

ATTACHMENT A

Redline Edits to the Proposed Protective Order

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

[CAPTION]

DOCKET [NUMBER]

ORDER [XX]

PROTECTIVE ORDER

BACKGROUND

- 1 The Washington Utilities and Transportation Commission (Commission) finds the parties reasonably anticipate that discovery or evidentiary filings will require information designated as confidential pursuant to WAC 480-07-160 to be disclosed to parties that, in the absence of a protective order, would not be authorized to access that information. The Commission further finds that a protective order governing disclosure of information designated as confidential is necessary to protect the provider of that information while promoting the free exchange of information and development of the evidentiary record.
- 2 Accordingly, the Commission enters this protective order (Order) pursuant to RCW 34.05.446 and WAC 480-07-420 to govern the discovery and use of information designated as confidential in this proceeding.

ORDER

A. General Provisions

- 3 **Confidential Information.** All access, review, use, and disclosure of any material designated by a party to this proceeding as confidential pursuant to WAC 480-07-160 (referred to in this Order as “Confidential Information”) is governed by this Order and by WAC 480-07-160. ~~The Commission expects Confidential Information to include only numbers, customer names, and planning details. A party must limit the information it designates as confidential to information that reasonably could compromise the party’s ability to compete fairly or that otherwise might impose a legitimate business risk to the party if the information is disclosed without the protections provided in this Order and WAC 480-07-160.~~ Confidential Information is defined in WAC 480-07-160(2)(b).
- 4 **Designating Confidential Information.** Parties must designate Confidential Information ~~as required inconsistent with~~ WAC 480-07-160. The Commission may reject any filing that

fails to properly designate or mark Confidential Information or that designates clearly public information as confidential.

~~5~~ ~~**Limitation on Use.** A party or counsel having access to Confidential Information pursuant to this protective order may request, review, use, or disclose that information only for purposes of this proceeding.~~

B. Disclosure of Access to Confidential Information

~~6~~ ~~**Persons Permitted Access.** No Confidential Information may be disclosed to anyone other than the Commissioners, Commission Staff, the presiding officer(s), and, subject to the requirements in paragraph 7 below, counsel for each of the parties to this proceeding, each such counsel's administrative staff, and persons designated by the parties as their experts in this matter. No expert other than members of Commission Staff may be an officer, director, direct employee, major shareholder, or principal of any party or any competitor of any party unless the provider of the Confidential Information waives this restriction. Any dispute concerning persons entitled to access Confidential Information must be brought before the presiding officer for resolution.~~

~~75~~ **Non-disclosure Agreement.** A party to this proceeding may not receive Confidential Information unless it has first consented to be bound to the protective order by signing the Non-Disclosure Agreement (Appendix A). Before being allowed access to any Confidential Information disclosed in this docket, each counsel or expert must agree to comply with and be bound by this Order by executing, filing, and serving Exhibit **BA** (counsel) or Exhibit **CB** (expert) attached to this Order (collectively Non-disclosure Agreement). A counsel's administrative staff need not execute a Non-disclosure Agreement if counsel agrees to be responsible for any violation of this Order that results from his or her staff's conduct. If the provider of the Confidential Information objects to allowing any expert to have access to such information, that party must complete the applicable portion of the Non-disclosure Agreement for that expert, timely file it with the Commission, and serve all parties. A party waives any objection to allowing access to Confidential Information to an expert who has executed a Non-disclosure Agreement if the party fails to comply with this requirement.

~~86~~ **Access to Confidential Information.** Parties must comply with the requirements in WAC 480-07-160 and WAC 480-07-420 when providing documents containing Confidential Information to the Commission or persons who have executed a Non-disclosure Agreement. The parties must not distribute copies of documents containing Confidential Information to, or discuss the contents of such information with, any person not bound by this Order. Persons who have executed a Non-disclosure Agreement agree that they will exercise all reasonable diligence to protect Confidential Information from disclosure to unauthorized persons.

C. Use of Confidential Information

7 **Disclosure of Confidential Information.** A party who receives Confidential Information and is bound by this protective order may only disclose Confidential Information to Commissioners, Commission Staff, the presiding officer(s), and, subject to the requirements in paragraph 7 below, the receiving party's counsel, such counsel's administrative staff, and persons designated by the receiving party as an expert in this proceeding. No expert other than members of Commission Staff may be an officer, director, direct employee, major shareholder, or principal of any party or any competitor of any party unless the provider of the Confidential Information waives this restriction. Any dispute concerning persons entitled to access Confidential Information must be brought before the presiding officer for resolution. A party, or a party's counsel or experts, may review, use, or disclose Confidential Information received from another party only for purposes of this proceeding.

Reference to Confidential Information. Any public reference to Confidential Information during any part of this proceeding including, but not limited to, in motions, briefs, arguments, direct testimony, cross-examination, rebuttal, and proposed offers of proof, must not disclose the content or substance of that information, directly or indirectly.

~~9~~ ~~The parties must negotiate how best to prevent unauthorized disclosure of Confidential Information with the goal of protecting each party's rights with respect to Confidential Information while allowing all parties the latitude to present the evidence necessary to support their respective cases and to maximize the information available to the public. If the parties cannot reach agreement about how to use or refer to Confidential Information without disclosing it in violation of this Order, they must notify the presiding officer, who will determine the arrangements to protect the Confidential Information to ensure that all parties are afforded their full due process rights, including the right to cross-examine witnesses.~~

~~108~~ Counsel or other representative of any party that intends to disclose Confidential Information during oral testimony, cross-examination, or argument must give such prior notice as is feasible to the provider of that information and the presiding officer. That notice, at a minimum, must permit the presiding officer an opportunity to clear the hearing room of persons not bound by this Order or to take such other action as is appropriate in the circumstances.

~~119~~ **Right to Challenge Admissibility.** Nothing in this Order may be construed to restrict any party's right to challenge the admissibility or use of any Confidential Information on any ground other than confidentiality, including but not limited to competence, relevance, or privilege.

~~1210~~ **Right to Challenge Confidential Designation.** Any party by motion or the Commission on its own initiative may challenge a party's designation of information as confidential under WAC 480-07-160 and this Order. The presiding officer will conduct an *in camera* hearing to determine the propriety of the designation. The burden of proof to show that such information is properly designated as confidential is on the party that made that designation. Pending a Commission determination, the challenged

Confidential Information shall be treated in all respects as protected under the terms of this Order. The commission may express its ruling orally on the record in an adjudicative proceeding, or in a written order. ~~The presiding officer will make his or her determination orally on the record or in a written order.~~

~~1311~~ If the ~~presiding officer~~Commission determines the challenged information is not entitled to protection under this Order and WAC 480-07-160, the information will continue to be protected under this Order for ten days from the date of the ~~presiding officer's~~Commission's determination. If a party seeks ~~Commission or~~ judicial review of the determination within that time, the Commission will stay the determination pending ~~an order from the Commission or~~ a decision by a reviewing court. If no party seeks ~~Commission or~~ judicial review of the ~~presiding officer's~~Commission's determination within 10 days, or if the ~~Commission and any~~ reviewing court upholds that determination, the Commission will require the challenged information to be refiled without the confidential designation or otherwise treated as public information.

~~1412~~ **Admission of Confidential Information under Seal.** The portions of the record of this proceeding containing Confidential Information will be sealed for all purposes, including administrative and judicial review, unless such Confidential Information is released from the restrictions of this Order, either through the agreement of the parties or pursuant to a lawful order of the Commission or of a court having jurisdiction to do so.

~~1513~~ **Return of Confidential Information.** Within thirty days following the conclusion of this proceeding, including any administrative or judicial review, every party to this proceeding (or such party's designated counsel and experts) ~~person who has executed a Non-disclosure Agreement and that has received, or~~ possesses or controls ~~any~~ Confidential Information provided by another party -(including personal notes that make substantive reference to Confidential Information), either must return all Confidential Information to the party that provided it or must certify in writing that all copies and substantive references to Confidential Information in notes have been destroyed; PROVIDED, that counsel may retain exhibits that contain Confidential Information as counsel records subject to the terms and conditions of this Order.

~~16~~ **Freedom of Information Laws.** ~~Until the Commission or any court having jurisdiction finds that any particular Confidential Information is not properly designated as confidential pursuant to WAC 480-07-160, any federal agency that has access to and/or receives copies of the Confidential Information must treat the Confidential Information as within the exemption from disclosure provided in the Freedom of Information Act at 5 U.S.C. § 552 (b)(4); and any Washington state agency that has access to and/or receives copies of the Confidential Information must treat the Confidential Information as being within the exemption from disclosure provided in RCW 42.56.210.~~

~~1714~~ **Notice of Compelled Production in Other Jurisdictions.** If a person who has executed a Non-disclosure Agreement Order is compelled to produce documents containing Confidential Information in any regulatory or judicial proceeding by the body conducting the proceeding, the person must provide notice to the party that provided the Confidential Information. Such Confidential Information must not be

produced for at least five business days following such notice, to permit the party that provided the information an opportunity to defend the protected status of the material before the regulatory or judicial body that would compel production. Disclosure after that date, in compliance with an order compelling production, is not a violation of this Order.

~~1815~~ **Modification.** The Commission may modify this Order on motion of a party or on its own motion upon reasonable prior notice to the parties and an opportunity for hearing.

~~1916~~ **Violation of this Order.** Violation of this Order by any party to this proceeding or by any other person bound by this Order by unauthorized use or unauthorized disclosure of Confidential Information may subject such party or person to liability for damages and shall subject such party to penalties as generally provided by law.

DATED at Olympia, Washington, and effective [DATE].

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

[NAME]
Administrative Law Judge

EXHIBIT A (PARTY CONSENT TO BE BOUND)

CONSENT TO BE BOUND
IN DOCKET [NUMBER]
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

This Protective Order governs the use of Confidential Information in this proceeding.

_____ (Party) agrees to be bound by the
terms of the Protective Order and certifies that it has an interest in these proceedings that is
not adequately represented by other parties to the proceeding.

Signature: _____

Printed Name: _____

Date: _____

EXHIBIT BA (ATTORNEY AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET [NUMBER]
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as attorney in
this proceeding for _____ (party to
this proceeding) agree to comply with and be bound by the Protective Order entered by
the Washington Utilities and Transportation Commission in Docket [NUMBER], and
acknowledge that I have reviewed the Protective Order and fully understand its terms and
conditions. I further agree to be responsible for any violations of the Protective Order that
result from the conduct of administrative staff I allow to have access to Confidential
Information.

Signature

Date

Address

EXHIBIT **CB** (EXPERT AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET [NUMBER]
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

Signature

Date

Employer

Address

Position and Responsibilities

* * *

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

_____ No objection.

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

Signature

Date