BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of PUGET SOUND ENERGY, INC. Petition for Approval of a Power Purchase Agreement for Acquisition of Coal Transition Power, as Defined in RCW 80.80.010, and the Recovery of Related Acquisition Costs	Docket No. UE-12____ Puget Sound Energy, Inc.'s Motion for Amended Protective Order with Highly Confidential Provisions

1. Puget Sound Energy, Inc. ("PSE") files this Motion for Amended Protective Order with Highly Confidential Provisions in conjunction with its petition for approval of a Power Purchase Agreement ("PPA") for acquisition of coal transition power, as defined in RCW 80.80.010, and the recovery of related acquisition costs dated August 20, 2012 (the "2012 PPA Petition"). PSE's representatives for purposes of this proceeding are:

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I. RELIEF REQUESTED

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

- PSE will be permitted to designate information as "highly confidential" in its testimony, exhibits, responses to data requests, and briefing in this proceeding, as well as at hearing.

- Only the Commission Staff and Public Counsel will have access to such "highly confidential" information.

- Any further release of "highly confidential" information to experts for Commission Staff or Public Counsel, or to any other parties who intervene in the 2012 PPA Petition, will be subject to a showing that such persons or entities are not current or potential owners or developers of energy resources: (i) that have been or could potentially be offered to PSE for its electric portfolio; (ii) that are competing or could potentially compete with other projects that are or could be offered to PSE for its electric portfolio. Restrictions on access to "highly confidential" information should also extend to employees of owners or developers of such energy resources, as well as to consultants or advisors to such owners or developers (including their attorneys) to the extent such persons are consulting or advising on matters for which the "highly confidential" information would be relevant; and

- For all persons or parties having access to "highly confidential" information, copying and handling of such information shall be limited in order to reduce the risk of inadvertent disclosure of that information.

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

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II. STATEMENT OF FACTS

4. On August 20, 2012, PSE filed its petition for approval of a Power Purchase Agreement for acquisition of coal transition power, as defined in RCW 80.80.010, and the recovery of related acquisition costs, along with prefiled direct testimony and exhibits in support of the petition. PSE marked information contained on a number of pages of these testimonies and exhibits "confidential" or "highly confidential".

5. The Commission's standard form of protective order should be sufficient to protect the materials in PSE's filing that have been marked "confidential." Such materials include certain negotiated terms of the Coal Transition PPA at issue in this proceeding and TransAlta Centralia Generation, LLC's bids into PSE's recent competitive bidding process under WAC Chapter 480-107 (the "2011 RFP Process"). The Commission's standard protective order prohibits the use of such information outside the scope of a particular proceeding.

6. By contrast, the material that PSE has marked "highly confidential" requires enhanced protections from disclosure. As detailed in the Declaration of Roger Garratt in Support of PSE's Motion for Amended Protective Order with Highly Confidential Provisions, submitted with this motion, the information that PSE has marked "highly confidential" is highly sensitive commercial information that was provided to PSE by third parties that participated in PSE's 2011 RFP Process. PSE's confidentiality agreements with third parties that provided such information to PSE, which were approved by the

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Commission as part of PSE's Requests for Proposals in Docket No. UE-111405, require PSE to seek a highly confidential protective order to protect such information.

7. In addition, PSE has marked a limited subset of additional information as "highly confidential" that was not submitted by project developers or owners, but that is highly commercially sensitive to PSE. Such information includes references to PSE's negotiating strategies, detailed results of cost analyses performed by PSE, and detailed cost information about resources considered outside the 2011 RFP process. Release of such information to owners or developers of project resources, to the counterparties to PSE in those transactions, or to potential counterparties for additional such transactions, would harm PSE and its customers because it would undercut PSE's negotiating position. Mr. Garratt's declaration provides further details in support of PSE's concerns.

8. PSE's concerns are significant and pressing, given its ongoing need to acquire additional electric resources to serve its customers. PSE is in the process of negotiating with other counterparties for certain of the resources (in addition to the PPA that is the subject of the 2012 PPA Petition) identified in response to the 2011 RFP under WAC Chapter 480-107. Discussions and negotiations with project developers will be ongoing over the next year or more regarding what may well be the next set of PSE resource acquisitions.

9. PSE respects the concerns that have been expressed by other parties that the "highly confidential" designation should not be applied lightly. PSE has been careful in its 2012 PPA Petition filing to minimize the amount of information designated "highly

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confidential." For example, PSE is releasing as public information its analyses of the portfolio benefits to PSE's electric portfolio of the PPA presented in the case. PSE does not believe that counterparties could "back into" commercially sensitive information from those figures, and they are helpful for other parties to understand why PSE agreed to the terms of the PPA. In addition, PSE has sought to provide explanations in the text of its filing of the relative attractiveness of the PPA as to other alternatives available to PSE. Taken all together, PSE believes that the public can understand and other parties can productively participate in the 2012 PPA Petition without access to the "highly confidential" information.

III. STATEMENT OF ISSUES

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

- Should the Commission enter a protective order that protects highly commercially sensitive information submitted to PSE by project owners or developers from disclosure or dissemination to current or potential owners or developers of energy resources who are competitors or potential competitors of each other?

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

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IV. EVIDENCE RELIED UPON

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

12. PSE further relies on the prefiled direct testimonies of its witnesses in this 2012 PPA Petition Filing that contain materials marked "highly confidential." These testimonies and exhibits explicitly show the content and context of information that PSE seeks to protect with this motion.

V. AUTHORITY AND ARGUMENT

13. Authority for PSE's requested relief is found in WAC 480-07-423(2), which provides for entry of a protective order with "highly confidential" provisions to protect information if the lack of enhanced restrictions on access to such information "imposes a highly significant risk of competitive harm." WAC 480-07-423(3)(b).

14. There is ample Commission precedent for the entry of a protective order with a "highly confidential" designation, including the protective order the Commission entered in PSE's 2011 and 2009 general rate cases and 2007 PCORC proceeding. *See WUTC v. PSE*, Docket No. UE-111048 and UE- UG-111049 (consolidated), Order No. 1 (June 17,

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2011); *WUTC v. PSE*, Docket No. UE-090704 and UE-090705 (consolidated), Order No. 03 (June 23, 2009); *see also WUTC v. PSE*, Docket No. UE-070565, Order No. 03 (April 12, 2007); *WUTC v PSE*, Docket No. UE-072300 *et al.*, Order No. 02 (Dec. 17, 2007); *WUTC v PSE*, Docket No. UE-060266 *et al.*, Order No. 03 (March 23, 2006); *WUTC v. PSE*, Docket No. UE-050870 (June 24, 2005) and Notice Clarifying Discovery Practice Under Order No. 03 Protective Order (August 11, 2005); *WUTC v. PSE*, Docket No. UE-031725, Order No. 02 (Oct. 29, 2003). *See also Application of U S WEST, Inc. and Qwest Communications International, Inc.*, Docket No. UT-991358, Sixth Supp. Order, at 2-4; *WUTC v. Olympic Pipe Line Co.*, Docket No. TO-011472, Seventh Supp. Order, at 2-4; *Air Liquide America Corp. et al. v. Puget Sound Energy, Inc.*, Docket No. UE-001952, Third Supp. Order, at 2-5. Generally, the Commission has amended its standard protective order to allow for the designation of highly confidential documents under the following circumstances: (1) the parties to the docket are competitors or potential competitors; (2) the information relevant to the case may be sensitive competitive information that would be of value to competitors if released; (3) a disclosing party may suffer harm if forced to disclose certain information without heightened protection; and (4) the entry of the protective order will facilitate discovery.

15. These considerations are reflected in the "highly confidential" protective orders themselves, which state that "parties to this proceeding are competitors or potential competitors"; that disclosure of highly confidential information will impose "a significant risk of competitive harm to the disclosing party"; and that parties should designate as highly

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confidential only information that "truly might impose a serious business risk if disseminated" without heightened protection. *See* Docket No. UT-991358 (6th Supp. Order at 2); Docket No. TO-011472 (7th Supp. Order at 2); Docket No. UE-001952 (3rd Supp. Order at 2).

16. The material PSE seeks to protect is precisely the type of information that is intended to be eligible for "highly confidential" protections in WAC 480-07-423(3)(b). The likely result of release of any of the "highly confidential" information to owners or developers of energy resources, or to persons or entities that represent or advise them, would be increased costs for PSE and, ultimately, its customers. This is because there would be a tendency on the part of project proposers and counterparties to use such information to benchmark their transactions with PSE against these other transactions in a sort of "most favored nation" view of negotiations over their particular projects. Instead of being provided with the information that would give them such leverage, counterparties should be required to focus on the cost structures of their own projects when negotiating with PSE.

17. PSE and its customers also have an interest in protecting against disclosure of such information to the public or to developers or owners who are competing or potentially competing against each other in the industry for at least two reasons: (1) because such developers or owners should not be put in the position of being able to "game" the RFP process by having access to confidential information about their competitors or potential competitors merely by intervening in the 2012 PPA Petition proceeding; and (2) because if PSE is to attract a broad slate of proposals in response to future RFPs, developers or owners

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

18. The materials PSE has marked "highly confidential" should not be viewed at all by potential owners or developers of energy resources: (i) that have been or could potentially be offered to PSE for its electric portfolio; (ii) that are competing or could potentially compete with other projects that are or could be offered to PSE for its electric portfolio. Restrictions on access to "highly confidential" information should also extend to employees of owners or developers of such energy resources, as well as to consultants or advisors to such owners or developers (including their attorneys) to the extent such persons are consulting or advising on matters for which the "highly confidential" information would be relevant. There is a highly significant risk of competitive harm to PSE and/or the project owners and developers that submitted their commercially sensitive information to PSE if parties who are competitors or potential competitors of each other, or who are counterparties or potential counterparties to PSE with respect to such transactions, are able to access the information PSE has designated "highly confidential" merely by intervening in this 2012 PPA Petition proceeding.

19. This "highly confidential" information that is relevant to this 2012 PPA Petition proceeding also presents a circumstance that justifies an employment restriction for persons given access to documents designated confidential or highly confidential. The

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appropriateness of imposing employment restrictions on persons given access to commercially sensitive material has been explored in employment cases in which courts have developed what is sometimes called the "inevitable disclosure doctrine." Typically in such cases the question is whether the court should issue an injunction prohibiting an employee from working for a competitor of his or her former employer. The answer turns on whether the employee could not help but disclose his or her former employer's trade secrets in performing the new job. As stated in one such case:

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

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

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

21. Consistent with these decisions, the public policy of this state is to provide strong protection to competitively-sensitive information. *See* RCW 4.24.601 (Legislature declared that protection of confidential commercial information "promotes business activity

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and prevents unfair competition"; it is consistent with the State's public policy that the "confidentiality of such information be protected and its unnecessary disclosure be prevented"). This policy is reflected in other statutes as well, including the Uniform Trade Secrets Act, RCW 19.108 *et seq.* ("the Act"), which provides a civil cause of action for misappropriation of trade secrets. The remedies provided in the Act, including attorneys' fees and exemplary damages, reflect the strength of the Legislature's commitment to protecting confidential information. *See* RCW 19.108.020-040; *see also* RCW 80.04.095 (confidential marketing, cost, and financial information is not subject to public inspection). Further, the Legislature recognized the need to protect the confidentiality of business information in proceedings such as this for approval of a coal transition PPA and expressly provided for a protective order to be issued by the Commission. *See* RCW 80.04.570(3).

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

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

24. This Commission should be even less concerned than civil courts about establishing employment restrictions related to access to highly confidential information. Unlike an employer who voluntarily provides employees with access to highly confidential materials, and who is in a position to control or condition the terms of such access, the regulated companies that appear before the Commission are typically compelled to provide highly confidential information through the discovery process or in order to meet their burden of proof in a proceeding. In addition, unlike an employee of a single employer, the counsel and consultants who would have access to highly confidential material in a Commission proceeding are typically engaged by more than one client. It is not unusual to have to make choices about representing one client versus another on one type of proceeding versus another due to ethical or practical constraints involving conflicts of interest.

25. With respect to the types of information that would justify access and employment restrictions, the fundamental questions are: (1) whether a reviewer is in a position to make competitive use of or facilitate the competitive use of the information, and (2) whether that reviewer can reasonably be expected to avoid making use of the

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information once it is in his or her brain. In this 2012 PPA Petition proceeding, potential owners or developers of energy resources: (i) that have been or could potentially be offered to PSE for its electric portfolio; or (ii) that are competing or could potentially compete with other projects that are or could be offered to PSE for its electric portfolio would be in a position to make competitive use of the information that PSE has designated "highly confidential." Once that information is in their brains, or the brains of their advisors or consultants, it would be very difficult to somehow segregate that information such that it does not impact development of a project proposal or negotiations with PSE or with other utilities or potential purchasers of energy projects.

26. PSE is not seeking to restrict access by Commission Staff or Public Counsel to "highly confidential" information beyond the protections contained in the Commission's standard protective order for "confidential" information. However, PSE believes that any external experts for Commission Staff and Public Counsel should be required to show that they are not involved in or providing advice to owners or developers of energy resources that meet the description set forth above and in the proposed protective order prior to being provided with access to the "highly confidential" information. *See* Exhibit A, ¶ 15.

27. PSE asks that any intervenors in this proceeding, including their principals, attorneys and experts, be required to make the same showing prior to being permitted access to the "highly confidential" information. Unlike some prior "Highly Confidential" protective orders, PSE is not seeking to limit at the outset the number of counsel or consultants that a party may wish to have view the Highly Confidential Information – as

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long as all such persons make the requisite certification that they are not involved in activities for which such information might provide an inappropriate competitive advantage. *See* Exhibit A, ¶ 14.

28. Finally, PSE requests that copying and access to all "highly confidential" information be restricted as set forth in PSE's proposed order to reduce the risk of inadvertent disclosure of "highly confidential" information. *See* Exhibit A ¶¶ 17, 18. Such restrictions are consistent with the restrictions that were imposed with respect to "highly confidential" information in PSE's last general rate case. *See WUTC v. PSE,* Docket No. UE-111048 and UE- UG-111049 (consolidated), Order No. 1 (June 17, 2011).

VI. CONCLUSION

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

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Dated this 20th day of August, 2012

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