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**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of

PUGET SOUND ENERGY, INC.

for (i) Approval of a Special Contract for Liquefied Natural Gas Fuel Service with Totem Ocean Trailer Express, Inc. and (ii) a Declaratory Order Approving the Methodology for Allocating Costs Between Regulated and Non-regulated Liquefied Natural Gas Services

Docket No. UG-15_____

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 special contract with Totem Ocean Trailer Express, Inc. (“TOTE”) for the supply of liquefied natural gas (“LNG”) as a marine fuel (the “TOTE Special Contract”), and a declaratory order approving the methodology for allocating costs between regulated and non-regulated LNG gas services to be provided by PSE’s proposed Tacoma LNG Facility.

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1 consulting or advising on matters for which the “highly
2 confidential” information would be relevant; and

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- 5 • For all persons or parties having access to “highly
6 confidential” information, copying and handling of such
7 information shall be limited in order to reduce the risk of
8 inadvertent disclosure of that information.
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10 4. PSE is submitting as Exhibit A to this motion a proposed form of amended
11 protective order with highly confidential provisions.
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14 II. STATEMENT OF FACTS

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16 5. On August 11, 2015, PSE filed its petition for (i) approval of the TOTE
17 Special Contract and a (ii) a declaratory order approving the methodology for allocating
18 costs between regulated and non-regulated LNG services to be provided by PSE’s proposed
19 Tacoma LNG Facility, along with prefiled direct testimony and exhibits in support of the
20 petition. PSE marked information contained on a number of pages of these testimonies and
21 exhibits “confidential” or “highly confidential”.
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31 6. The Commission’s standard form of protective order should be sufficient to
32 protect the materials in PSE’s filing that have been marked “confidential.” Such materials
33 include costs associated with the development and construction of PSE’s proposed
34 Tacoma LNG Facility. The Commission’s standard protective order prohibits the use of
35 such information outside the scope of a particular proceeding.
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43 7. By contrast, the material that PSE has marked “highly confidential” requires
44 enhanced protections from disclosure. As detailed in the Declaration of Roger Garratt in
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1 Support of PSE’s Motion for Amended Protective Order with Highly Confidential
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3 Provisions, submitted with this motion, the material that PSE has marked “highly
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5 confidential” requires enhanced protections from disclosure. The information that PSE has
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7 marked “highly confidential” is highly sensitive commercial information related to the
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9 TOTE Special Contract negotiated between PSE and TOTE. This information, if released to
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11 current or potential suppliers or purchasers of LNG for vehicular fuel or industrial end uses,
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13 could cause significant competitive harm to TOTE in its efforts to obtain LNG fuel supply in
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15 other jurisdictions. Additionally, PSE has marked as “highly confidential” certain studies
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17 commissioned by PSE with respect to (a) the projected price spreads between ultra-low-
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19 sulfur diesel and intermediate fuel oil 380 and Sumas natural gas prices and (b) market
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21 assessments for several potential LNG markets, including heavy-duty on-road
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23 transportation, and marine, rail, and industrial conversion markets. This information, if
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25 released to current or potential suppliers or purchasers of LNG for vehicular fuel or
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27 industrial end uses, could cause significant competitive harm to PSE as it markets non-
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29 regulated fuel sales to customers other than TOTE. Mr. Garratt’s declaration provides
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31 further details in support of PSE’s concerns.
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38 8. PSE respects the concerns that have been expressed by other parties that the
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40 “highly confidential” designation should not be applied lightly. PSE has been careful in its
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42 2015 LNG Petition filing to minimize the amount of information designated “highly
43
44 confidential.” For example, PSE is not seeking highly confidential treatment of any
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46 information that does not relate to (i) the TOTE Special Contract or (ii) studies
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1 commissioned by PSE with respect to (a) the projected price spreads between ultra-low-
2 sulfur diesel and intermediate fuel oil 380 and Sumas natural gas prices and (b) market
3 assessments for several potential LNG markets, including heavy-duty on-road
4 transportation, and marine, rail, and industrial conversion markets. PSE is making the
5 projected budget of the Tacoma LNG Project, which consists of the Tacoma LNG Facility
6 and associated upgrades to its natural gas distribution system, public. PSE has marked
7 detailed budget projection information confidential (but not highly confidential). Taken all
8 together, PSE believes that the public can understand and other parties can productively
9 participate in the 2015 LNG Petition without access to the “highly confidential” information.
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23 III. STATEMENT OF ISSUES

24 9. This Motion for Amended Protective Order with Highly Confidential

25 Provisions presents the following issues:
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- 28 • Should the Commission enter a protective order that
29 protects highly commercially sensitive information relating
30 to TOTE and the TOTE Special Contract from disclosure
31 or dissemination to current or potential suppliers or
32 purchasers of LNG for vehicular fuel or industrial end
33 uses?
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- 35 • Should the Commission enter a protective order that
36 protects highly commercially sensitive information relating
37 to studies commissioned by PSE with respect to (a) the
38 projected price spreads between ultra-low-sulfur diesel and
39 intermediate fuel oil 380 and Sumas natural gas prices and
40 (b) market assessments for several potential LNG markets,
41 including heavy-duty on-road transportation, and marine,
42 rail, and industrial conversion markets?
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IV. EVIDENCE RELIED UPON

10. 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.

11. PSE further relies on the prefiled direct testimonies of its witnesses in this 2015 LNG 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

12. 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).

13. 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,

1 2011); *WUTC v. PSE*, Docket No. UE-090704 and UE-090705 (consolidated), Order No. 03
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3 (June 23, 2009); *see also WUTC v. PSE*, Docket No. UE-070565, Order No. 03 (April 12,
4
5 2007); *WUTC v PSE*, Docket No. UE-072300 *et al.*, Order No. 02 (Dec. 17, 2007); *WUTC v*
6
7 *PSE*, Docket No. UE-060266 *et al.*, Order No. 03 (March 23, 2006); *WUTC v. PSE*, Docket
8
9 No. UE-050870 (June 24, 2005) and Notice Clarifying Discovery Practice Under Order No.
10
11 03 Protective Order (August 11, 2005); *WUTC v. PSE*, Docket No. UE-031725, Order
12
13 No. 02 (Oct. 29, 2003). *See also Application of U S WEST, Inc. and Qwest Communications*
14
15 *International, Inc.*, Docket No. UT-991358, Sixth Supp. Order, at 2-4; *WUTC v. Olympic*
16
17 *Pipe Line Co.*, Docket No. TO-011472, Seventh Supp. Order, at 2-4; *Air Liquide America*
18
19 *Corp. et al. v. Puget Sound Energy, Inc.*, Docket No. UE-001952, Third Supp. Order, at 2-5.

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24 Generally, the Commission has amended its standard protective order to allow for the
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26 designation of highly confidential documents under the following circumstances: (1) the
27
28 parties to the docket are competitors or potential competitors; (2) the information relevant to
29
30 the case may be sensitive competitive information that would be of value to competitors if
31
32 released; (3) a disclosing party may suffer harm if forced to disclose certain information
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34 without heightened protection; and (4) the entry of the protective order will facilitate
35
36 discovery.
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40 14. These considerations are reflected in the “highly confidential” protective
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42 orders themselves, which state that “parties to this proceeding are competitors or potential
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44 competitors”; that disclosure of highly confidential information will impose “a significant
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46 risk of competitive harm to the disclosing party”; and that parties should designate as highly
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1 confidential only information that “truly might impose a serious business risk if
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3 disseminated” without heightened protection. *See* Docket No. UT-991358 (6th Supp. Order
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5 at 2); Docket No. TO-011472 (7th Supp. Order at 2); Docket No. UE-001952 (3rd Supp.
6
7 Order at 2).
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10 15. The material PSE seeks to protect is precisely the type of information that is
11
12 intended to be eligible for “highly confidential” protections in WAC 480-07-423(3)(b). The
13
14 likely result of release of any of the “highly confidential” information to current or potential
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16 suppliers or purchasers of LNG for vehicular fuel or industrial end uses would be decreased
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18 competitive negotiating positions for TOTE in its efforts to obtain LNG fuel supply in other
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20 jurisdictions and PSE as it markets non-regulated fuel sales to customers other than TOTE.
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22 This is because there would be a tendency on the part of suppliers and purchasers to use
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24 such information to benchmark their potential transactions against the TOTE Special
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26 Contract and PSE’s assessments of LNG markets in a sort of “most favored nation” view of
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28 negotiations over their particular needs. Instead of being provided with the information that
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30 would give them such leverage, counterparties should be required to focus on the cost
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32 structures of their individual needs when negotiating with either TOTE or PSE.
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38 16. The materials PSE has marked “highly confidential” should not be viewed at
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40 all by current or potential suppliers or purchasers of LNG for vehicular fuel or industrial end
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42 uses. Restrictions on access to “highly confidential” information should also extend to
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44 employees of such current or potential suppliers or purchasers, as well as to consultants or
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46 advisors to such current or potential suppliers or purchasers (including their attorneys) to the
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1 extent such persons are consulting or advising on matters for which the “highly confidential”
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3 information would be relevant. There is a highly significant risk of competitive harm to
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5 TOTE and PSE if parties who are competitors or potential competitors of either TOTE or
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7 PSE, or who are counterparties or potential counterparties to either TOTE or PSE with
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9 respect to such transactions, are able to access the information PSE has designated “highly
10
11 confidential” merely by intervening in this 2015 LNG Petition proceeding.
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15 17. This “highly confidential” information that is relevant to this 2015 LNG
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17 Petition proceeding also presents a circumstance that justifies an employment restriction for
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19 persons given access to documents designated confidential or highly confidential. The
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21 appropriateness of imposing employment restrictions on persons given access to
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23 commercially sensitive material has been explored in employment cases in which courts
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25 have developed what is sometimes called the “inevitable disclosure doctrine.” Typically in
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27 such cases the question is whether the court should issue an injunction prohibiting an
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29 employee from working for a competitor of his or her former employer. The answer turns
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31 on whether the employee could not help but disclose his or her former employer’s trade
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33 secrets in performing the new job. As stated in one such case:
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37 [U]nless [the former employee] has an uncanny ability to
38 compartmentalize information, he would necessarily be making
39 decisions...by relying on his knowledge of [the former
40 employer’s] trade secrets.
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43 *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995).
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1 18. A court's willingness to apply this doctrine in a particular case may be
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3 influenced by evidence of bad faith or wrongdoing by an employee, but such a showing is
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5 not required. *See Air Products and Chem., Inc. v. Johnson*, 442 A.2d 1114, 1118 (Penn.
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7 Sup. Ct. 1982) ("The record indicates that Johnson is an honest man. There is no dispute as
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9 to his integrity. It is certain that he intends to refrain from disclosing any of the proven trade
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11 secrets of Air Products."). *See also Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1460
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13 (M.D.N.C. 1996).
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17 19. Consistent with these decisions, the public policy of this state is to provide
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19 strong protection to competitively-sensitive information. *See RCW 4.24.601* (Legislature
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21 declared that protection of confidential commercial information "promotes business activity
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23 and prevents unfair competition"; it is consistent with the State's public policy that the
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25 "confidentiality of such information be protected and its unnecessary disclosure be
26
27 prevented"). This policy is reflected in other statutes as well, including the Uniform Trade
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29 Secrets Act, *RCW 19.108 et seq.* ("the Act"), which provides a civil cause of action for
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31 misappropriation of trade secrets. The remedies provided in the Act, including attorneys'
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33 fees and exemplary damages, reflect the strength of the Legislature's commitment to
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35 protecting confidential information. *See RCW 19.108.020-040; see also RCW 80.04.095*
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37 (confidential marketing, cost, and financial information is not subject to public inspection).
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42 20. Washington courts enforce non-compete agreements that contain
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44 employment restrictions where such agreements are found to be reasonable under the
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46 circumstances of the case. Whether a non-compete covenant is reasonable involves
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1 consideration of three factors: (1) whether the restraint is necessary for the protection of the
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3 business or goodwill of the employer; (2) whether it imposes upon the employee any greater
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5 restraint than is reasonably necessary to secure the employer's business or goodwill; and
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8 (3) whether the degree of injury to the public is such loss of the service and skill of the
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10 employee as to warrant non-enforcement of the covenant. *See Perry v. Moran*, 109 Wn.2d
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12 691, 698 (1987). Courts also consider the scope of the restriction. *Id.* at 700.
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15 21. In *Perry v. Moran*, the Washington Supreme Court found that a covenant
16
17 prohibiting an accountant from providing services to clients of his former employer for a
18
19 period of three years after terminating his employment was valid and enforceable. *Id.* at
20
21 691. Similarly, in *Knight, Vale, & Gregory v. McDaniel*, 37 Wn. App. 366, 370 (1984), the
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23 court upheld a three-year non-compete agreement that prohibited an accountant from
24
25 performing accounting services for clients of his former employer.
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29 22. This Commission should be even less concerned than civil courts about
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31 establishing employment restrictions related to access to highly confidential information.
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33 Unlike an employer who voluntarily provides employees with access to highly confidential
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35 materials, and who is in a position to control or condition the terms of such access, the
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37 regulated companies that appear before the Commission are typically compelled to provide
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39 highly confidential information through the discovery process or in order to meet their
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41 burden of proof in a proceeding. In addition, unlike an employee of a single employer, the
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43 counsel and consultants who would have access to highly confidential material in a
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45 Commission proceeding are typically engaged by more than one client. It is not unusual to
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1 have to make choices about representing one client versus another on one type of proceeding
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3 versus another due to ethical or practical constraints involving conflicts of interest.
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5 23. With respect to the types of information that would justify access and
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7 employment restrictions, the fundamental questions are: (1) whether a reviewer is in a
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9 position to make competitive use of or facilitate the competitive use of the information, and
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11 (2) whether that reviewer can reasonably be expected to avoid making use of the
12
13 information once it is in his or her brain. In this 2015 LNG Petition proceeding, current or
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15 potential suppliers or purchasers of LNG for vehicular fuel or industrial end uses would be
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17 in a position to make competitive use of the information that PSE has designated “highly
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19 confidential.”
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23 24. PSE is not seeking to restrict access by Commission Staff or Public Counsel
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25 to “highly confidential” information beyond the protections contained in the Commission’s
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27 standard protective order for “confidential” information. However, PSE believes that any
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29 external experts for Commission Staff and Public Counsel should be required to show that
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31 they are not involved in or providing advice to current or potential suppliers or purchasers of
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33 LNG for vehicular fuel or industrial end uses prior to being provided with access to the
34
35 “highly confidential” information. *See Exhibit A, ¶ 15.*
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39 25. PSE asks that any intervenors in this proceeding, including their principals,
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41 attorneys and experts, be required to make the same showing prior to being permitted access
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43 to the “highly confidential” information. Unlike some prior “Highly Confidential”
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45 protective orders, PSE is not seeking to limit at the outset the number of counsel or
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1 consultants that a party may wish to have view the Highly Confidential Information – as
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3 long as all such persons make the requisite certification that they are not involved in
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5 activities for which such information might provide an inappropriate competitive advantage.
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7 *See* Exhibit A, ¶ 14.
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10 26. Finally, PSE requests that copying and access to all “highly confidential”
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12 information be restricted as set forth in PSE’s proposed order to reduce the risk of
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14 inadvertent disclosure of “highly confidential” information. *See* Exhibit A ¶¶ 17, 18. Such
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16 restrictions are consistent with the restrictions that were imposed with respect to “highly
17
18 confidential” information in PSE’s last general rate case. *See WUTC v. PSE*, Docket
19
20 No. UE-111048 and UG-111049 (consolidated), Order No. 1 (June 17, 2011).
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24 VI. CONCLUSION

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27 27. For the reasons set forth above, PSE respectfully requests that the
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29 Commission enter an amended standard protective order in this case with enhanced
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31 protection of highly confidential information, in the form provided as Exhibit A to this
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33 motion.
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1 Dated this 11th day of August, 2015
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4 **PERKINS COIE LLP**

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8 By: 

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