

Docket No. A-130355 - Vol. I

Rulemaking to Make Corrections and Changes in
Rules in WAC 480-07

January 30, 2017



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BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of)
)
Analysis of Staff Proposed) Docket No. A-130355
Revisions to WAC 480-07)
Governing Information Designated)
as Confidential)
)

RULE ADOPTION HEARING
Pages 1-85

1:31 p.m.
January 30, 2017

Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive Southwest
Olympia, Washington 98504-7250

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A P P E A R A N C E S

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LISA ANDERL, CenturyLink
DONNA BARNETT, Puget Sound Energy
ZACH KRAVITZ, NW Natural
DUSTIN TILL, PacifiCorp
LAUREN RUSSELL, Union Pacific Railroad Co.
JESSE COWELL, Industrial Customers of Northwest
Utilities

* * * * *

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.

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

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

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

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

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.

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

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.

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

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

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

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

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

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.

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

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

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

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

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

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.

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

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

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

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.

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.

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

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

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

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

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

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

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.

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

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

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

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

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

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

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.

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.

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.

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.

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

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.

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

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 --

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

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

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.

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

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.

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

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

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

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

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

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

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.

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

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

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.

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.

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.

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.

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.

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

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.

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

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

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

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

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

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

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

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

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

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

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.

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

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

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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Did I miss anybody -- is there anybody in
the room or on the bridge line who wants to make a
comment who hasn't had the opportunity yet? Okay.

Then we will take this under advisement, and
we're adjourned for the afternoon. Thank you very much.

(Hearing concluded at 3:20 p.m.)

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