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1 BEFORE THE WASHINGTON STATE

2 UTILITIES AND TRANSPORTATION COMMISSION

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4 In the Matter of )

5 )

6 Analysis of Staff Proposed ) Docket No. A-130355

7 Revisions to WAC 480-07 )

8 Governing Information Designated)

9 as Confidential )

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RULE ADOPTION HEARING

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Pages 1-85

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1:31 p.m.

16

January 30, 2017

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18 Washington Utilities and Transportation Commission

1300 South Evergreen Park Drive Southwest

19 Olympia, Washington 98504-7250

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COMMISSIONER ANN E. RENDAHL

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COMMISSIONER PHILIP B. JONES

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19 ADDITIONAL SPEAKERS:

LISA ANDERL, CenturyLink

21 DONNA BARNETT, Puget Sound Energy

ZACH KRAVITZ, NW Natural

22 DUSTIN TILL, PacifiCorp

LAUREN RUSSELL, Union Pacific Railroad Co.

23 JESSE COWELL, Industrial Customers of Northwest

Utilities

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\* \* \* \* \*

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1 OLYMPIA, WASHINGTON; JANUARY 30, 2017

2 1:31 P.M.

3

4 CHAIR DANNER: Good afternoon. This is the

5 meeting of the Utilities and Transportation Commission,

6 and we are here for a hearing on proposed changes to the

7 procedural rules that are contained in Washington

8 Administrative Code, Chapter 480-07, and this is Docket

9 A-130355.

10 I'm Dave Danner, Chair of the Commission,

11 and I'm joined by my colleagues, Commissioner Ann

12 Rendahl and Commissioner Philip Jones.

13 We have a sign-in sheet that has not been

14 signed in by anybody, so it will be a very short hearing

15 this afternoon.

16 And so what I'd like to do, we basically

17 have -- I would group things into two groups:

18 Confidentiality and other stuff. And so what I'd like

19 to do this afternoon, Mr. Kopta, is I'd like you to give

20 us kind of a summary of the proposal for both groups,

21 and then we'll focus on -- I think we'll -- let's do the

22 issues other than confidentiality first, and then we

23 will save the best for last and have that discussion

24 later on.

25 So why don't you proceed.

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1 MR. KOPTA: All right. Thank you,

2 Mr. Chairman, good afternoon, and Commissioners.

3 I'm Greg Kopta, the Director of

4 Administrative Law for the Commission presenting Staff's

5 recommendation on these rules. As you mentioned,

6 Mr. Chairman, these are the procedural rules in WAC

7 480-07, only a portion of those at this point.

8 We have before you Parts I, II and IIIA.

9 Part I are the general procedural rules for filing and

10 those kinds of things with the Commission; Part II are

11 the rules that address rulemaking; and Part III are the

12 rules that address adjudications; IIIA are just the

13 general rules for adjudications.

14 So we've been at this for a while, and the

15 objective has been to streamline, clarify and better

16 organize our procedural rules and to reflect the

17 Commission's current practice. The last time that the

18 rules were updated was 2004, I believe, so it's been a

19 while.

20 And we've had five rounds of comments on the

21 rules that are before you today, and three workshops.

22 And I think that the rules are better for having had

23 this much public interaction. We've had really positive

24 and helpful suggestions from stakeholders. As a result,

25 I think most people that have been involved in this

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1 process generally support the outcome.

2 There are some comments that we received on

3 the proposed rules. Those are in the form of a matrix

4 that the Commission Staff filed last week on Wednesday.

5 Copies should be available if people don't have them.

6 So they are summarizing the comments we received and

7 Staff's recommendations and responses to those comments.

8 The rules, in addition to clarifying and

9 reorganizing, we've made some substantial changes,

10 probably the biggest of which is that the Commission --

11 once these rules are adopted, if they are, the

12 Commission will only serve documents electronically, no

13 longer serving copies in paper, and submissions for most

14 filings will also be electronic rather than in paper,

15 and there will be no more fax filings with the

16 Commission, and we're trying to reflect current

17 technology and our --

18 CHAIR DANNER: Does anybody file by fax

19 anymore?

20 MR. KOPTA: Surprisingly, yeah, some people

21 do. Sometimes we get applications for licenses, you

22 know, common carrier type things, and occasionally, the

23 annual report will come in by fax.

24 But we intend to issue a notice, probably

25 the last notice that we do by paper, informing everyone

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1 that the Commission regulates that there are changes and

2 that these are some of them, so that they will be better

3 prepared. But in this day and age, when 75 percent of

4 people have smartphones, it just seems to make a lot

5 more sense to file things either through the web portal

6 or via e-mail.

7 We also have new rules for electronic

8 signatures, which kind of goes along with the electronic

9 filing, and for Commission requests for information

10 outside of communications.

11 I won't repeat the comments and responses in

12 the matrix unless there are specific questions that the

13 commissioners have. I am available to respond to any

14 further comments that people that are here to comment

15 have.

16 The two most significant issues have to do

17 with confidentiality, which is in WAC 480-07-160, and

18 there are two issues that multiple parties commented on.

19 One of them is the change that we've

20 proposed to the definition of confidential information.

21 Right now, the rule includes both confidential

22 information as designated by companies pursuant to

23 WAC -- I mean, pursuant to RCW 80.04.095 and 81.77.210.

24 And in addition to that information, other information

25 that may be exempt from disclosure under the Public

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1 Records Act.

2 We've proposed to eliminate the other

3 exemptions because they are covered under a different

4 process. And the rule is specifically designed to cover

5 the process for the confidential information designated

6 under 80.04.095.

7 The other controversial issue is a change in

8 procedure in an adjudication. If a party challenges

9 another party's designation of confidential information,

10 the rule presently would have the Commission resolve

11 that dispute. We have recommended that the Commission

12 change that so that it's consistent with requests for

13 public records.

14 And under both of the statutes, there's a

15 ten-day period in which a party has to respond or to

16 seek a court order compelling the Commission to withhold

17 that information. And in the absence of such an order,

18 then the Commission releases that information.

19 Our concern is that the Public Records Act

20 is very broad and the exemptions are very narrow, and in

21 the absence of a specific exemption that allows the

22 Commission to do something other than the ten-day hold

23 and wait for a court order, then the Commission risks

24 being in violation of the Public Records Act.

25 We will discuss that a little bit more in

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1 depth when we come into the confidentiality issues, but

2 for now, that's a broad overview of the issues that have

3 been raised by the commenting parties, and I'm available

4 for any questions that you have.

5 CHAIR DANNER: All right. Thank you very

6 much.

7 Are there any questions for Judge Kopta

8 before we begin?

9 MR. JONES: No.

10 CHAIR DANNER: Okay. So let's do this.

11 Again, I don't have a sign-up sheet, so I'm just going

12 to basically go through and call on people that I think

13 are here, and if there's others who want to come up, I

14 will invite them to do so, or people who are on the

15 bridge line.

16 So we're going to talk first about the

17 procedural rules that -- the general procedural rules,

18 the rulemakings and the adjudications. We'll start

19 first, but we will -- let's keep confidentiality off to

20 the side. Let's talk about everything else first, and

21 then we'll have a second round, and everybody will come

22 up a second time who wants to speak on that.

23 So even though that may not be as efficient

24 as you like, it helps us compartmentalize and it is,

25 after all, for all of us.

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1 So that said, why don't we start with Public

2 Counsel. Do you have anything you want talk about on

3 the general?

4 MS. GAFKEN: I don't actually -- I don't

5 actually have much more to add to the record other than

6 my filed comments that have been added to the record

7 along the way. I will say that Public Counsel has

8 appreciated the opportunity --

9 CHAIR DANNER: There's a seat for you there.

10 MS. GAFKEN: Okay.

11 CHAIR DANNER: And, actually, could you

12 identify yourself for the court reporter?

13 MS. GAFKEN: Of course. My name is Lisa

14 Gafken. I'm with Public Counsel.

15 CHAIR DANNER: That's G-A-F-K-E-N.

16 MS. GAFKEN: We have appreciated the efforts

17 to modernize the rules. It has been a long time since

18 they've been updated, but there's been reasons for that.

19 We are quite excited to move into the

20 electronic age. When this rulemaking first started, we

21 were really pushing for an ability to still receive

22 paper, and I think paper will still have a place in our

23 practice, because, you know, an active case is just

24 easier on paper.

25 But an update in terms of how Public Counsel

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1 has been operating, we have been moving to digitize our

2 office, and that's due in large part to losing our file

3 space. So, you know, when you're forced to move into a

4 new world, then you do that. And so we've been given

5 the opportunity. It's something that I've been looking

6 at, and our legal assistant has been looking at doing.

7 And so once that became a reality, then we really moved

8 quickly to make that happen. So I'm looking forward to

9 a bright new world of being in a digital era.

10 And so I guess I really don't have much more

11 to say about the other bucket, but thank you.

12 CHAIR DANNER: So we will see you shortly

13 with regard to the confidentiality?

14 MS. GAFKEN: Yes.

15 CHAIR DANNER: All right. Thank you.

16 Puget Sound Energy?

17 MS. BARNETT: Good afternoon, Commissioners.

18 Donna Barnett with Perkins Coie. I represent Puget

19 Sound Energy. And that's Barnett, B-A-R-N-E-T-T.

20 And I'd like to echo Ms. Gafken's comments

21 in that we appreciate the work, the hard work that's

22 been done over the past three years now on this, and we

23 think these are significant improvements over the

24 current rules and we appreciate all the work that has

25 been put in.

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1 Our -- most of our comments today are going

2 to be centered on the confidentiality issue, but that

3 doesn't mean -- we filed six comment letters over the

4 few years, so I would like you to please to read those.

5 Just because we didn't put in -- put every comment in

6 every letter doesn't mean we've just decided that it's

7 not an issue anymore.

8 Specifically, just a couple things to note.

9 Flexibility with regard to work papers and hidden cells,

10 and I think work papers which are not submitted or filed

11 with the -- they're not filed with the Commission,

12 maintaining as much flexibility around work papers as

13 possible, to be able to use them as they're intended to

14 be, in electronic format, as a working, living document,

15 to be able to use them, understanding that that is

16 important for the parties.

17 Also, I think Union Pacific filed comments

18 most recently about the notice to -- well, the

19 Commissioners' and the Staff's ability to review records

20 at any time, and that is -- I think their comment was to

21 include a reasonable -- a reasonability language in

22 there, or within reason. And we support that, but

23 understand that it's gone -- it's worked very well so

24 far with staff and with our -- PSE's and other parties'

25 books, I'm sure, has been open all the time, so they

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1 have -- Staff has been very good at providing notice and

2 working with us, but -- so we support Union Pacific's

3 language there, though.

4 And I think that is it except for the

5 confidentiality issue.

6 CHAIR DANNER: Okay. Are there any

7 questions for Ms. Barnett?

8 COMMISSIONER JONES: No.

9 CHAIR DANNER: All right.

10 COMMISSIONER RENDAHL: No.

11 CHAIR DANNER: So thank you. We'll see you

12 again shortly.

13 MS. BARNETT: Yes.

14 CHAIR DANNER: Okay. Well, I guess rather

15 than have me call up people without knowing, why don't

16 just somebody else come up.

17 Anyone else looking to speak on this issue?

18 Good afternoon.

19 MR. KRAVITZ: Hi, Chairman, Commissioners.

20 Zach Kravitz from NW Natural. My comments on the other

21 portions of the rulemaking, non-confidential issues is

22 really, we just want to extend our thanks to Staff. We

23 think this will do a very nice job streamlining some of

24 the process involved at the Commission. I know our

25 regulatory team and our staff are thrilled to see more

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1 electronic filing, so we're really happy to see those

2 changes.

3 This docket, it predates my time at NW

4 Natural, so I understand all the hard work that has gone

5 into it, and so I'm just kind of jumping in here at the

6 end. And so I appreciate everyone's work on this, and I

7 have a few more comments when we get to the second phase

8 of this.

9 CHAIR DANNER: Okay.

10 MR. KRAVITZ: Thanks.

11 CHAIR DANNER: I think I'm catching a theme

12 here.

13 All right. Anyone else who wants to comment

14 on the other category?

15 Good afternoon.

16 MR. TILL: Good afternoon, Chair Danner and

17 Commissioner Rendahl and Commissioner Jones. I'm Dustin

18 Till appearing on behalf of PacifiCorp. That's T-I

19 double L.

20 And I would like to echo NW Natural and

21 Puget Sound Energy's commendations of the Staff. I

22 think -- I'm also relatively new to this docket, but I

23 know what's involved, a similarly robust public process

24 that's been a pleasantly collaborated process.

25 And we're in agreement with Staff that, in

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1 general, the rules are much improved. They improved the

2 efficacy and the clarity of the Commission's procedural

3 rules, so we'd like to commend Staff on all of their

4 diligent and hard work.

5 We do some have some rather nuance points

6 of, I guess, disagreement on some of the

7 non-confidentiality rules. Those are summarized in the

8 written comments that we've submitted throughout this

9 proceeding, and we'd ask that the Commission take those

10 into consideration as it's deliberating these proposed

11 rules.

12 Just a couple of quick points on that. We

13 echo Puget Sound Energy's comment around the ability to

14 some discretion around the formatting of electronic

15 spreadsheets, particularly hidden cells in large

16 filings, rate case filings with significant work papers.

17 The administrative burden of going through, you know,

18 hundreds and hundreds of separate workbooks to identify

19 hidden cells is rather onerous, and it really

20 outweighs -- the burden far outweighs the kind of the

21 transparency piece. Because hidden -- it's kind of a

22 misnomer. Hidden cells within an Excel spreadsheet

23 aren't -- they're not hidden, they're readily

24 ascertainable and viewable by individuals with, what I

25 would call, you know, fairly rudimentary spreadsheet

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1 skills, so parties that are reviewing these, I think,

2 are generally, you know, familiar with the workings of

3 Excel and other spreadsheet programs.

4 And so -- and that's where I dislike that

5 term "hidden," because it suggests that utilities or

6 other parties are trying to hide information, but it's

7 really a formatting issue to put the most pertinent

8 information up front to facilitate printing.

9 CHAIR DANNER: So I understand what you're

10 saying and I also have a little practical experience

11 here where, you know, in an adjudication, the narrative

12 is all going in one direction, and so that's kind of

13 where we're going with our decision, and then we hear

14 afterwards, yeah, but you didn't look at this cell that

15 we never mentioned to you and is, in fact, a hidden

16 cell, but if you had ascertained rudimentary Quicken

17 skills, you would have found it, but we didn't because

18 the narrative never told us to do that.

19 And so when we're trying to get to an end

20 that is a practical end, we want to be flexible, but we

21 also don't want to provide kind of a pretext for

22 misleading the Commission, whether it's intentionally or

23 not, to where we aren't looking for that information.

24 If you understand what I'm trying to say.

25 MR. TILL: And I very much do, Chair, and

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1 PacifiCorp's intent in all regulatory proceedings is

2 transparency and providing for a full vetting of our

3 decisions based on the merits of those decisions. And

4 so while I appreciate the concerns about sensitivity,

5 you know, where we're coming from isn't kind of a hide

6 the ball game, but it's really -- kind of the

7 administrative burden of going through literally

8 hundreds and hundreds of work pages before they're

9 submitted to ensure that there's -- because now we have

10 a compliance obligation if this rule is adopted.

11 And so I'm just asking that the Commission

12 take that into consideration, kind of the compliance

13 regulatory burden with, you know, maybe what we're kind

14 of hoping to get out of it, and in no way want to be --

15 have my comments construed as we want to hide

16 information, because that's not at all --

17 CHAIR DANNER: No, and it's not -- it's not

18 taken that way. It's just that sometimes, you know, if

19 it's -- if it's there, it's now officially in the

20 record, but it's a needle in a haystack unless there's

21 something else that's pointing to it. And that's what

22 we don't want, to have a situation like that.

23 MR. TILL: And I appreciate that, so I

24 just -- I submit that to the Commission for

25 consideration.

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1 CHAIR DANNER: Yeah.

2 MR. TILL: And, you know, other than that,

3 like I said, we rely on the comments that we've

4 submitted. And again, we appreciate Staff's diligent

5 work on this. So thank you.

6 CHAIR DANNER: Thank you.

7 COMMISSIONER RENDAHL: I would also echo the

8 Chair's comments. Having been involved in rate cases

9 for a number of years before the Commission, this has

10 been an issue for the Commission for a very long time.

11 And those who were perhaps before the Commission in

12 these cases are aware of that.

13 Our -- you know, our staff is somewhat less

14 than your staff, and a lot of people go into a company's

15 presentation of a case.

16 CHAIR DANNER: In number, not in skills or

17 abilities.

18 COMMISSIONER RENDAHL: I absolutely echo

19 that, and we have one accounting advisor --

20 CHAIR DANNER: Right.

21 COMMISSIONER RENDAHL: -- and they're not

22 able to talk with all of you the way you all can talk

23 with one another.

24 So this is really -- it's not so much -- it

25 is for Commission Staff, but this is a really critical

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1 issue for the commissioners and their advisors in

2 evaluating cases, and this applies not just to the

3 companies, it applies to the staff when they're making

4 their presentations to the Commission. It's so we can

5 figure out what you're asking for.

6 And as my colleague mentioned, you can

7 mention so many things in your narrative, but there

8 might be something in these spreadsheets, and if they're

9 hidden in a way that's not easily discernible, then it

10 makes it difficult for us to really have all the

11 information to come up with the right answer and really

12 work with all of you in coming up with the right answer.

13 So it's in everybody's interest.

14 I understand hiding columns so that you can

15 shorten up the spreadsheet, but there are ways to hide

16 things and there are ways to hide things. So maybe

17 there's a different way of saying this, as you said,

18 but, you know, the rule talks about, you know, making

19 sure that things are not password protected, not hidden.

20 We need to see them. We need to see this information

21 and our staff need to see it, so we can figure out the

22 right answer to what you're asking for.

23 So that's the whole intent of this rule.

24 It's not to come down on you for hiding a cell and we're

25 going to fine you. That's not -- the purpose is so we

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1 can get the information we need to come up with the

2 right answer. So that's --

3 MR. TILL: I appreciate those comments.

4 CHAIR DANNER: All right. Thank you very

5 much. Appreciate it.

6 Good afternoon.

7 MS. RUSSELL: Good afternoon. My name is

8 Lauren Russell. I'm here on behalf of Union Pacific

9 Railroad Company. We have some comments we'd like to

10 can make on the proposed confidentiality --

11 MS. RENDAHL: I'm not sure your mic is on.

12 If you press the button, the light comes on.

13 MS. RUSSELL: Is that better?

14 CHAIR DANNER: So, Ms. Russell, we're going

15 to bifurcate this, so we'll do -- we're going to do --

16 MS. RUSSELL: Understood, Commissioner. I

17 just wanted to make a brief comment about 480-07-175 --

18 CHAIR DANNER: Okay.

19 MS. RUSSELL: -- if that would be

20 appropriate at this time.

21 CHAIR DANNER: Sure.

22 MS. RUSSELL: Okay. Union Pacific

23 incorporates its comments that it has submitted in the

24 form of two draft letters previously. They would just

25 like to reiterate that they oppose what is seemingly

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1 very broad language that the Commission has the ability

2 to access and inspect accounts, papers and other

3 documents at any and all times.

4 I recognize that this language echoes

5 statutory language, but as it stands, there are some

6 concerns about protection for privileged information

7 under attorney-client privilege, the work product

8 doctrine, commercially sensitive information, security

9 sensitive information or other information protected

10 under federal law.

11 UP has some additional concerns about the

12 process of whether -- if they need to object to a

13 request for some of this information it believes should

14 be privileged. They recognize that the Staff --

15 Commission Staff is required to respond within just five

16 days to any legal objections that the company would set

17 forth.

18 It's also seemingly unclear what recourse,

19 if any, the company may have if it disagrees with the

20 Commission's ultimate determination of the objection.

21 Other concerns include the speed of this

22 process and what appears to be a lack of a hearing on

23 these proposed legal objections.

24 And just to follow up on the reasons that UP

25 has concerns with this rule, they are a private company

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1 operating in a competitive marketplace, so they have

2 concerns about a lack of protection for commercially

3 sensitive and proprietary information.

4 And we'd just like to note that Union

5 Pacific and the Commission of the State of Washington

6 share a common interest in preventing certain

7 individuals with malicious intentions getting access to

8 security sensitive information. So there's information

9 such as the transport of hazardous materials, where

10 those trains will be heading at what times. UP would

11 just like to ensure that that information would remain

12 protected, and it's unclear whether those protections

13 are in place under the proposed law.

14 And then finally, there's -- UP would just

15 like to point out that the current proposed rule doesn't

16 make mention of other preemptive laws, such as federal

17 law which requires railroads to withhold some -- or

18 prohibits them from disclosing such information, such as

19 customer routes and other customer information.

20 So just for the record, UP would like to

21 state objections to that rule. Thank you.

22 CHAIR DANNER: Okay. Thank you.

23 I think we're going to have that discussion

24 later on as part of the confidentiality portion. I also

25 seem to recall that we did address the federal -- the

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1 federal legal issues in that conversation, but we'll

2 have that conversation.

3 MR. KOPTA: Yeah. Yes. This is WAC

4 480-07-175, which is a new rule, so it's not precisely

5 within the issues having to do with confidentiality,

6 although Union Pacific, obviously, has raised some of

7 those in connection with that particular rule.

8 CHAIR DANNER: Yeah, yeah. Okay. Well, I

9 think -- I was actually hoping to put 175 issues aside

10 into the second phase, but I understand why you raised

11 them there.

12 MR. KOPTA: And that's -- we can certainly

13 address them as --

14 CHAIR DANNER: Okay. Why don't we do that.

15 MR. KOPTA: Okay.

16 CHAIR DANNER: All right. So, Ms. Russell,

17 we may actually have you up again and -- when we get

18 into that discussion.

19 MS. RUSSELL: Okay.

20 CHAIR DANNER: All right. Great.

21 Anyone else in the room want to come

22 forward?

23 MR. COWELL: Good afternoon. Thank you,

24 Commissioners. Jesse Cowell on behalf of the Industrial

25 Customers of Northwest Utilities, C-O-W-E-L-L.

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1 And I wanted to just briefly -- well, to

2 start off with, again, I also am very appreciative of

3 staff's efforts, particularly the last couple rounds.

4 There was a matrix provided with Staff's explanation on

5 why certain changes were made or not made, and I found

6 throughout the process that Staff was very thoughtful

7 and considerate in listening to -- I know particularly

8 for ICNU's position, some changes were made, some

9 changes were not made, but very appreciate of that.

10 And particularly in the sense of, we focused

11 a lot on the rule provisions for intervenors. And I'd

12 support a lot of the changes that Staff is recommending,

13 which I think will streamline the process for us from

14 the intervenor's perspective.

15 And then lastly, some commentators have said

16 that we encourage the Commission to look at some prior

17 comments. We've spent a lot of time on it, and I have

18 not wanted to just regurgitate the same arguments over

19 and over, but on some of the points that we may have

20 disagreed with Staff, we hope that the Commission will

21 look at those comments and consider the flip side.

22 CHAIR DANNER: Okay. Great. Thank you very

23 much.

24 All right. Anyone else in the room or on

25 the bridge line who wants to discuss the issues other

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1 than confidentiality?

2 All right. Then let's go into

3 confidentiality. Okay. Is there anything you want to

4 start off with in your discussion?

5 MR. KOPTA: I tried to give you a high level

6 summary of the two issues. I did not discuss 175

7 issues. I can provide you with a little insight into

8 that particular rule.

9 CHAIR DANNER: That might be useful for the

10 record.

11 MR. KOPTA: That is a new rule that the --

12 essentially establishes a procedure for the Commission

13 requesting information outside of the context of an

14 adjudication. We've always had the statutory authority

15 to be able to do that, but our consumer affairs and

16 investigative staffs have found that there are sometimes

17 issues that arise with respect to companies being

18 responsive to requests for information. So this merely

19 provides a vehicle for Staff to send out what are

20 essentially data requests to companies outside of an

21 adjudication to obtain information.

22 The timelines are very similar in terms of

23 responses or objections, and certainly confidentiality

24 would be one objection that a company could make to

25 providing information. We require in the rule that

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1 Staff give a prompt response to whatever objection we

2 receive, and then the Commission would rule on that

3 objection and either overrule it and require the company

4 to provide the information, or sustain it and -- and no

5 longer require them to provide the information.

6 It is essentially, like I say, a data

7 request or a bench request. And depending on who issues

8 the order, if it's an administrative law judge or even

9 the executive director, then there are other rules that

10 provide for Commission review of those decisions. If

11 the commissioners were to make that determination, which

12 I would not anticipate, but if that were the case, then

13 that would be a final determination by the

14 commissioners, which would then be appealable to the

15 Superior Court if a company disagrees.

16 CHAIR DANNER: Okay. So let's say there are

17 rail safety staff, again, and he's doing an

18 investigation and wants information from Union Pacific.

19 Union Pacific says, well, wait a minute, there's a

20 federal law that says this information is not to be

21 disclosed, so we're not going to disclose it.

22 If we agree with them, then that's the end

23 of the matter. If we disagree with them, then what is

24 the -- how does it unfold?

25 MR. KOPTA: Well, if an administrative law

0026

1 judge enters the decision, it would be -- it could be

2 reviewed to the full Commission just like any other

3 initial order. And if the commissioners were to agree

4 and to require that information to be provided, then the

5 recourse that the company would have is the same

6 recourse that they would have with any final order from

7 the Commission, which would be to go to Superior Court.

8 CHAIR DANNER: Okay. Okay.

9 Are there any questions for Mr. Kopta before

10 we ask for more?

11 MR. KOPTA: Yeah. I will just note, with

12 respect to the other confidentiality issues that Staff

13 did -- or more specifically, I prepared a memo on those

14 two issues, a copy of which are on the back table as

15 well as something that was filed in the docket last

16 Wednesday, so I don't feel the need to necessarily

17 repeat that. Hopefully, folks have read that and

18 understand the reasoning behind the proposals, and I'm

19 certainly willing to engage in further discussion.

20 CHAIR DANNER: Okay. Any of my colleagues

21 want him to read that into the record word by word?

22 COMMISSIONER RENDAHL: Absolutely not.

23 Thank you.

24 COMMISSIONER JONES: No, thank you.

25 CHAIR DANNER: All right.

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1 COMMISSIONER RENDAHL: I enjoy the sound of

2 your voice, but I think we --

3 MR. KOPTA: Thank you.

4 CHAIR DANNER: Okay. So let's -- let's ask

5 for comment, but first, Ms. Russell, do you want to --

6 is there anything that you've heard that you want to

7 respond to so far?

8 MS. RUSSELL: Thank you. Thanks for the --

9 it's off again.

10 Thanks for the clarification on the rule.

11 One comment I think I'd make in response is, at least

12 from our reading, it doesn't appear that the

13 confidential designation would apply to UP, so they

14 would not be able to use the confidential objection as a

15 way to object to some of these requests.

16 MR. KOPTA: Not the confidentiality under

17 80.04.095 or 80.177.210, but certainly, if there's a

18 provision in federal law or some other exemption under

19 the Public Records Act, then --

20 MS. RUSSELL: Such as attorney-client

21 privilege as well as other --

22 MR. KOPTA: Absolutely.

23 MS. RUSSELL: Okay. It just doesn't get to

24 take advantage of the confidentiality designation.

25 MR. KOPTA: Correct.

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1 CHAIR DANNER: Yeah, this is -- this has

2 been in our state -- it seems a very strange and a bit

3 artificial designation, but our state law says that

4 Title 80 companies are entitled to confidentiality and

5 Title 81, not so much.

6 MS. RUSSELL: It does seem strange when it

7 accepts solid waste companies, but everyone else so --

8 all right. Thank you.

9 MR. KOPTA: Well, yeah, there's a specific

10 statute that the solid waste companies were able to have

11 the legislation enact, so --

12 CHAIR DANNER: Yeah. We don't do statutes,

13 so you'd have to take that one up on the other side of

14 the lake.

15 Okay. So ready to do a deeper dive into

16 confidentiality. So, Ms. Barnett, do you want to --

17 MS. BARNETT: Sure. Thank you, Chairman

18 Danner, Commissioners.

19 First, let me dispose of one that -- minor,

20 but it does fall under confidentiality. The marking

21 designation, I think that the staff has recommended

22 changing the designation marking to require, quote,

23 designated information is confidential per protective

24 order in docket blank or per WAC.

25 That's the little label that you've seen on

0029

1 pages that are confidential that go on every -- the

2 front page of a confidential document and then every

3 page that contains confidential information. I

4 understand this clarifies that it may not just be

5 highlighted material, or it's just designated any way

6 that the party has deemed makes it's clear what is

7 confidential and what's highly confidential. But these

8 are little just -- just -- just practically, little

9 labels that we're trying to cram in.

10 It's really wordy, and to put quotes that

11 say, we must say, "Designated information is

12 confidential pursuant to the protective order in Docket

13 UE-11111/UG-11112" on every page in the middle, the way

14 right now, it just says, "Confidential per" or "Highly

15 confidential per." Throw the "highly confidential" out,

16 and it's just crazy. So we think if we could keep that

17 the same -- I think I'm done.

18 Okay. Now, to the --

19 CHAIR DANNER: So basically what you're

20 saying is if you can do -- if you can do a notification

21 that somehow is clear to us that this -- all right, this

22 stack of documents is confidential per WAC blah, blah,

23 blah, you know, and you don't need to stamp it on every

24 single page --

25 MS. BARNETT: No. I think we do need to

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1 stamp it on every single page. I'm saying the stamp

2 that we use, I want it -- I want to be able to say,

3 "confidential" or "highly confidential" per WAC or per

4 protective order. I don't want to have to say

5 Designated information is highly confidential per

6 protective order in Docket blah, blah, blah in a tiny

7 little label, when we're just trying to say this one row

8 of this one table that is taking up this entire page, so

9 the -- just --

10 COMMISSIONER RENDAHL: Because --

11 CHAIR DANNER: In other words, why use

12 twenty words when three will do.

13 MS. BARNETT: Yeah. So right now, it's

14 quoted the words we have to use in the label. I'd like

15 a little more flexibility to be able to just -- even the

16 label, I understand that -- if we can label it in any

17 way that clearly designates which is confidential and

18 which isn't, I'd like that.

19 COMMISSIONER RENDAHL: So because of

20 formatting and --

21 MS. BARNETT: Yes.

22 COMMISSIONER RENDAHL: You might lose a row

23 because you had to have more words.

24 MS. BARNETT: Yeah. More words, right.

25 CHAIR DANNER: So do you think that any of

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1 those words is -- the deletion of any of those words is

2 going to confuse us?

3 MS. BARNETT: I don't. Because I know from

4 past working with you, I think it's worked out very well

5 so far. I don't think there's been any significant --

6 but again, if there is significant confusion, we've

7 also -- we're open and willing to work that out on a

8 case-by-case basis.

9 CHAIR DANNER: All right.

10 MS. BARNETT: Now to the good stuff.

11 CHAIR DANNER: Yes.

12 MS. BARNETT: Okay.

13 CHAIR DANNER: That was good stuff, but --

14 MS. BARNETT: The first one I also think

15 is -- the first issue I want to take is the definition

16 of confidential material. And I appreciate Judge

17 Kopta's memo. It was very helpful and able to -- in

18 identifying the specific issues and being able to

19 respond to that more efficiently today. So thank you so

20 much for that.

21 I would like to first, the designated -- the

22 definition of confidential information does remove the

23 reference to exempt material under the Public Records

24 Act for information that is personally identifying

25 information such as names, phone numbers, Social

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1 Security numbers, things like that.

2 We recommend keeping that in there, because

3 as we've said before, the Public Records Act and the

4 discovery rules are different, distinct, and just for an

5 example, I just want to -- just something that actually

6 has come up, or either something very similar to it has

7 come up where, if we're in a consumer rules enforcement

8 action and a data request comes for all bills, or even

9 in a rate case, a data request comes in to see all

10 employee information for something that happens to

11 have -- or a screenshot of a particular database that

12 happens to have personally identifying information on

13 it, would be credit card numbers or which -- more like

14 Social Security numbers maybe for an employee, that is

15 not -- we could flag that by saying it's confidential

16 pursuant to the WAC, either redact it or provide it

17 under a confidential seal.

18 Right now, with the -- with the proposed

19 rules, we wouldn't be able to call that confidential.

20 So I understand that if there is a challenge to the

21 confidentiality, we would be able to raise that and

22 not -- and to deal with that in Superior Court, but I'm

23 worried that it would get lost. Since we couldn't put

24 it on yellow paper, we wouldn't be able to put it on --

25 designated confidential per WAC, or unless it

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1 specifically said a protective order, there's just no

2 way to identify it before there's a challenge.

3 So if a Kroger or another party that's not

4 Staff or Public Counsel requests a "me too" data request

5 and get all the -- I see that easily getting lost in the

6 shuffle, because we wouldn't -- weren't able to

7 designate that particular information as confidential.

8 I think that's -- the legislature says

9 that's very important information and very -- you know,

10 you want to keep that out. So I'm afraid that taking it

11 out of the WAC is actually going to cause bigger

12 problems than streamlining is to benefit.

13 CHAIR DANNER: So in other words, we've been

14 talking internally here that confidential information is

15 different than exempt information. You have information

16 that simply is exempt under the Public Records Act and

17 you have information that you're submitting as

18 confidential. And if somebody wants to have that

19 confidential information disclosed, they go through the

20 ten-day process and so forth.

21 But if something is exempt but you decide

22 that even though it's exempt you're going to put it in

23 the record, it's have -- and seek confidential

24 protection for that, it needs to be treated the same way

25 just for the -- because it's going to go under the same

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1 process; is that -- am I getting that right?

2 MS. BARNETT: Well, yeah, I don't get

3 that -- so if -- if Public Counsel asks PSE for a

4 screenshot of a bill and it's got a name and a phone

5 number and an address on there, right now, that doesn't

6 fall under confident- -- or at least proposed rules, it

7 doesn't fall under confidential definition. I see it

8 falls under the Public Records Act, but it hasn't been a

9 Public Records Act. It hasn't been -- I mean, it hasn't

10 been a request for public record.

11 CHAIR DANNER: Um-hmm.

12 MS. BARNETT: It's not a public record

13 because PSE -- it's in PSE's -- they're asking it from

14 PSE. It hasn't been submitted to the Commission, it

15 hasn't been submitted to any staff, and it's not in

16 front of the Commission at all.

17 Now, what -- I'm sorry to use Public

18 Counsel, but so what Public Counsel could do if they --

19 if there was information on there they wanted to use as

20 an exhibit in an adjudicative proceeding, they would

21 file that and then it would be put up on the website.

22 So -- but there would be no -- we wouldn't be able to

23 designate that or flag it as confidential because it

24 isn't a public record. It was simply -- and it doesn't

25 have to be Public Counsel. It could be any other party.

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1 It could be a consumer.

2 COMMISSIONER RENDAHL: So if we were to

3 somehow -- if we were to decide to distinguish between

4 confidentiality and other documents, you would want some

5 way to distinguish them so it was clear that they were

6 exempt or not disclosable for some other reason? I'm

7 just trying to --

8 MS. BARNETT: Yeah, yeah. Some way to flag

9 them --

10 COMMISSIONER RENDAHL: Or I don't -- I love

11 all these colors, but -- you know what I mean?

12 MS. BARNETT: Yeah.

13 COMMISSIONER RENDAHL: But some way to

14 distinguish that this is a document that may not fit

15 under confidentiality, but is exempt from disclosure, so

16 that the parties understand there's some special

17 treatment involved, it's subject to a protective order,

18 in the --

19 MS. BARNETT: There might not be a

20 protective order in the case, right, but yes, I think

21 you're right. We need some way to identify it as -- as

22 don't put it on the website.

23 COMMISSIONER RENDAHL: Right. So if it's --

24 if we proceed along these lines of defining confidential

25 information in this way, you would want some way to

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1 treat that exempt -- public records exempt information,

2 or otherwise HIPAA protected information --

3 MS. BARNETT: Yeah.

4 COMMISSIONER RENDAHL: -- that kind of

5 information --

6 MS. BARNETT: Yeah.

7 COMMISSIONER RENDAHL: -- in a separate way.

8 MS. BARNETT: Right. And the existing

9 rules, they just incorporate anything that's under the

10 Public Records Act is confidential.

11 CHAIR DANNER: Yeah. So if it's exempt

12 information, you submit it as confidential.

13 MS. BARNETT: Exactly. And then it's

14 flagged and we -- yeah, and so they know that if it's --

15 they do want to turn it into an exhibit, if it's a just

16 a data request right now, or a response to a data

17 request, that it's on yellow paper or blue paper. They

18 know to do something to it before it's submitted.

19 CHAIR DANNER: Okay.

20 MS. BARNETT: And the -- my final point on

21 the confidentiality issue is the treating Public Records

22 Act material the same as confidential material -- or a

23 challenge for confidentiality, treating it the same as a

24 Public Records Act request. I think -- I understand the

25 streamlining, and I understand Judge Kopta wrote about

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1 the liability issue in the memo, and I appreciate that.

2 I think, however, that the Commission

3 resolution of conflicts pursuant to a protective order

4 is an important function of the Commission, and it works

5 very well, I think, right now. I think Judge Kopta

6 wrote in his memo that it doesn't happen very often, but

7 when it does, I think the system we've got right now is

8 really working.

9 And there's a lot of informal resolution in

10 the course behind the scenes before it ever gets to a

11 formal challenge. But we do think that eliminating

12 review from the Commission of its own protective order

13 is a big deal, and would simply shift the dispute to

14 Superior Court where it's a much lengthier, much more

15 involved, and much more -- much more expensive ordeal

16 than it is in front of the Commission in an adjudicative

17 proceeding.

18 Right now, for the Commission to rule, it's

19 a one-time -- like you described, if they're going to

20 maintain the confidentiality, they'll maintain it.

21 That's it. If they're not, then they say no. And then

22 the next step is a Superior Court if they want to.

23 But the Superior Court, it's, you know,

24 three hearings, a nine-month process, and tens of

25 thousands of dollars. And I'm afraid that eliminating

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1 the Commission review of that will simply create more --

2 more challenges, frankly, if everyone knows that the

3 utility has to go defend this in front of Superior

4 Court.

5 There are more -- there are going to be more

6 challenges, they're going to be more contentious, and,

7 frankly, I'm afraid that right now the data requests and

8 discovery process is -- is very broad. We're very open,

9 at least for PSE and other parties I represent, and I

10 think Staff and Public Counsel know and appreciate that,

11 and there's -- and part of that is PSE knowing that, if

12 there's confidential information, it's going to be

13 protected.

14 In response to a data request, we can be

15 broad in our response and let them figure out what they

16 need out of this instead of parsing out every word of

17 the request to say, is this really responsive? Do they

18 really need this? And what is going to happen to the

19 information?

20 So I sense -- I'm afraid this is going to

21 create more burden than the streamline is going to

22 create efficiency.

23 CHAIR DANNER: So the other side of the

24 argument would be that, what force and effect would it

25 have for us to say that we're going to take information

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1 that's disclosable under the Public Records Act and

2 we're going to put it under a protective order even

3 though there's a statute that says that you can't

4 protect that.

5 And so it would seem to me the duplication

6 is going to be if -- we used Public Counsel last time,

7 we'll use ICNU this time -- that they -- you've put

8 something -- you submitted something under a protective

9 order, but it's not information that should be deemed

10 confidential under the Public Records Act.

11 So if somebody's going to say, well, even

12 though it's under a protective order, that should be

13 public information, so we're going to go to Court

14 anyway, and so what has the protective order

15 accomplished?

16 MS. BARNETT: Well, I think the protective

17 order does -- first of all, that information is

18 protected under the Public Records Act request, too,

19 because it does recognize -- it does protect it as

20 exempt information that's provided pursuant to a

21 protective order.

22 So there is that overlap, but I do think

23 that it may be -- and I don't have any examples at the

24 top of my head, but there may be examples that the

25 Commission may understand that something needs to be

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1 kept confidential because the party has made the case

2 and got a protective order under it, but it doesn't fall

3 under one of the exemptions of the Public Records Act.

4 And I, honestly, don't have an example, but

5 I think that's part of the expertise of the Commission

6 to be able to have that flexibility to say, yeah, this

7 is the stuff that we govern. We understand this and we

8 understand it's not covered under the rule, under the

9 Public Records Act statute, but nonetheless, it needs to

10 be protected --

11 CHAIR DANNER: And so --

12 MS. BARNETT: -- pursuant to the order.

13 CHAIR DANNER: -- are you confident the

14 Superior Court would say, yeah, this is not covered by

15 the Public Records Act, but it is about covered by a

16 protective order, so we're going to keep it protected?

17 MS. BARNETT: I think that that would be one

18 party's position. But again, the staff is there to say

19 that. If it's a Public Records Act challenge, Staff is

20 represented in the Superior Court, and they're able to

21 say why that protective order should be -- why that is

22 exempt --

23 CHAIR DANNER: Yeah.

24 MS. BARNETT: -- or maybe why it shouldn't.

25 But they're represented and I think that's -- that's the

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1 second level set of protection for it. But the first

2 level should be -- definitely, I think the first level

3 should be before the Commission to enforce its own

4 protective order. It shouldn't be for Superior Court.

5 I think we'd be down there every day.

6 CHAIR DANNER: Mr. Jones?

7 COMMISSIONER JONES: So go over that again,

8 Ms. Barnett.

9 MS. BARNETT: All of it?

10 COMMISSIONER JONES: Superior Court -- just

11 bring it down to specifics. So Superior Court takes

12 about nine months, three hearings?

13 MS. BARNETT: Yeah.

14 COMMISSIONER JONES: And do you have a rough

15 idea of how much that costs?

16 MS. BARNETT: $35,000 would be the

17 last-ish-ish [sic].

18 COMMISSIONER JONES: Okay.

19 CHAIR DANNER: Peanuts.

20 COMMISSIONER JONES: I don't know if it's

21 peanuts, Mr. Chairman.

22 UNKNOWN SPEAKER: Not on my budget.

23 COMMISSIONER JONES: And then those costs go

24 into rates --

25 MS. BARNETT: Yes.

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1 COMMISSIONER JONES: -- in the next rate

2 case, right?

3 MS. BARNETT: That's right. And that's -- I

4 have to say the 35,000 is off the top of my head. That

5 was before the actual trial, so that was only two

6 hearings. We did not get to the third hearing.

7 COMMISSIONER JONES: When was the last time

8 that PSE had to do this?

9 MS. BARNETT: It -- probably a couple.

10 COMMISSIONER JONES: Couple of years.

11 MS. BARNETT: Yeah.

12 COMMISSIONER JONES: Because I remember the

13 proceeding during the merger case --

14 MS. BARNETT: Yeah.

15 COMMISSIONER JONES: -- where we had some --

16 MS. BARNETT: I think there's been one since

17 the merger case, but I can't remember what it is.

18 COMMISSIONER JONES: And then so your

19 arguments are basically the informal process tends to

20 work okay. Use the expertise of the Commission Staff,

21 or the ALJs, the attorneys, the Staff, try to -- if

22 things can be resolved that way, it's more streamlined,

23 it takes less time, less cost, and it generally works

24 okay?

25 MS. BARNETT: That's right.

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1 COMMISSIONER JONES: Okay.

2 MS. BARNETT: Thank you.

3 COMMISSIONER RENDAHL: Ms. Barnett, can you

4 address the issue raised in Staff's memo about the

5 concern about the last sentence of 84.05 [sic] -- well,

6 the last section of -- I think it's 84.05 -- I'm not --

7 MS. BARNETT: 80.04.095?

8 COMMISSIONER RENDAHL: 80.04.095 -- it's

9 been a long day already -- that speaks to the protective

10 orders and -- and how you read that language.

11 MS. BARNETT: Yes. I think that -- to

12 paraphrase, I think it's -- [as read] the Public Records

13 Act is a legislative recognition that the Commission and

14 the Public Records Act is a separate and distinct [sic]

15 from the information exchanged between parties in

16 adjudicative proceeding, and I'm -- this is paraphrasing

17 from NW Natural's comments on this, and that it --

18 COMMISSIONER RENDAHL: This is the -- the

19 sentence I'm talking about is: Nothing in the section

20 shall prevent the use of protective orders by the

21 Commission governing disclosure of proprietary or

22 confidential information in contested proceedings.

23 So in reading the comments and reading the

24 memo --

25 MS. BARNETT: Um-hmm.

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1 COMMISSIONER RENDAHL: -- and thinking about

2 this, I think it would be helpful if you can give me

3 your thoughts on whether -- what that means --

4 MS. BARNETT: I think I --

5 COMMISSIONER RENDAHL: -- and whether you've

6 had any, you know, legislative history into the meaning

7 of that sentence.

8 Do you have anything to share with us that

9 would help us -- does that create an exception from the

10 Public Records Act, the application of the Public

11 Records Act? Does it mean we do something different for

12 protective orders, or does it mean what the Staff memo

13 says, which is it's not -- it's subsumed under the

14 Public Records Act?

15 MS. BARNETT: No, I think that -- and I

16 don't have a legislative dictionary to look into that,

17 and I didn't find any -- just very quickly, because I

18 did just review this memo very recently, but I didn't

19 find any -- any -- anything specific.

20 But I do think that's an acknowledgement

21 from the legislature that the Public Records Act does

22 not necessarily cover everything that a protective order

23 is going to cover. And it recognizes the agency's role

24 in -- in protecting information that may not be

25 protected under the Public Records Act.

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1 I think it's -- I think it supports PSE's

2 position and the utilities' position, and if I can speak

3 for them, that it recognizes that we know that the

4 agency has authority and expertise to do protective

5 orders, too, and nothing in the Public Records Act is

6 going to step on those. So I think it's a recognition

7 that they shouldn't be streamlined, shouldn't be

8 subsumed, that they're separate and distinct.

9 COMMISSIONER RENDAHL: Okay. Thank you.

10 CHAIR DANNER: Yeah. So this is -- it's

11 really an interesting question of statutory construction

12 because you -- it's really an interesting question of

13 statutory construction because you need to give every

14 word -- the assumption that every word means something.

15 At the same time, you need to read this in a way so all

16 these pieces fit together.

17 And so, you know, I can look at this

18 language about protective orders is -- is by itself, it

19 has to have -- it needs to mean something in addition to

20 the other provisions we're looking at. At the same

21 time, we want to try and read them in a way that

22 reconciles all these various pieces of the Public

23 Records Act.

24 MS. BARNETT: Yeah.

25 CHAIR DANNER: I mean, do you think that

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1 your interpretation does that?

2 MS. BARNETT: Yeah, I do. I think it -- and

3 I think that the legislature could have just said

4 that -- I mean, that -- that the protective orders are

5 subsumed under here. They could have clearly said that,

6 but recognizing the distinct role that they play

7 acknowledges that the agency's going to have its own

8 process, and they should have their own process. And

9 then if a public records request is made, then we have

10 our process over here.

11 I think that -- that having separate

12 processes does not necessarily mean they're redundant,

13 and they don't have to be. And I also think that, like

14 I said earlier, just -- just eliminating completely the

15 Commission's process is going to burden the Court

16 process for sure, but also hurt ratepayers in additional

17 costs and time.

18 CHAIR DANNER: Okay. All right. Thank you.

19 Any other questions for, Ms. Barnett?

20 COMMISSIONER JONES: No.

21 CHAIR DANNER: Okay. Thank you very much.

22 I think we're off to an interesting start.

23 So I don't know, who should we go to next?

24 Mr. Kravitz, why don't you come forward since you were

25 mentioned by Ms. Barnett.

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1 MR. KRAVITZ: Thank you, Chairman Danner.

2 It's Zach Kravitz, K-R-A-V-I-T-Z, for NW Natural.

3 So I'm going to pick on -- pick up where we

4 just left off, because I think that's a good place to

5 start, which is RCW 80.04.095. And the last sentence of

6 that section states that, Nothing in this section shall

7 prevent the use of protective orders by the Commission

8 governing disclosure of proprietary or confidential

9 information in contested proceedings.

10 I do think that creates the exception that

11 we're talking about here. I do think that gives the

12 Commission the authority to adjudicate discovery

13 disputes under a protective order that would include

14 disputes regarding confidential information.

15 That is -- to take a step back a little bit,

16 I think it would fall under the broad authority given to

17 the Commission to hold hearings and adjudicate these

18 proceedings and have discovery disputes, and this

19 particular provision states that there -- there's --

20 within those proceedings, the Commission can issue

21 protective orders.

22 And as I understand how that process would

23 work is, I'm familiar with it, the parties to a docket

24 will have a -- what really becomes a contract in terms

25 of how they're going to resolve discovery disputes. And

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1 usually, the first step in that is an informal process

2 followed by a potentially more formal process, if it

3 comes to that, if the parties can't resolve that

4 dispute. I think usually those disputes do end up

5 getting resolved informally, and -- but if not, of

6 course, you can go to the Commission and have the

7 Commission answer that question.

8 One -- one of the nice things about these --

9 COMMISSIONER RENDAHL: Let me ask you a

10 question.

11 MR. KRAVITZ: Sure.

12 COMMISSIONER RENDAHL: So -- so if you have

13 a dispute about documents and a discovery request,

14 ordinarily, we would handle that in a motion to compel

15 before an administrative law judge.

16 Would this rule have the effect of turning

17 that motion to compel, if one of the companies or one --

18 if the Staff or the companies -- if somebody wanted

19 information and another party says, well, it's

20 confidential or whatever, we don't want to disclose it,

21 would it turn that -- what would ordinarily be a motion

22 to compel process before the Commission into this

23 ten-day procedure in court? Is that the concern you're

24 talking about?

25 MR. KRAVITZ: Yes, it is. And that was --

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1 that's -- in my reading of the proposed rules, would

2 state that any dispute of confidentiality in a contested

3 proceeding at the Commission would have to be resolved

4 by a Superior Court.

5 Now, if I'm reading that wrong, then a lot

6 of my arguments I'll back away from.

7 COMMISSIONER RENDAHL: Well, that's the way

8 I understand it. So the contrary view, or the view of

9 the proposed rule here, I think we're all aware of how

10 rigidly courts interpret Public Records Act cases, and

11 the potential that that places -- the liability that

12 places on the Commission if somebody were to raise this

13 issue in a proceeding. That -- you know, it hasn't

14 happened yet, but it doesn't mean it won't happen, and

15 these Public Records Act cases are happening more and

16 more.

17 MR. KRAVITZ: Right.

18 COMMISSIONER RENDAHL: So there is an issue.

19 I don't think it's been resolved yet. If you all are

20 aware of any of these cases before any other agencies or

21 any other situation, that might be helpful for us. This

22 really is a new issue that I'm not sure has been decided

23 yet, and so that's I think what we're grappling with.

24 MR. KRAVITZ: I definitely understand that

25 tension with the severity of the Public Records Act. I

0050

1 would say, when you have parties to a contested case at

2 the Commission that sign a protective order, what they

3 are doing is entering into a contract with all of the

4 parties that state that this is how we're going to

5 resolve these disputes, and we're going to resolve these

6 disputes through informal resolution, followed by

7 resolution seeking an order from the Commission.

8 So I am not aware of any party going outside

9 of a protective order and filing a Public Records Act

10 request in that type of situation. I -- and I'm not

11 sure if -- well -- I not aware of --

12 CHAIR DANNER: And it's unlikely that third

13 parties would do that because they haven't seen anything

14 that's under a protective order --

15 MR. KRAVITZ: A third --

16 CHAIR DANNER: -- people who aren't under

17 the protective order. So a member of the public

18 wouldn't know that there's -- they might suspect, but

19 they wouldn't know that there's anything that they could

20 do a public records request for.

21 MR. KRAVITZ: I would -- well, they would

22 know that there's a protective order, they will know

23 that the information provided to the Commission was

24 either provided in full publicly or it was redacted and

25 provided confidentially. I think that would be in -- in

0051

1 the form of testimony or briefs or whatever filings were

2 made at the Commission. So in that case, if there was

3 an outside party -- I shouldn't call them a party --

4 CHAIR DANNER: An outside interest -- an

5 interested person who says, I want to know what's under

6 that redaction.

7 MR. KRAVITZ: Right. And I think there

8 would be two options -- well, off the top of my head,

9 two options that would be available to them.

10 One, if it wasn't too late, and they wanted

11 to be a party to the case, that would be something that

12 they could do and they could sign a protective order.

13 Two, I do think that --

14 CHAIR DANNER: Okay. So it's a journalist,

15 and the journalist doesn't have standing.

16 MR. KRAVITZ: And two, I would say that what

17 would be absolutely appropriate for them is to file a

18 public records request, and at that point in time, that

19 would be adjudicated under the public records law, but

20 that would be outside of what's happening at the

21 contested case between the parties to the docket.

22 CHAIR DANNER: Okay. So it would be,

23 behavior of the parties is covered by the protective

24 order. The behavior of parties outside of the case --

25 MR. KRAVITZ: Yes.

0052

1 CHAIR DANNER: -- is covered by the Public

2 Records Act is how you suggest it be.

3 MR. KRAVITZ: Yes. And I believe that is

4 how it has -- it would be currently handled, yes. I

5 would say that it should remain that way.

6 CHAIR DANNER: Okay. All right. Any other

7 questions for Mr. Kravitz?

8 MR. KRAVITZ: Um --

9 CHAIR DANNER: Oh, you have more?

10 MR. KRAVITZ: And if I may.

11 CHAIR DANNER: Yes, you may.

12 COMMISSIONER RENDAHL: Take a little bit

13 more.

14 MR. KRAVITZ: And I just would say that

15 there would be places that I'm -- certain circumstances

16 that I'd be really concerned that a court -- let's say

17 that these proposed rules were approved, and there was a

18 situation where there were two parties that were

19 exchanging information, be it through discovery, and

20 it's Public Counsel, it's ICNU, it's anyone, they

21 request information from NW Natural and I provide them

22 confidential information under protective order, it's

23 been redacted, and that discovery is only between these

24 two parties.

25 At that point in time, if they challenged

0053

1 that document and they say, we think this document is

2 not confidential, the question is, where -- where do we

3 go from there? Because at this point, it's a document

4 exchanged between two entities that are not the

5 government.

6 And so if we were to move forward under this

7 proposed rule, I would have ten days to go to a Superior

8 Court, and I'd be very afraid that the Court would say,

9 we don't have standing to resolve this dispute and this

10 isn't a public records issue because there's no public

11 record in the dispute.

12 And so maybe there is a way to go to that

13 court and have them resolve that dispute, but I would

14 think either they would say, no, you don't have

15 standing, or it could be a really, really long process.

16 And I don't think that would help anybody here in having

17 some efficient administration of these cases.

18 So with that, I will -- I will say, if it's

19 the position of Staff that this is -- if, I guess, the

20 current process is maybe a little outside the bounds of

21 what the statutes contemplate, I think that maybe we

22 should all look into whether, you know, what we're

23 doing -- or what we're proposing to do is legal or not

24 legal, and maybe have some more robust discussion on

25 some of the nuances of the law.

0054

1 If the position is that there is just a

2 better process to go forward, I would say that also this

3 has raised a lot of interest and maybe it would deserve

4 some more time for the parties to talk a little bit

5 about this more in, I don't know, a workshop setting or

6 some sort of meeting to really understand everyone's

7 interests and come up with potentially a process that

8 everyone could be comfortable with.

9 So that's just two thoughts going forward,

10 but, I guess, as my comments say, and I would recommend

11 to the Commission respectfully that the current process,

12 including the definition for how we handle confidential

13 information here, would be something that works and it

14 should not be changed. Thank you.

15 CHAIR DANNER: All right. Any other

16 questions? All right. Thank you very much.

17 Okay. PacifiCorp should come forward.

18 MR. TILL: Thank you, Chair Danner. Again,

19 this is Dustin Till with PacifiCorp. That's T-I double

20 L.

21 I don't want to -- I'll kind of pile onto

22 some of the comments made by Puget Sound Energy and NW

23 Natural. We're generally in agreement.

24 I would like to kind of move the

25 conversation up just a level of abstraction to make sure

0055

1 we're all talking about the same thing here, and what

2 we're talking about are confidentiality rules that

3 govern interparty disclosures. Okay?

4 We're not talking about public --

5 disclosures by an agency that are subject to the Public

6 Records Act. Okay?

7 So I think it's very important to separate

8 those, because I feel that this -- in this discussion,

9 we're really conflating those two things, and it's

10 caused some confusion.

11 And so what we're trying to do here is to

12 define what's confidential for the purposes of

13 interparty disclosures, and the rules as they're --

14 they're proposed right now, they cross-reference the

15 Public Record Act, in that they cross-reference the

16 definitions in the PRA. And I think that that, in many

17 ways, is the appropriate thing to do, because it creates

18 definitional symmetry between, you know, what's

19 considered confidential in this silo, the interparty

20 disclosure silo, what's considered confidential for the

21 agency, so you don't have kind of conflicting

22 obligations.

23 But what's happening here is, it's giving

24 rise to these concerns as Commissioner -- Chair -- or

25 Commissioner Rendahl said, you know, about the

0056

1 Commission's liability under the PRA. I think one way

2 to maybe address this is, instead of cross-referencing

3 the definitions from the PRA, in the definition of, hey,

4 this is what the Commission considers to be confidential

5 in the context of interparty disclosures, of just

6 spelling that out. You know, you can copy the words,

7 but you eliminate that reference to the Public Record

8 Act that everybody seems to be getting hung up on right

9 now. And so you really -- you really draw a distinction

10 between those two mechanisms of disclosure.

11 And --

12 COMMISSIONER RENDAHL: So I'm sorry. So you

13 heard Ms. Barnett's discussion about the need to be able

14 to designate, though, those documents that are exempt

15 under the Public Records Act. And so are you saying

16 that you would not reference those in the definition, to

17 have some way of separately designating them?

18 I guess I was a bit confused about whether

19 you agree or disagree with Ms. Barnett on the

20 designations under the definitional --

21 MR. TILL: Right. So when I -- when

22 PacifiCorp is being asked to turn over a document, it's

23 not a public record and we're not seeking to protect it

24 or to avoid disclosure under the PRA, we're ideally

25 doing it under a protective order and we're trying to

0057

1 get to a definition within a protective order of what

2 can be considered confidential, what's non-confidential,

3 and this confliction.

4 And so once that record is given to Staff,

5 it becomes a public record that's subject to the PRA,

6 but not until then. If Staff doesn't get that, it's not

7 a public record, and so I'm suggesting that we draw a

8 distinction, and that's a really separate analysis that

9 Staff has to make. Once it has that record, it has to

10 make the decision, as a threshold matter, right, about

11 its status. Because Staff is the one -- or the

12 Commission is the entity that's getting the public

13 record request, right? It's not the utility itself.

14 Now, there's circumstances where it provides

15 notice to the original party that propounded that

16 information, and there are all sorts of different

17 mechanisms that trigger to determine whether it's exempt

18 or not under the PRA.

19 CHAIR DANNER: Okay. But when you turn a

20 document over to ICNU, that's not -- there's no public

21 record, but when you submit that same document to Staff,

22 it becomes a public record as soon as that's time

23 stamped by our records center or my staff.

24 MR. TILL: Correct. And at that point, it's

25 subject to all of the protections and the -- kind of the

0058

1 adjudicatory mechanisms of the Public Record Act. But

2 I'm talking -- this is why I think it's important to

3 separate these kind of silos of information, because

4 what we're trying to do here is say, you know, how do we

5 best protect, in my case, PacifiCorp's confidential --

6 whether it's business information, customer information,

7 and prevent another party from disclosing that

8 information in another proceeding, in another forum

9 where it's not protected.

10 And so I do -- I maintain that I think some

11 of this confusion that we're wrestling with here is

12 driven by the cross -- the definitional cross-reference

13 to the PRA, when that confusion can be really, I think,

14 fairly simply perhaps resolved by just dropping the

15 definitions themselves for the Commission to promulgate

16 a rule that says, this is what's confidential for

17 purposes of a -- you know, for a protective order, or

18 for discovery in a Commission adjudication. And that

19 way, you're not trying to conflate -- you're not somehow

20 suggesting that the public record applies to a record

21 that it just simply doesn't apply to. So that's just a

22 suggestion.

23 And in any event, I just don't feel that the

24 rules the way they're drafted really draw that

25 distinction between what we're doing, and I feel our

0059

1 conversation is getting confused about what we're

2 talking about here.

3 Similarly, when we talk to -- when we're

4 talking about the process for challenging claims of

5 confidentiality, under the rules as proposed, I have to

6 go to court, I have -- and it's not a public record,

7 it's a utility record, so it's not subject at all to the

8 judicial review or resolution provisions of the Public

9 Record Act, and so, frankly, and this is kind of the

10 question. I have no idea what my jurisdictional hook is

11 to go to court. I don't know how I have standing. I

12 don't have a final appealable order of the Commission

13 making a determination about anything. I have maybe a

14 protective order, I might not have a protective order.

15 So I don't understand, as a matter of law,

16 how I go before a court and make any sort of argument,

17 and I feel it's well within the Commission's discretion

18 to develop -- and in its broad authority to develop

19 rules that govern these interparty exchanges that allow

20 the Commission to make determinations about whether

21 parties or information is consistent with that, and,

22 frankly, that allows the Commission to determine

23 compliance with its own protective order.

24 Because as drafted here, it says the

25 Commission isn't responsible in the first instance in

0060

1 determining whether information complies with its own

2 protective orders issued in the docket, and, you know,

3 as Puget Sound Energy said, it really increases the cost

4 and the burden of having these resolutions, you can

5 imagine, in the context of a hearing where there's a

6 dispute about confidential information, and the hearing

7 has to stop, the parties have to go to court, and who

8 knows how long that court -- and then when -- instead

9 what you can have is a simple determination by the

10 Commission interpreting its own -- its own rules, which

11 I think is, you know, well within the Commission's

12 jurisdiction to do so.

13 Those are really, you know, my big comments

14 on the two topics that we're talking about here, and I'd

15 implore you to really kind of make sure that, as we're

16 thinking about this analytically, that we keep these two

17 obligations separate and consider -- and then I

18 would just -- this is an idea that came up listening to

19 the other speakers, you know, there may be some other

20 options to prevent this kind of conflation that's

21 causing confusion. And I would agree with NW Natural

22 that perhaps some more process and some further

23 collaboration with Staff and with stakeholders on this

24 issue would be warranted. So --

25 CHAIR DANNER: All right. Thank you.

0061

1 COMMISSIONER JONES: I have a question.

2 CHAIR DANNER: Hang on.

3 Commissioner Jones.

4 COMMISSIONER JONES: So you seem to be

5 asking two things, and I don't have the statutes in

6 front of me. And we'll deliberate on this, of course,

7 afterwards, but you seem to be saying, don't conflate

8 the PRA with -- take those references of the PRA out of

9 the part of the statute that deals with interparty

10 discovery in the adjudication.

11 MR. TILL: Correct, that's a suggestion.

12 COMMISSIONER JONES: And then you want us to

13 be fairly prescriptive instead of -- I heard Ms. Barnett

14 saying that a lot of this is done informally with Staff,

15 that you're able to resolve things in a streamlined way

16 informally, but you appear to be asking for the

17 interparty discovery issues in an adjudication; you want

18 perhaps, as an idea, to list out and be a little more

19 prescriptive. That's the way I heard you anyway.

20 MR. TILL: Right. And I think that

21 that's -- that's correct, Commissioner Jones. I'd like

22 to have clear rules about what constitutes confidential

23 information and what doesn't constitute confidential,

24 and so we have clear sideboards on that.

25 Now, I -- to be completely candid, most of

0062

1 my regulatory practice is in Oregon. We have a very

2 contentious kind of -- we deal with a lot of motions to

3 compel and issues around confidentiality, so this is an

4 issue I'm quite familiar with, and there's quite a bit

5 of collaborative process despite the Oregon Commission

6 adopting, you know, clear definitions of what

7 constitutes confidential information.

8 So I don't think a clear definition

9 precludes parties from working informally. I think it

10 actually facilitates more expeditious and effective

11 conversations because we understand what the

12 regulatory def- -- we understand what the game is,

13 right? So I don't think we want to have amorphous

14 definitions, and I think that they -- they want to be

15 clear. And --

16 COMMISSIONER JONES: Sure.

17 MR. TILL: -- one point I did forget to

18 bring up is just, as we're looking at these definitions,

19 I do feel it's important that we make sure that our

20 customers' personal financial private information --

21 COMMISSIONER JONES: Yes.

22 MR. TILL: -- is specifically subsumed into

23 the definition of confidential --

24 COMMISSIONER JONES: Right.

25 MR. TILL: -- for purposes of interparty

0063

1 disclosures.

2 COMMISSIONER JONES: And on that point,

3 that's a pretty common definition. You all agree -- I

4 think all parties agree on what is called PII,

5 personally identifiable information, PII.

6 Is there any disagreement among the parties

7 on that? No. Good. Okay.

8 MR. TILL: Thank you.

9 CHAIR DANNER: All right. Thank you very

10 much. Okay. Let's see.

11 Mr. Cowell, did you have anything you want

12 to add?

13 MR. COWELL: Yes. Thank you, Commissioners.

14 In listening to this discussion, I'm wishing

15 that I'd spent more time reviewing this issue, and so,

16 to that point, I'd also support the recommendations that

17 maybe, as a discrete issue, that we spend some more time

18 on this, maybe in a workshop and maybe with some further

19 comment filings.

20 The little bit that we did address this, we

21 had mentioned our understanding of maybe Staff's intent

22 with the changes to how adjudication would work over

23 confidentiality disputes would be that it could create

24 an incentive for utilities to avoid improper and overly

25 expansive confidentiality designations.

0064

1 And I don't know -- I was just -- we were

2 talking it over, and neither one of us -- with

3 Ms. Gafken, Public Counsel, about -- because thankfully,

4 I've not had to go to Superior Court and figure out,

5 would attorney fees be involved?

6 And then assuming that the Court says that,

7 no, Utility, you are actually trying to improperly

8 restrict information, could attorney fees be given to

9 the challenging party? And then could we come back to

10 the Commission, and the Commission says, and actually,

11 Utility, you can't recoup your attorney costs and the

12 payment you had to make in rates.

13 So these are the kind of questions I'd like

14 to look at. And I would say that, from the ratepayer

15 perspective behind the scenes, as Mr. Till had mentioned

16 also, having similar things happen in Oregon, that I've

17 never had to go beyond DEFCON-2, but we've kind of

18 had -- there's been some brinksmanship saying, okay, I'm

19 ready to hit the button and we're going with this.

20 And we've been able to shy away from it, but

21 again, that maybe goes to my point of -- at least

22 something that I thought worthy to explore of a

23 disincentive, because it would be so costly and

24 burdensome to try to get parties to agree so that they

25 don't have to go to Superior Court.

0065

1 CHAIR DANNER: Okay. Questions for

2 Mr. Cowell? All right. Thank you very much.

3 Ms. Gafken?

4 MS. GAFKEN: I'm going to start briefly with

5 175 and then move onto the other issues. So -- and

6 Public Counsel didn't file any comments on either one of

7 these issues, but with 175, I believe that that codifies

8 the current practice.

9 Being able -- Staff's ability to ask a

10 company informal DRs during an investigation, for

11 example, that's statutorily authorized, and I believe

12 that just happens kind of under the normal course of

13 things. It's a normal regulatory function. And so

14 Public Counsel does support Section 175 as it's written.

15 Now, for the other piece, again, we didn't

16 file any comments on that proposed section. We did find

17 the proposal interesting and provocative. We see it as

18 placing a burden on the companies, and so one reason

19 that we didn't file any comment on that was we thought,

20 well, it's really the company's battle to bring before

21 the Commission, if there is a battle to bring.

22 But one thing that we do see a positive

23 there, it does place a burden on the company to not

24 over-designate, and that is kind of a perennial issue

25 of, are companies over-designating things confidential.

0066

1 Now, we don't see a lot of motions along those lines,

2 but they could be brought.

3 I don't agree with Puget Sound Energy's

4 characterization that we would now see more challenges

5 if this rule were to be adopted. I don't think that

6 would be the case. I think challenges would be brought

7 when needed. And I don't see an increased frequency

8 there.

9 One thing -- excuse me. One thing I would

10 also note in terms of, you know, when things become a

11 public record, so when the AG's office also receives the

12 documents from the companies, they also become public

13 records. And so if my office were to receive a public

14 records request, we would follow the same procedures.

15 And that's provided for under RCW 80.04.090, and that's

16 one of the reasons why we are able to receive some of

17 the documents even when there's not a protective order.

18 Some companies -- most companies are willing

19 to work with us in that regard. Some companies that

20 aren't as familiar with that provision are a little bit

21 more nervous about it, but we're usually able to talk

22 through those things. That usually happens in

23 situations where we're before the Commission in an open

24 meeting setting versus an adjudication. But we've been

25 able to work through a lot of those issues.

0067

1 Talking about that last sentence in

2 80.04.095, I think the distinction there, at least the

3 way that I've interpreted it, all the language before

4 that last sentence I think talks about the

5 non-adjudication situation, and then that last sentence

6 says, you can still do a protective order when you're in

7 an adjudicative proceeding. At least that's how I've

8 looked at that language.

9 COMMISSIONER RENDAHL: So you're reading is

10 that it is different from the process of going to court?

11 MS. GAFKEN: Right. I'm not sure that it

12 has anything to do with the going to court piece. I

13 think it's along the lines of what I was talking about

14 earlier, about being able to receive information from

15 companies either through an investigation, or maybe some

16 things before an opening meeting, on the open meeting

17 agenda.

18 So the Commission is able to receive

19 information from companies outside of an adjudication,

20 and so companies are still able to designate things

21 confidential outside of an adjudication under that

22 statute, and so -- but the statute doesn't limit the

23 Commission's ability to then, in an adjudication, adopt

24 a protective order.

25 COMMISSIONER RENDAHL: Thank you.

0068

1 CHAIR DANNER: Okay. Questions for

2 Ms. Gafken?

3 COMMISSIONER RENDAHL: Is she done?

4 MS. GAFKEN: I'm looking to make sure I'm

5 done. I think I'm done. Thank you.

6 COMMISSIONER JONES: No questions.

7 CHAIR DANNER: All right. Thank you very

8 much.

9 So we have -- before we go further, anyone

10 else in the room that has -- Ms. Anderl.

11 MS. ANDERL: Hi. Good afternoon. This is

12 Lisa Anderl. My last name is spelled A-N-D-E-R-L, and

13 I'm in-house counsel with CenturyLink.

14 We filed very brief comments kind of

15 generally concurring with the "if it's not broken, don't

16 fix it" sort of approach that I think the industry's

17 taken to the confidentiality rule, and I just wanted to

18 come up here and reiterate that.

19 And honestly, the more I listen to the

20 discussion, and the more I read the rule carefully and

21 read now Staff's interpretation of what's going to

22 happen here, kind of the more confused I am about how

23 it's going to work.

24 So I also think that we could benefit from

25 some additional time and some additional stakeholder

0069

1 work, maybe even a workshop. I'm not usually one to

2 raise my hand for that, but I think it could be useful.

3 I personally believe that the last sentence

4 of 80.04.095 confers upon the Commission additional

5 authority, a broad administrative adjudicative authority

6 to determine what appropriate information and

7 protections may -- what information is necessary and

8 what protections are appropriate for that information in

9 an adjudicative proceeding.

10 I mean, adjudicative proceedings are

11 different from rulemakings in that it's not

12 one-size-fits-all. You're going to have different

13 facts, you're going to have information that people

14 think is confidential that we can't even brainstorm

15 right now to determine what that is.

16 And I think that the statute and the APA --

17 the confidentiality provision in Title 80 and the APA

18 read together, when the Commission's exercising its

19 adjudicative authority, gives you broad authority to

20 create these designations of confidential and highly

21 confidential to reasonably determine what the scope of

22 those is.

23 COMMISSIONER RENDAHL: But there's no

24 exemption in the Public Records Act for adjudications,

25 as I read it, and so that's where I think the rub is.

0070

1 And so how do we -- how do we make the APA

2 work with the Public Records Act in this particular

3 situation? That's where my mind is trying to wrap

4 around, how we marry those together in a way to avoid

5 violating the Public Records Act.

6 MS. ANDERL: Well, right. Okay. But then

7 are you just saying, we don't need a rule, we don't need

8 a protective order, all we need is 80.04.095, and that

9 governs all disclosures?

10 With all due respect, because I don't do

11 adjudications all that much, I'm not talking about

12 within the interparty discovery process, but I'm talking

13 about requests from externals.

14 I don't think that's right either, because

15 that gives you nothing. And really what this new rule

16 is saying is, if it's not exempt, it's not confidential.

17 And I don't -- that doesn't strike me as right unless

18 you read the statute, giving the exemption very broadly,

19 you know, to encompass valuable commercial information,

20 including trade secrets or confidential, you know,

21 marketing information. I mean, we can start putting

22 "Trade Secret" on our documents, because we feel like

23 everything that we haven't voluntarily released to the

24 public is, by some measure, valuable commercial or trade

25 secret type information. But I have a hard time, you

0071

1 know, agreeing that that's the right answer either.

2 The other thing I wanted to point out is, I

3 don't necessarily agree that having the Commission not

4 decide protects you. So I'm sure that's news you wanted

5 to hear.

6 CHAIR DANNER: When you say "protects you,"

7 meaning protects us?

8 MS. ANDERL: The Commission, yeah. Yeah.

9 Because if, in fact -- if the Commission withholds

10 exempt information from disclosure, which the memo says

11 you should do, who has decided that it is exempt? Have

12 you just taken the designating party's word for it, or

13 have you done your own analysis? If you have done your

14 own analysis, well, then you've decided it's either

15 exempt or it's not. If you haven't done your own

16 analysis, boy, you're at the mercy of whether the party

17 has, you know, properly designated and can subsequently

18 prove that it was exempt.

19 So I don't think that you not deciding these

20 things and you not enforcing your protective orders --

21 which I think should be more than procedural, I think

22 they are substantive orders -- I don't think it -- it

23 lets you out of the admittedly difficult, icky place of

24 the liability associated with getting it wrong on a

25 Public Records Act request. I'm not turning a blind eye

0072

1 to that.

2 CHAIR DANNER: Yeah. Of course, that's --

3 you know, that's the risk every time we get a public

4 records request. We have to make those kinds of

5 determinations.

6 MS. ANDERL: Right. Right. And so why not

7 save me the $35,000, and at least, you know, make a

8 ruling on the confidentiality -- the merits of the

9 confidentiality of a challenged piece of information,

10 which I think you're uniquely situated to do, and not

11 make us go to court every time, because that is a big

12 burden.

13 And this last one that Ms. Barnett talked

14 about, Perkins Coie actually represented CenturyLink and

15 it was to protect some information that we had submitted

16 to the military department in connection with our 911

17 response to the request for proposals, and so it wasn't

18 your agency. But she's -- that is the exact amount, and

19 that was just a TRO and preliminary injunction. That

20 didn't even get us to the trial.

21 CHAIR DANNER: Okay.

22 MS. ANDERL: So that's -- that's my plea.

23 COMMISSIONER JONES: I had hoped that you

24 were going to give us more clarity, Ms. Anderl.

25 MS. ANDERL: If I had thought I was going

0073

1 to, I wouldn't have waited to be the last one.

2 CHAIR DANNER: But just -- yeah, okay. I

3 keep hearing $35,000. I'm trying to figure out how I

4 can turn this into a revenue stream.

5 COMMISSIONER JONES: Just put a one percent

6 fee on top of that.

7 CHAIR DANNER: Okay. WRA, did you have

8 anything that you wanted to add today? Okay.

9 Is there anyone else who's in the room who

10 wants to speak this afternoon?

11 Is there anyone else who is on the bridge

12 line who wishes to participate this afternoon? Okay.

13 Hearing nothing, is -- Judge Kopta, is there

14 anything you want to add this afternoon before we

15 adjourn?

16 MR. KOPTA: Oh, as a lawyer, I can't leave

17 things unresponded to.

18 CHAIR DANNER: That's why I asked you.

19 MR. KOPTA: The easy thing first, the

20 definition of "confidential information."

21 I share the concern that we make sure that

22 information that is exempt under the Public Record Act

23 is not something that the Commission discloses. But

24 I'm -- my concern is, with the definition right now,

25 that we are more likely to do that under the existing

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1 definition than if we were to change it to exclude that

2 information.

3 Right now that information would need to be

4 designated exactly the same as information that's

5 designated as confidential under 80.04.095, which raises

6 the possibility that if a company -- if somebody

7 requests that information, and the company decides, eh,

8 we don't need to go to court to get that protected, and

9 after ten days the Commission releases that information,

10 believing it is 80.04.095 information, when in fact it

11 is exempt -- and I can't say that our records center

12 staff is going to be able to know the difference between

13 exempt information and 80.04.095 information unless they

14 have some reason to believe that there's a

15 distinction -- so I think what makes the most sense is

16 to set up a procedure that's consistent with 80.04.095,

17 and to deal separately with information that is exempt,

18 because they are two different things.

19 And as mentioned in the memo, I'm certainly

20 open to looking at developing a rule that would

21 specifically talk about exempt information and how that

22 could be separately designated and flagged, if that

23 would be of benefit, and I think it might very well be

24 both for the Commission and the industry that is

25 providing that information. But I think it's more

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1 confusing and more potentially problematic to conflate

2 those two things than to keep them separate.

3 With respect to subsection 5 of WAC

4 480-07-160, which has to do with challenges, I think the

5 situation in which information is strictly disclosed

6 between private parties in a Commission adjudication is

7 very, very small. I mean, you're talking about data

8 request responses that perhaps ICNU propounds to Puget

9 Sound Energy, and no other party has asked for other

10 data requests.

11 And in my experience, in 20 years of

12 litigating cases before the Commission, and six years as

13 an administrative law judge, it's almost universal that

14 the first data request that parties send out is, give me

15 all your responses to everybody else's data requests.

16 And once you provide it to Staff or Public Counsel, it

17 becomes a public record.

18 So there really are not going to be many, if

19 any, circumstances in which you're talking about

20 information that's provided solely under protective

21 order between parties that are not either the Commission

22 or the Attorney General.

23 I think there's been a lot of discussion

24 about the last sentence in 80.04.095. And I looked at

25 the first few words of that sentence: Nothing in this

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1 section shall prevent the use of protective orders. I

2 do not read that as conferring any authority on the

3 Commission, but instead preserving other authority.

4 That doesn't create its own authority; it just says,

5 this section doesn't prevent from you doing something

6 that you have authority to do under another statute.

7 That statute happens to be the APA -- and

8 let me get the right citation -- RCW 34.05.446, sub (1),

9 simply says that Presiding officers shall have the

10 authority to enter protective orders. That's all it

11 says.

12 So we are, again, as Commissioner Rendahl

13 mentioned, in a bit of a quandary in terms of how that

14 relates to the Public Records Act. My concern, reading

15 cases that have been decided recently by the Court of

16 Appeals and the Supreme Court, is that the courts look

17 at Public Records Act requests and challenges, they

18 review the act very broadly and exemptions very

19 narrowly. And unless there is a specific exemption in

20 the act, or in another statute that deals with the

21 particular type of information, then the courts are not

22 going to authorize agencies to withhold information.

23 What the proponents are -- those who believe

24 that the Commission's protective order would have its

25 own authority I think are essentially predicting that a

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1 Superior Court, when presented with the issue, would

2 say, you're right, we are going to allow agencies, in

3 the course of adjudications, to create their own

4 exemptions to the Public Records Act. And I don't see a

5 court saying that, not based on the decisions that I've

6 read.

7 So my concern is that, if we're put in that

8 position, we risk substantial liability, which likely

9 would exceed $35,000, based on the one experience that

10 we've had recently about being sued for violating the

11 Public Records Act.

12 And therefore, I think, in my view, the

13 Public Records Act trumps the -- any authority that the

14 Commission has under a protective order, and that's the

15 reason that Staff has proposed the change to the rule.

16 I certainly have no problem, and I believe

17 it would be a good idea to talk with parties about how

18 we can address that. One possibility -- I know this is

19 purely talking -- you know, talking off the top of my

20 head, would be -- and this is dangerous -- but to

21 include in the protective order an agreement that

22 everyone who signs it agrees to waive the ten-day rule

23 until the Commission decides on any challenge.

24 That I could live with, because then we'd

25 have whoever's making the challenge agreeing that they

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1 won't go to court and charge us with a violation of the

2 Public Records Act because we didn't provide the

3 information after ten days, or require the company to go

4 and obtain an order from the Court.

5 But I think, barring that kind of express

6 agreement that a party is not going to go to court, then

7 we are certainly open to the possibility that they will.

8 CHAIR DANNER: All right. So I understand

9 where you're coming from, and I'm still -- I mean, what

10 I heard from Ms. Barnett and Ms. Anderl and others is

11 basically the -- how big a problem is this? If it ain't

12 broke, don't fix it. Why are we setting up a system

13 that might encourage people to go to court when right

14 now we can handle these things here and get them out of

15 here and not make a mountain out of a molehill.

16 MR. KOPTA: Well, because it's been my

17 experience, again, reading the Public Records Act cases,

18 that often agencies will go along with a particular

19 procedure only to find out later, when it's been

20 challenged for the first time, that that's not

21 consistent with the Public Records Act, and they owe

22 fines and attorney's fees.

23 So the fact that it hasn't been an issue

24 before doesn't mean that it won't be an issue in the

25 future. And if it arises in that context, then the

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1 Commission faces substantial liability even though, as a

2 matter of practice, we may have been doing the same

3 thing for 20 years.

4 CHAIR DANNER: Right. So I mean, it almost

5 comes down to a cost benefit. I mean, if it's going to

6 be $30,000 a pop, where actually that's only before it

7 gets to trial, so it could be $100,000 a pop, and we can

8 save the company three of those, and then if we find

9 ourselves at risk at some point, you know, it might be

10 less and --

11 COMMISSIONER JONES: Now you're talking.

12 CHAIR DANNER: I mean, this is difficult.

13 It's not -- it's not easy. I think I would like to go

14 back and rewrite the Public Records Act, but that's not

15 something that's going to happen.

16 MR. KOPTA: Well, and I agree with you. You

17 know, what's interesting to me is that courts don't look

18 at what makes sense; they look at what the act says.

19 There was a recent decision entered at the

20 end of last year, Hikel vs. City of Lynnwood. There are

21 four things that the statute -- the Public Records Act

22 requires an agency to do in response to a public records

23 request within five days.

24 And in this case, the City of Lynnwood, when

25 it received a request, asked the requester for

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1 clarification of what the requester was asking for. And

2 the requester filed a lawsuit, and the Court of Appeals

3 said, asking for clarification is not among the four

4 things that you have to do within five days, and

5 therefore, you are liable for violation of the Public

6 Records Act.

7 Does that make sense? I don't think so. Is

8 that what the statute says? Literally, yes.

9 And so in this circumstance, the exemption

10 under the Public Records Act is information designated

11 under 80.04.095 that a court has determined is

12 confidential under that statute, not that the Commission

13 has determined is confidential. So the way the statute

14 is set up, both 80.04.095 and the Public Records Act,

15 the Commission is taken out of that decision.

16 I will answer Ms. Anderl's question, when

17 she said the Commission has no authority to decide

18 whether information is confidential under that statute.

19 The statute clearly says that the company whose

20 information it is designates it as confidential, and we

21 treat it that way unless and until somebody requests it,

22 and ten days passes without a Court agreeing that it is,

23 in fact, confidential. But the Court makes that

24 determination, not the Commission.

25 Do I like that? Does it make sense? No.

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1 Is that what the statute says? Yes.

2 CHAIR DANNER: Okay. So we gave you the

3 last word, but if anybody wants to give a brief response

4 to what Mr. Kopta has said, you're welcome to do so.

5 Ms. Barnett, I see you jumped up, so we'll

6 give you that opportunity, and then we are actually

7 going to break for the afternoon.

8 MS. BARNETT: Yes, thank you. I appreciate

9 that and I will be quick.

10 I do just want to -- I think the delineation

11 that -- between the Public Records Act and challenges of

12 confidentiality under adjudications, keep in mind the

13 third-party challenges, it really has been working well.

14 We go to Superior Court. We deal with it. The

15 in-party -- or in adjudicative proceedings, challenges

16 under the public -- protective order, they are things

17 like -- ICNU, I'm going to pick on you this time -- ICNU

18 saying, this is not highly confidential; this is

19 confidential. I want my consultant to be able to see

20 this, and he's not going to sign a highly confidential.

21 That's this [sic].

22 What is highly confidential? What is

23 confidential? It's saying, this entire table is not

24 confidential. I at least need to be able to see the

25 headings so we can put that on our -- in the middle of

0082

1 an evidentiary hearing, and use that as a demonstrative

2 exhibit. Get rid of that.

3 These are the challenges that we're dealing

4 with under the protective order in an adjudicative

5 proceeding. Yes, they're much more than that, but

6 that's the kind of stuff -- it may not -- we usually

7 resolve it before it gets to the Commission, but those

8 do not need to go in front of a Superior Court and have

9 a nine-month, three-hearing issue over every one of

10 those.

11 And I'm not saying that there's going to be

12 a ton more, but I do think there would be more if the

13 utility or the industry is worried that this open

14 exchange -- and we know this stuff isn't going to be

15 challenged. We know it's confidential under the WAC and

16 under the protective order and we can deal with it in

17 here.

18 If that goes away, it reduces the

19 flexibility, I think increases the risk and the

20 liability to the Commission, because now they're just

21 passing it down to somebody else to make the decision

22 and making a Superior Court rule on what's highly

23 confidential and what's confidential under a protective

24 order. I think that's -- anyway --

25 CHAIR DANNER: So if something gets

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1 submitted as confidential and the Commission doesn't

2 think it should be confidential at all, we just simply

3 say we --

4 MS. BARNETT: Yeah.

5 CHAIR DANNER: I mean, we leave it to you to

6 go to court.

7 MS. BARNETT: That we would have a hearing.

8 I would understand -- ability to be able to be heard on

9 that. But yes, absolutely. It shouldn't go in front of

10 a Superior Court to say that.

11 CHAIR DANNER: All right. What do you think

12 of the idea of having a provision in the protective

13 order that says that this is -- you know, we're going to

14 limit you to these, you agree not to go to court.

15 MS. BARNETT: That's an interesting concept.

16 I haven't even given it any thought. And so you're

17 saying that Judge Kopta's take-away-the-ten-day option,

18 we'll deal with it here, I'd be open to that. I haven't

19 talked to my client about it, but --

20 CHAIR DANNER: Okay. Okay. Well, he just

21 threw it out there, so --

22 MS. BARNETT: Yeah, it should be --

23 CHAIR DANNER: All right. We have a lot to

24 think about and a lot to discuss, so I thank everybody

25 for participation this afternoon.

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1 Did I miss anybody -- is there anybody in

2 the room or on the bridge line who wants to make a

3 comment who hasn't had the opportunity yet? Okay.

4 Then we will take this under advisement, and

5 we're adjourned for the afternoon. Thank you very much.

6 (Hearing concluded at 3:20 p.m.)

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3 STATE OF WASHINGTON )

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7 I, ANITA W. SELF, a Certified Shorthand Reporter

8 in and for the State of Washington, do hereby certify

9 that the foregoing transcript is true and accurate to

10 the best of my knowledge, skill and ability.

11 IN WITNESS WHEREOF, I have hereunto set my hand

12 and seal this 14th day of February, 2017.

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17 ANITA W. SELF, RPR, CCR #3032

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