in the 2006 GRC without access to the "highly confidential" information.

III. STATEMENT OF ISSUES

10. This Motion for Amended Protective Order with Highly Confidential Provisions presents the following issues:

- Should the Commission enter a protective order that protects highly commercially sensitive information submitted to PSE by project owners or developers from disclosure or dissemination to current or potential owners or developers of energy resources who are competitors or potential competitors of each other?
- Should the Commission enter a protective order that protects PSE's sensitive negotiating strategies and analyses regarding power resources from disclosure or dissemination to current or potential owners or developers of energy resources who are competitors or potential competitors of each other, or who are current or potential counterparties to transactions with PSE?

IV. EVIDENCE RELIED UPON

11. In support of the relief requested in this motion, the Company relies upon the Declaration of Eric M. Markell In Support of PSE's Motion for Amended Protective Order with Highly Confidential Provisions, which has been submitted with this motion. Mr. Markell's declaration describes the information that PSE seeks to protect with the "highly confidential" designation and the harms that would result from disclosure of such information.

12. The Company further relies on the prefiled direct testimonies of its witnesses in this 2006 GRC Filing that contain materials marked "highly confidential." These testimonies and

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exhibits explicitly show the content and context of information that the Company seeks to protect with this motion.

V. AUTHORITY AND ARGUMENT

13. Authority for the Company's requested relief is found in WAC 480-07-423(1), which provides for entry of a protective order with "highly confidential" provisions to protect information if the lack of enhanced restrictions on access to such information "imposes a highly significant risk of competitive harm." WAC 480-07-423(1)(b).
14. There is ample Commission precedent for the entry of a protective order with a "highly confidential" designation, including the protective order the Commission entered in PSE's 2003 PCORC proceeding. *See WUTC v. PSE*, Docket No. UE-031725, Order No. 02 (Oct. 29, 2003). *See also Application of U S WEST, Inc. and Qwest Communications International, Inc.*, Docket No. UT-991358, Sixth Supp. Order, at 2-4; *WUTC v. Olympic Pipe Line Co.*, Docket No. TO-011472, Seventh Supp. Order, at 2-4; *Air Liquide America Corp. et al. v. Puget Sound Energy, Inc.*, Docket No. UE-001952, Third Supp. Order, at 2-5. Generally, the Commission has amended its standard protective order to allow for the designation of highly confidential documents under the following circumstances: (1) the parties to the docket are competitors or potential competitors; (2) the information relevant to the case may be sensitive competitive information that would be of value to competitors if released; (3) a disclosing party may suffer harm if forced to disclose certain information without heightened protection; and (4) the entry of the protective order will facilitate discovery.
15. These considerations are reflected in the "highly confidential" protective orders themselves, which state that "parties to this proceeding are competitors or potential competitors";

that disclosure of highly confidential information will impose "a significant risk of competitive harm to the disclosing party"; and that parties should designate as highly confidential only information that "truly might impose a serious business risk if disseminated" without heightened protection. *See* Docket No. UT-991358 (6th Supp. Order at 2); Docket No. TO-011472 (7th Supp. Order at 2); Docket No. UE-001952 (3rd Supp. Order at 2).

16. The material PSE seeks to protect is precisely the type of information that is intended to be eligible for "highly confidential" protections in WAC 480-07-423(1)(b). The likely result of release of any of the "highly confidential" information to owners or developers of energy resources or to persons or entities that represent or advise them, would be increased costs for the Company and, ultimately, its customers. This is because there would be a tendency on the part of project proposers and counterparties to use such information to benchmark their transactions with the Company against these other transactions in a sort of "most favored nation" view of negotiations over their particular projects. Instead of being provided with the information that would give them such leverage, counterparties should be required to focus on the cost structures of their own projects when negotiating with the Company.

17. The Company and its customers also have an interest in protecting against disclosure of such information to the public or to developers or owners who are competing or potentially competing against each other in the industry for at least two reasons: (1) because such developers or owners should not be put in the position of being able to "game" the RFP process by having access to confidential information about their competitors or potential competitors merely by intervening in the 2006 GRC proceeding; and (2) because if PSE is to attract a broad slate of proposals in response to future RFPs, developers or owners considering submitting

proposals must have confidence that the confidentiality of their sensitive commercial information will be respected, notwithstanding the fact that PSE's resource acquisitions are subject to some degree of public scrutiny through the regulatory process.

18. The materials PSE has marked "highly confidential" should not be viewed at all by potential owners or developers of energy resources: (i) that have been or could potentially be offered to PSE for its electric portfolio; (ii) that are competing or could potentially compete with other projects that are or could be offered to PSE for its electric portfolio. Restrictions on access to "highly confidential" information should also extend to employees of owners or developers of such energy resources, as well as to consultants or advisors to such owners or developers (including their attorneys) to the extent such persons are consulting or advising on matters for which the "highly confidential" information would be relevant. 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 2006 GRC proceeding.

19. This "highly confidential" information that is relevant to this 2006 GRC proceeding also presents a circumstance that justifies an employment restriction for persons given access to documents designated confidential or highly confidential. The appropriateness of imposing employment restrictions on persons given access to commercially sensitive material has been explored in employment cases in which courts have developed what is sometimes called the "inevitable disclosure doctrine." Typically in such cases the question is whether the court should

issue an injunction prohibiting an employee from working for a competitor of his or her former employer. The answer turns on whether the employee could not help but disclose his or her former employer's trade secrets in performing the new job. As stated in one such case:

[U]nless [the former employee] has an uncanny ability to compartmentalize information, he would necessarily be making decisions...by relying on his knowledge of [the former employer's] trade secrets.

PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995).

20. A court's willingness to apply this doctrine in a particular case may be influenced by evidence of bad faith or wrongdoing by an employee, but such a showing is not required. *See Air Products and Chem., Inc. v. Johnson*, 442 A. 2d 1114, 1118 (1982) ("The record indicates that Johnson is an honest man. There is no dispute as to his integrity. It is certain that he intends to refrain from disclosing any of the proven trade secrets of Air Products."). *See also Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1460 (M.D.N.C. 1996).

21. Consistent with these decisions, the public policy of this state is to provide strong protection to competitively-sensitive information. *See* RCW 4.24.601 (Legislature declared that protection of confidential commercial information "promotes business activity and prevents unfair competition"; it is consistent with the State's public policy that the "confidentiality of such information be protected and its unnecessary disclosure be prevented"). This policy is reflected in other statutes as well, including the Uniform Trade Secrets Act, RCW 19.108 *et seq.* ("the Act"), which provides a civil cause of action for misappropriation of trade secrets. The remedies provided in the Act, including attorneys' fees and exemplary damages, reflect the strength of the Legislature's commitment to protecting confidential information. *See* RCW 19.108.020-040; *see*

also RCW 80.04.095 (confidential marketing, cost, and financial information is not subject to public inspection).

22. Washington courts enforce non-compete agreements that contain employment restrictions where such agreements are found to be reasonable under the circumstances of the case. Whether a non-compete covenant is reasonable involves consideration of three factors: (1) whether the restraint is necessary for the protection of the business or goodwill of the employer; (2) whether it imposes upon the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill; and (3) whether the degree of injury to the public is such loss of the service and skill of the employee as to warrant non-enforcement of the covenant. *See Perry v. Moran* 109 Wn.2d 691, 698 (1987). Courts also consider the scope of the restriction. *Id.* at 700.

23. In *Perry v. Moran*, the Washington Supreme Court found that a covenant prohibiting an accountant from providing services to clients of his former employer for a period of three years after terminating his employment was valid and enforceable. *Id.* at 691. Similarly, in *Knight, Vale, & Gregory v. McDaniels*, 37 Wash. App. 366, 370 (1984), the court upheld a three-year non-compete agreement that prohibited an accountant from performing accounting services for clients of his former employer.

24. This Commission should be even less concerned than civil courts about establishing employment restrictions related to access to highly confidential information. Unlike an employer who voluntarily provides employees with access to highly confidential materials, and who is in a position to control or condition the terms of such access, the regulated companies that appear before the Commission are typically compelled to provide highly confidential information

through the discovery process or in order to meet their burden of proof in a proceeding. In addition, unlike an employee of a single employer, the counsel and consultants who would have access to highly confidential material in a Commission proceeding are typically engaged by more than one client. It is not unusual to have to make choices about representing one client versus another on one type of proceeding versus another due to ethical or practical constraints involving conflicts of interest.

25. With respect to the types of information that would justify access and employment restrictions, the fundamental questions are: (1) whether a reviewer is in a position to make competitive use of or facilitate the competitive use of the information, and (2) whether that reviewer can reasonably be expected to avoid making use of the information once it is in his or her brain. In this 2006 GRC proceeding, potential owners or developers of energy resources: (i) that have been or could potentially be offered to PSE for its electric portfolio; or (ii) that are competing or could potentially compete with other projects that are or could be offered to PSE for its electric portfolio would be in a position to make competitive use of the information that the Company has designated "highly confidential." Once that information is in their brains, or the brains of their advisors or consultants, it would be very difficult to somehow segregate that information such that it does not impact development of a project proposal or negotiations with PSE or with other utilities or potential purchasers of energy projects.

26. 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 that meet the description set forth above and in the proposed protective order prior to being provided with access to the "highly confidential" information. *See* Exhibit A, § 14.

27. 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.

28. Finally, the Company requests that copying and access to all "highly confidential" information be restricted as set forth in PSE's proposed order to reduce the risk of inadvertent disclosure of "highly confidential" information. *See* Exhibit A, § 16. Such restrictions are consistent with the restrictions that were imposed with respect to "highly confidential" information in PSE's last general rate case, Docket Nos. UG-040640 et al. *See* Docket No. UG-040640, Order No. 04 (May 20, 2004). In particular, they recognize that staff for authorized counsel or consultants will need to have access to confidential information for purposes of case preparation. *See* Exhibit A, § 17.

VI. CONCLUSION

29. For the reasons set forth above, PSE respectfully requests that the Commission enter an amended standard protective order in this case with enhanced protection of highly confidential information, in the form provided as Exhibit A to this motion.

DATED this 15th day of February 2006.

Respectfully submitted,

PERKINS COIE LLP



By _____

Kirstin S. Dodge, WSBA #22039

Jason Kuzma, WSBA #31830

Attorneys for Puget Sound Energy, Inc.

**EXHIBIT A to
PSE's Motion for Amended Protective Order with Highly Confidential
Provisions**

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

WASHINGTON UTILITIES AND)	
TRANSPORTATION COMMISSION,)	DOCKET NO. _____
)	
Complainant,)	
)	ORDER NO. ____
v.)	
)	
PUGET SOUND ENERGY, INC.)	PROTECTIVE ORDER WITH
)	"HIGHLY CONFIDENTIAL"
Respondent.)	PROVISIONS

1 The Washington Utilities and Transportation Commission (Commission) finds that a protective order to govern disclosure of proprietary and confidential information is necessary in this proceeding. The Commission has reviewed Puget Sound Energy, Inc.'s (PSE) Motion for Amended Protective Order with Highly Confidential Provisions, the Declaration of Eric M. Markell in Support of PSE's Motion for Amended Protective Order with Highly Confidential Provisions, provided the parties an opportunity to comment on the motion and proposed protective order, considered their comments, and finds as follows:

- a. It is likely that proprietary and confidential information will be required to resolve the issues in this proceeding.
- b. Absent a protective order, a significant risk exists that confidential information might become available to persons who have no legitimate need for such information and that injury to the information provider or third parties could result.
- c. In accordance with WAC 480-07-420(2), the Commission finds that it is necessary to create a separate designation and a higher degree of protection for certain documents asserted by parties to be highly

confidential. This is consistent with the Commission's practice in prior cases involving contentions that certain documents require heightened protection to facilitate discovery, and is consistent with the requirements of WAC 480-07-423.

2 Accordingly, the Commission enters this Protective Order to govern the discovery and use of proprietary and confidential documents in this proceeding:

A. General Provisions

3 **Confidential Information.** All access, review, use, and disclosure of any material designated by a party to this proceeding as confidential (referred to in this Order as "Confidential Information") is governed by this Order and by WAC 480-07-160. The Commission expects Confidential Information to include only numbers, customer names, and planning details. The Commission requires the parties to redact such information from the pre-filed testimony, exhibits, briefs, and all other documents filed with the Commission, and provide complete versions of the documents that include the redacted material, under separate cover in the manner described below. The Commission may reject a filing or any other submission that fails to segregate Confidential Information, or categorizes public information as confidential.

4 Parties must scrutinize potentially confidential material, and strictly limit what they designate "Confidential Information" to only information that truly might compromise their ability to compete fairly or that otherwise might impose a business risk if disseminated without the protections provided in this Order. The first page and individual pages of a document determined in good faith to include Confidential Information must be marked by a stamp that reads: "**Confidential Per Protective Order in WUTC Docket No. _____**", except that materials in PSE's pre-filed direct testimonies and exhibits designated as "**Confidential Per WAC 480-07-160**" shall also be subject to the protections and restrictions set forth in this Order for "Confidential Information". Placing a Confidential Information stamp on the first page of an exhibit indicates only that one or more pages contains Confidential Information and will not serve to protect the entire contents of the multi-page document. Each page of the redacted version of a document that contains Confidential Information must be marked separately to indicate where confidential information is redacted. The

confidential (*i.e.*, unredacted) version must be provided on yellow or canary paper with references (*i.e.*, highlighting or other markings) to show where Confidential Information is redacted in the original document.

- 5 **Confidential and Redacted Versions.** Parties must file complete confidential (*i.e.*, unredacted) and redacted versions of testimony, exhibits, and briefs with the Commission. This includes electronic versions, and requires that all diskettes and all electronic mail specify whether the file is confidential, redacted, or public.
- a. If a witness has a confidential portion of her testimony, the sponsoring party must provide a complete redacted version of the testimony and a complete confidential version, with confidential pages on yellow or canary paper.
 - b. Parties must submit (at least) two diskettes or e-mail attachments, one with the electronic version of the confidential text and one with the electronic version of the redacted text.
 - i. Parties **MUST** identify the confidential diskettes with prominent red markings and the word "confidential" in addition to the contents and the docket number. The others must be prominently labeled "redacted" or "public".
 - ii. Parties **MUST** identify each confidential digital file with a C in the file name and **MUST** have the legend "**CONFIDENTIAL PER PROTECTIVE ORDER IN WUTC DOCKET NO. _____.**" (or, with respect to PSE's pre-filed direct testimonies and exhibits "**Confidential Per WAC 480-07-160**") prominently displayed on the first page (*i.e.*, the page that appears on the computer screen when the file is opened).
 - iii. Parties **MUST** identify each highly confidential digital file with an HC in the file name and **MUST** have the legend "**HIGHLY CONFIDENTIAL PER PROTECTIVE ORDER IN WUTC DOCKET NO. _____.**" (or, with respect to PSE's pre-filed direct testimonies and exhibits "**Highly Confidential Per WAC 480-07-160**") prominently displayed on the first page (*i.e.*, the

page that appears on the computer screen when the file is opened).

- 6 **Purpose of Access and Use; Confidentiality.** No Confidential Information distributed or obtained pursuant to this Protective Order may be requested, reviewed, used or disclosed, directly or indirectly, by any party, expert or counsel or any other person having access pursuant to this Order, except for purposes of this proceeding. Persons having access to the Confidential Information pursuant to this Order must request, review, use or disclose Confidential Information only by or to persons authorized under this Order, and only in accordance with the terms specified in this Order. Without limiting the foregoing, persons having access to Confidential Information shall not use any Confidential Information to design, develop, provide, or market any product, service, or business strategy that would compete with any product of the party asserting confidentiality.

B. Disclosure of Confidential Information

- 7 **Persons Permitted Access.** No Confidential Information will be made available to anyone other than Commissioners, the Washington Utilities and Transportation Commission Staff (Commission Staff), the presiding officer(s), and counsel for the parties for this proceeding, including counsel for Commission Staff, and attorneys' administrative staff such as paralegals. However, counsel may authorize those persons designated as their party's experts in this matter to access any Confidential Information solely for the purposes of this proceeding. Except for the Commission Staff, no such expert may be an officer, director, direct employee, major shareholder, or principal of any party or any competitor of any party (unless this restriction is waived by the party asserting confidentiality). Any dispute concerning persons entitled to access Confidential Information must be brought before the presiding officer(s) for resolution.
- 8 Staff of designated outside counsel and staff of designated outside consultants who are authorized to review Confidential Information may have access to confidential documents or information for purposes of processing the case, including but not limited to, receiving and organizing discovery, and preparing prefiled testimony, hearing exhibits, and briefs. Outside counsel and consultants

are responsible for appropriate supervision of their staff to ensure the protection of all confidential information consistent with the terms of this Order.

9 **Nondisclosure Agreement.** Before being allowed access to any Confidential Information designated for this docket, each counsel and expert must agree to comply with and be bound by this Order on the form of Exhibit A (counsel and administrative staff) or B (expert) attached to this Order. Counsel for the party seeking access to the Confidential Information must deliver to counsel for the party producing Confidential Information a copy of each signed agreement, which must show each signatory's full name, permanent address, the party with whom the signatory is associated and, in the case of experts, the employer (including the expert's position and responsibilities). The party seeking access must also file a copy of the agreement to the Commission and, in the case of experts, the party providing Confidential Information shall complete its portion and file it with the Commission or waive objection as described in Exhibit B.

10 **Access to Confidential Information.** Copies of documents designated confidential under this Order will be provided in the same manner as copies of documents not designated confidential, pursuant to WAC 480-07-400 and WAC 480-07-405. Requests for special provisions for inspection, dissemination or use of confidential documents must be submitted to the presiding officer if not agreed by the parties. The parties must neither distribute copies of documents that include Confidential Information to, nor discuss the contents of confidential documents with, any person not bound by this Order. Persons to whom copies of documents are provided pursuant to this Order warrant by signing the confidentiality agreement that they will exercise all reasonable diligence to maintain the documents consistent with the claim of confidentiality.

C. Highly Confidential Information

11 **Designation and Disclosure of Highly Confidential Information.** Intervenors in this proceeding may include competitors, or potential competitors. Moreover, information relevant to the resolution of this case is expected to include sensitive competitive information. Parties to this proceeding may receive discovery requests that call for the disclosure of highly confidential documents or information, the disclosure of which imposes a highly significant risk of competitive harm to the disclosing party or third parties. Parties may designate

documents or information they consider to be Highly Confidential and such documents or information will be disclosed only in accordance with the provisions of this Section.

- 12 Parties must carefully scrutinize responsive documents and information and strictly limit the amount of information they designate as Highly Confidential Information to only information that truly might impose a serious business risk if disseminated without the heightened protections provided in this Section. The first page and individual pages of a document determined in good faith to include Highly Confidential Information must be marked by a stamp that reads: "**Highly Confidential Per Protective Order' in WUTC Docket No. _____**", except that materials in PSE's pre-filed direct testimonies and exhibits designated as "**Highly Confidential Per WAC 480-07-160**" shall also be subject to the protections and restrictions set forth in this Order for "Highly Confidential Information".
- 13 Placing a "Highly Confidential" stamp on the first page of a document indicates only that one or more pages contains Highly Confidential Information and will not serve to protect the entire contents of a multi-page document. Each page that contains Highly Confidential Information must be marked separately to indicate where Highly Confidential Information is redacted. The unredacted versions of each page containing Highly Confidential Information and provided under seal also must be stamped "Highly Confidential" and submitted on light blue paper with references (*i.e.*, highlighting or other markings) to show where Highly Confidential Information is redacted in the original document.
- 14 Parties who seek access to or disclosure of Highly Confidential documents or information must designate one or more outside counsel and one or more outside consultant, legal or otherwise, to receive and review materials marked "Highly Confidential . . ." For each person for whom access to Highly Confidential Information is sought, parties must submit to the party that designated the material as Highly Confidential and file with the Commission a Highly Confidential Information Agreement, in the form prescribed by Exhibit C of this Order, certifying that the person requesting access to Highly Confidential Information:

- a. Is not now involved, and will not for a period of two years involve themselves in, competitive decision making with respect to which the documents or information may be relevant, by or on behalf of any company or business organization that competes, or potentially competes, with the company or business organization from whom they seek disclosure of highly confidential information with respect to the development or purchase of energy resources; and
- b. Is not now involved, and will not for a period of two years involve themselves in, the ownership or development of electric energy projects or resources: (i) that have been or could potentially be offered to PSE for its electric portfolio; or (ii) that are competing or could potentially compete with other projects that are or could be offered to PSE for its electric portfolio; and
- c. Is not now involved, and will not for a period of two years involve themselves in, providing consulting services or advice to owners or developers of electric energy projects or resources: (i) that have been or could potentially be offered to PSE for its electric portfolio; or (ii) that are competing or could potentially compete with other projects that are or could be offered to PSE for its electric portfolio, to the extent such consultation or advice involves matters for which the "highly confidential" information would be relevant; and
- d. Has read and understands, and agrees to be bound by, the terms of the Protective Order in this proceeding, including this Section of the Protective Order.

The restrictions in this paragraph do not apply to persons employed with the Attorney General's office for Public Counsel and Commission Staff. However, Public Counsel and Commission Staff shall submit the Highly Confidential

Information Agreement, in the form prescribed by Exhibit C of this Order, for any external experts or consultants they wish to have review the Highly Confidential Information.

- 15 Any party may object in writing to the designation of any individual counsel or consultant as a person who may review Highly Confidential documents or information. Any such objection must demonstrate good cause, supported by affidavit, to exclude the challenged counsel or consultant from the review of Highly Confidential documents or information. Written response to any objection must be filed within five days after receipt of the objection. If, after receiving a written response to a party's objection, the objecting party still objects to disclosure of the Highly Confidential Information to the challenged individual, the Commission shall determine whether the Highly Confidential Information must be disclosed to the challenged individual.
- 16 Outside counsel designated in the manner described in Section 14, above, may provide one copy of Highly Confidential documents or information to their outside consultants or experts who have been designated to receive Highly Confidential Information in the manner described in Section 14, above. Designated outside counsel and consultants will each maintain the Highly Confidential documents and information and any notes reflecting their contents in a secure location to which only designated counsel and consultants have access. No additional copies will be made, except for use as part of prefiled testimonies or exhibits or during hearing, and then such copies shall also be subject to the provisions of this Order.
- 17 Staff of designated outside counsel and staff of designated outside consultants who are authorized to review Highly Confidential Information may have access to Highly Confidential documents or information for purposes of processing the case, including but not limited to receiving and organizing discovery, and preparing prefiled testimony, hearing exhibits, and briefs. Outside counsel and consultants are responsible for appropriate supervision of their staff to ensure the protection of all confidential information consistent with the terms of this Order.

- 18 Any testimony or exhibits prepared that include or reflect Highly Confidential Information must be maintained in the secure location until filed with the Commission or removed to the hearing room for production under seal and under circumstances that will ensure continued protection from disclosure to persons not entitled to review Highly Confidential documents or information. Counsel will provide prior notice (at least one business day) of any intention to introduce such material at hearing, or refer to such materials in cross-examination of a witness. The presiding officer will determine the process for including such documents or information following consultation with the parties.
- 19 The designation of any document or information as Highly Confidential may be challenged by motion and the classification of the document or information as Highly Confidential will be considered in chambers by the presiding officer(s). The party contending that a document or information is Highly Confidential bears the burden of proving that such designation is necessary.
- 20 Highly Confidential documents and information will be provided to Commission Staff and Public Counsel under the same terms and conditions of this Protective Order as govern the treatment of Confidential Information provided to Commission Staff and Public Counsel and as otherwise provided by the terms of this Protective Order other than this Section.

D. Use of Confidential Information in This Proceeding

- 21 Unless specifically stated otherwise, references to "Confidential Information" in Part D of this Order apply to Confidential Information and to Highly Confidential Information.
- 22 **Reference to Confidential Information.** If counsel or persons afforded access to confidential information refer to such information orally or in writing during any part of this proceeding, any public reference (*i.e.*, any reference that will not be placed in a sealed portion of the record) shall be solely by title, exhibit reference, or some other description that will not disclose the substantive confidential information contained in the document. Any other written reference shall be segregated and marked "Confidential Information," or "Highly Confidential Information," as appropriate, and access to it shall be given solely to persons

who are authorized access to the information under this Order. The parties must not disclose to any person not bound by the terms of this Order any confidential information that has been referenced in this proceeding.

- 23 Parties intending to publicly refer to confidential information in oral testimony, cross-examination, or argument must provide as much prior notice as is feasible to the affected party and the presiding officer. Unless alternative arrangements are in place to protect the confidential information, as provided below, there must be sufficient notice to permit the presiding officer an opportunity to clear the hearing room of persons not bound by this Order or take such other action as is appropriate in the circumstances.
- 24 **Protected Use by Agreement.** Any party who intends to use any confidential information in the course of this proceeding, including but not limited to testimony to be filed by the party, exhibits, direct and cross-examination of witnesses, rebuttal testimony, or a proffer of evidence, shall give reasonable notice of such intent to all parties and to the presiding officer, and attempt in good faith to reach an agreement to use the confidential information in a manner which will protect its trade secret, proprietary, or other confidential nature. The parties shall consider such methods as: (1) use of clearly edited versions of confidential documents, (2) characterizations of data rather than disclosure of substantive data, and (3) aggregations of data. The goal is to protect each party's rights with respect to confidential information while allowing all parties the latitude to present the evidence necessary to their respective cases.
- 25 If the parties cannot reach agreement about the use of confidential information, they must notify the presiding officer. The presiding officer will determine the manner of best protecting the confidential information while ensuring that all parties are afforded their rights to due process, including the right to cross-examine witnesses.
- 26 **Right to Challenge Admissibility.** Nothing in this Order may be construed to restrict any party's right to challenge the admissibility or use of any confidential information on any ground other than confidentiality, including but not limited to competence, relevance, or privilege.

- 27 **Right to Challenge Confidentiality.** Any 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. Pending determination, the challenged information shall be treated in all respects as protected under the terms of this Order.
- 28 The presiding officer may challenge a party's assertion of confidentiality by notice to all parties.
- 29 If the presiding officer determines the challenged information is not entitled to protection under this Order, the information continues to be protected under this Order for ten days thereafter to enable the producing party to seek Commission or judicial review of the determination, including a stay of the decision's effect pending further review.
- 30 **Admission Of Confidential Information Under Seal.** The portions of the record of this proceeding containing confidential information will be sealed for all purposes, including administrative and judicial review, and must not be examined by any person except under conditions of this Order, unless such confidential information is released from the restrictions of this Order, either through the agreement of the parties or pursuant to a lawful order of the Commission or of a court having jurisdiction to do so.
- 31 **Return of Confidential Information.** Within thirty (30) days after the conclusion of this proceeding, including any administrative or judicial review, every person who possesses any confidential information (including personal notes that make substantive reference to confidential information and transcripts of any depositions to which a claim of confidentiality is made), must return all confidential information to the party that produced it, or at the producing party's election, must certify in writing that all copies and substantive references to confidential information in notes have been destroyed. These provisions apply to all copies of exhibits which contain confidential information and for that reason were admitted under seal. The only exceptions are: (1) that counsel may retain exhibits as counsel records, for only so long as they represent the participant in this proceeding; and (2) that the Commission will retain a complete

record of the testimony and documentary evidence admitted to the record or refused admission, including confidential information, as part of the Agency's official records.

- 32 **Freedom of Information Laws.** Until the Commission or any court having jurisdiction finds that any particular confidential information is not of a trade secret, proprietary, or confidential nature, any federal agency that has access to and/or receives copies of the confidential information must treat the confidential information as within the exemption from disclosure provided in the Freedom of Information Act at 5 U.S.C. § 552 (b)(4); and any Washington state agency that has access to and/or receives copies of the confidential information must treat the confidential information as being within the exemption from disclosure provided in RCW 42.17.310(1)(h) and (q).
- 33 **Notice of Compelled Production In Other Jurisdictions.** If a signatory to this Protective Order is compelled to produce confidential documents in any regulatory or judicial proceeding by the body conducting the proceeding, the signatory must provide notice to the party that provided the confidential information. Such confidential information must not be produced for at least ten days following notice, to permit the party that provided the information an opportunity to defend the confidential nature of the material before the regulatory or judicial body that would compel production. Disclosure after that date, in compliance with an order compelling production, is not a violation of this Order.
- 34 **Modification.** The Commission may modify this Order on motion of a party or on its own motion upon reasonable prior notice to the parties and an opportunity for hearing.
- 35 **Violation of this Order.** Violation of this Order by any party to this proceeding or by any other person bound by this Order by unauthorized use or unauthorized divulgence of Confidential or Highly Confidential Information may subject such party or person to liability for damages and shall subject such party to penalties as generally provided by law, including, but not limited to, the provisions of RCW 80.04.380-.405.

DATED at Olympia, Washington, and effective this ____ day of _____, 2005

DOCKET NO. UE-_____
ORDER NO. ____

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WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

EXHIBIT A (ATTORNEY AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET NO. _____
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as attorney in
this proceeding for _____ (party
to this proceeding) agree to comply with and be bound by the Protective Order
entered by the Washington Utilities and Transportation Commission in Docket
No. _____, and acknowledge that I have reviewed the Protective Order and
fully understand its terms and conditions.

Signature

Date

Address

[Service Date _____]

EXHIBIT B (EXPERT AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET NO. _____
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as expert witness in this proceeding for _____ (a party to this proceeding) hereby agree to comply with and be bound by the Protective Order entered by the Washington Utilities and Transportation Commission in Docket Nos. _____, and acknowledge that I have reviewed the Protective Order and fully understand its terms and conditions.

Signature

Date

Employer

Address

Position and Responsibilities

* * *

The following portion is to be completed by the responding party and filed with the Commission within 10 days of receipt; failure to do so will constitute a waiver and the above-named person will be deemed an expert having access to Confidential Information under the terms and conditions of the Protective Order.

_____ No objection.

_____ Objection. The responding party objects to the above-named expert having access to Confidential Information. The objecting party shall file a motion setting forth the basis for objection and asking exclusion of the expert from access to Confidential Information.

Signature

Date

EXHIBIT C (HIGHLY CONFIDENTIAL INFORMATION AGREEMENT)

AGREEMENT CONCERNING HIGHLY CONFIDENTIAL INFORMATION
IN DOCKET NO. _____
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as

- In-house attorney
- In-house expert
- Outside counsel
- Outside expert

in this proceeding for _____ (a party to this proceeding) hereby declare under penalty of perjury under the laws of the State of Washington that the following are true and correct:

- a I am not now involved, and will not for a period of two years involve myself in, competitive decision making with respect to which the documents or information may be relevant, by or on behalf of any company or business organization that competes, or potentially competes, with the company or business organization from whom they seek disclosure of highly confidential information with respect to the development or purchase of energy resources; and
- b I am not now involved, and will not for a period of two years involve myself in, the ownership or development of electric energy projects or resources: (i) that have been or could potentially be offered to PSE for its electric portfolio; or (ii) that are competing or could potentially compete with other projects that are or could be offered to PSE for its electric portfolio; and
- c I am not now involved, and will not for a period of two years involve myself in, providing consulting services or advice to owners or developers of electric energy projects or resources: (i) that have been or could

potentially be offered to PSE for its electric portfolio; or (ii) that are competing or could potentially compete with other projects that are or could be offered to PSE for its electric portfolio, to the extent such consultation or advice involves matters for which the "highly confidential" information would be relevant; and

- d. I have read and understand, and agree to be bound by, the terms of the Protective Order in this proceeding, including this Section C of the Protective Order.

Signature

Date

City/State where this Agreement was signed

Employer

Position and Responsibilities

Permanent Address

* * *

The following portion is to be completed by the responding party and filed with the Commission within 10 days of receipt. Failure to do so will constitute a waiver and the above-named person will be deemed a person having access to Highly Confidential Information under the terms and conditions of the protective order.

_____ No objection.

_____ Objection. The responding party objects to the above-named person having access to Highly Confidential Information. The objecting party shall file a motion with the Commission, supported by affidavit, setting forth the basis for objection and asking exclusion of the person from access to Highly Confidential Information.

DOCKET NO. UE-_____
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Signature

Date

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