

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of
PUGET HOLDINGS LLC
and
PUGET SOUND ENERGY, INC.
For an Order Authorizing Proposed
Transaction

DOCKET NO. U-072375

(CORRECTED)
PUBLIC COUNSEL MOTION
CHALLENGING THE
CONFIDENTIALITY OF CERTAIN
MATERIALS PROVIDED IN
DISCOVERY BY JOINT
APPLICANTS

I. MOTION

- I.* The Public Counsel Section of the Washington State Attorney General’s Office (Public Counsel) files this motion pursuant to WAC 480-07-160(4) and Paragraphs 20 and 28 of the Protective Order in this case.¹ Public Counsel challenges the confidentiality of all information currently designated highly confidential, contained in Exhibit No.____ (SGH-1THC), the highly confidential, pre-filed, direct testimony of Steven G. Hill (filed June 17, 2008).²

¹ Paragraph 20 of the Protective Order with “Highly Confidential” Provisions (Protective Order), Order 03, states: [t]he designation of any document or information as Highly Confidential may be challenged by motion and the classification of the document or information as Highly Confidential will be considered in chambers by the presiding officer(s). The party contending that a document or information is Highly Confidential bears the burden of proving that such designation is necessary. (Paragraph 28 reiterates these points and applies to documents or information designated as confidential or as highly confidential.)

² The information at issue was excerpted from the Joint Applicants’ responses to six data requests. These responses and where the information appears in Mr. Hill’s testimony are as follows:

- (1) “Private Placement Memorandum,” Joint Applicants’ Response to Public Counsel Data Request No. 3005 Attachment A. Information from this Memorandum appears on pages 33, 34, 36, and 37.
- (2) “Presentation to the Investment Consortium,” PSE Response to Public Counsel Data Request No. 3008 Attachment A. Information from this Presentation appears on pages 34 and 35.
- (3) “Debt Agreement,” Joint Applicants’ Response to Public Counsel Data Request No. 3027. Information from this Agreement appears on pages 21, 39-41, 42-44, and 54.
- (4) Public Applicants’ Supplemental Response to Public Counsel Data Request No. 3166. Information from this Supplemental Response appears on pages 47, 49, 50, 52, 53, 55, and 56.

2. Public Counsel respectfully requests that the Commission inspect this information *in camera*, and hereby moves the Commission for an Order declaring that this information is not entitled to confidential status so that Mr. Hill’s entire direct testimony is non-confidential and available publicly.
3. **Procedural Context; Issues Raised By Motion.** The timing of this motion is tied to a July 25, 2008, request for public records received by the Commission from an individual citizen, Diane Woody, for Mr. Hill’s highly confidential testimony. After receiving notification from the Commission of the request, PSE filed a Complaint for Injunctive Relief in Thurston County Superior Court on July 31, 2008.³ Because the request involves Public Counsel testimony, Public Counsel expects to file a Motion to Intervene in that proceeding and will generally support the request, including by this motion pursuant to the protective order. It may be the court’s view that the issues are best addressed before the Commission. A Commission ruling regarding the confidentiality of the information contained in Mr. Hill’s direct testimony may help the Superior Court in determining whether an injunction is proper.
4. Due to the short time remaining, Public Counsel is not requesting that the motion be resolved prior to the hearings and is prepared to proceed with confidential examination on the protected material. The evidentiary hearing will provide an opportunity to evaluate the need for confidential treatment of the underlying documents and information referenced in Mr. Hill’s testimony and will provide an opportunity for *in camera* review. Public Counsel does not object

(5) Joint Applicants’ Response to Staff Data Request No. 1047. Information from this Response appears on page 35.

(6) “Letters from Moody’s and Standard and Poor’s,” Joint Applicants’ Response to ICNU Data Request No. 3.32, Attachments B, E, F. Information from these letters appears on pages 60, 61, 62-65, 67, and 69.

³ *Puget Sound Energy, Inc. and Puget Holdings, LLC v. WUTC*, Case Nos. 08-2-01816-1 and 08-2-01738-6.

and believes it would be appropriate for the Commission to extend the time for response to the motion until after the hearings are concluded. A specific schedule could be discussed with counsel during the hearings next week.

5. A post-hearing ruling limiting the confidentiality designations, although not affecting the hearings next week, could still have value in providing more public access to information about the transaction in the briefs, in the Commission's order, and in any subsequent proceedings.

II. MEMORANDUM

A. Background

6. On December 17, 2007, Puget Holdings LLC (Puget Holdings) and Puget Sound Energy, Inc. (PSE) (Joint Applicants) filed a joint application for an order authorizing the proposed transfer of ownership and control of Puget Energy and its wholly owned subsidiary, PSE, to Puget Holdings. The Joint Applicants requested, and were granted, a protective order with "highly confidential" provisions. The Joint Applicants have designated substantial amounts of material "highly confidential," both in their original filing and in their discovery responses.

7. Mr. Hill referred extensively to the Joint Applicants' responses to data requests in his direct testimony challenging the proposed transaction. Thus, the testimony was filed as highly confidential and substantial portions were redacted in the publicly available version. Public Counsel contacted PSE and requested that the Company remove its confidential designation from all information contained in Mr. Hill's direct testimony. On July 14, 2008, Public Counsel and PSE counsel conferred regarding the confidential designation of this material. PSE subsequently

notified Public Counsel of certain limited portions of the testimony that it would regard as public, but did not agree to lift the designation from the bulk of the information.⁴

8. On July 23, 2008, Commission Staff, Puget Sound Energy, Inc., Puget Holdings LLC, the Industrial Customers of Northwest Utilities (ICNU), Northwest Industrial Gas Users (NWIGU), The Energy Project, The Kroger Company, and the Northwest Energy Coalition filed a multi-party settlement stipulation. The Commission subsequently issued a notice revising the procedural schedule to allow rebuttal testimony on the stipulation and scheduling an evidentiary hearing for August 25 through 27, 2008.

B. The Applicable Legal Standard

9. It is Washington's declared public policy that government is conducted in public,⁵ adjudications are held openly,⁶ and records of public agencies are publically accessible.⁷ These policies are subject only to specific, carefully drawn exceptions.⁸ In limited circumstances, the Commission may issue a protective order, allowing confidential treatment of filed, commercial information.⁹ In addition, the Commission may create a separate designation for certain

⁴ Copies of the Joint Applicants' document detailing the items for which confidentiality is not asserted are attached as HIGHLY CONFIDENTIAL and NON-CONFIDENTIAL Appendices A.

⁵ RCW 42.30.

⁶ Const. art. I, § 5.

⁷ RCW 42.56.040 *et seq.* The Commission has recognized these public policies. *See e.g. In re the Application of U.S. West, and Qwest Communications Int'l, For an Order Disclaiming Jurisdiction or, in the Alternative, Approving the U.S. West-Qwest Communications Int'l Merger*, Docket No. UT-991358, Eighth Supplemental Order, ¶¶78-79 (hereinafter *U.S. West Order*); and, *In the Matter of the Application of Quest Corporation*, Docket No. UT-021120, Sixth Supplemental Order, ¶14.

⁸ Similar principles apply in the civil context. In *Rufer v. Abbott Laboratories*, the Washington State Supreme Court, sitting en banc, held that "any records that were filed with the court in anticipation of a court decision (dispositive or not) should be sealed or continue to be sealed only when the court determines . . . that there is a compelling interest which overrides the public's right to the open administration of justice." 154 Wn.2d 530, 549 (2005).

⁹ WAC 480-07-420.

documents asserted by parties to be highly confidential.¹⁰ Accordingly, the Protective Order in this case provides that parties may designate as highly confidential “information that truly might impose a serious business risk if disseminated without the heightened protections provided in this Section.”¹¹

10. In addition, RCW 80.04.095 gives parties a chance to limit public disclosure of certain information filed with the Commission and not otherwise publicly available. Specifically, records filed with the Commission “which contain valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer specific usage . . . may not be subject to inspection until after notice is given to the person or persons directly affected.”¹²

11. The Commission has stated that designation of information as confidential is not encouraged.¹³ Thus, parties asserting a designation are required to scrutinize potentially confidential material, and strictly limit what they designate as confidential.¹⁴ If challenged, the burden of demonstrating that the confidential designation is proper rests on the party asserting confidentiality.¹⁵ Moreover, the Commission may deny confidential designation where the public has a “legitimate need” for the information.¹⁶ The Commission has denied designating

¹⁰ WAC 480-07-423. In addition, WAC 480-07-420(2) states: “[t]he commission may, upon motion by a party, or on its own initiative, amend its standard form of protective order to meet the parties' and the commission's needs in individual cases.”

¹¹ Protective Order, ¶12.

¹² RCW 80.04.095.

¹³ *U.S. West Order*, ¶75.

¹⁴ Protective Order, ¶4.

¹⁵ WAC 480-07-160(4). *See also U.S. West Order*, ¶75.

¹⁶ The Protective Order is meant only to prevent information from being available to “persons who have no legitimate need for such information.” *See Protective Order*, ¶1(b).

information confidential partially because the agreement “concern[ed] matters that are of public import.”¹⁷

C. This Material is Not Entitled to Designation as Highly Confidential

12. The notion that some of the most critical information upon which the proposed acquisition transaction is based, i.e. the financial premises, may not be made known to the public, is antithetical to Washington’s legal and policy framework of public regulation. Historically, all, or virtually all, financial and operational plans of a utility have been presented and analyzed publicly in regulatory proceedings. This is a function of the legal expectation that utility regulation should be a transparent process.
13. Title 80 reflects the breadth and detail of financial and operational information which utilities must provide. The Commission has authority to access all of the Company’s books and records.¹⁸ Statutes and Commission rules require that utilities annually file financial information in extensive detail,¹⁹ as well as budgets and budget projections.²⁰ The Commission may require more frequent reporting and may prescribe the content and form of these reports.²¹ Utilities wishing to issue stocks, bonds, notes, or other evidence of indebtedness must file with the Commission specific detailed information including the “terms of the financing.”²² Additionally, companies are required to provide future projections as to resource acquisitions publicly as part of their integrated resource planning (IRP) process.²³ The expectation and legal

¹⁷ Docket No. UT-991358, Eighth Supplemental Order, ¶80.

¹⁸ RCW 80.04.070.

¹⁹ RCW 80.04.080; WAC 480-90 Part III; and WAC 480-100 Part III.

²⁰ RCW 80.04.300 and 320 (publication may be waived for proposed capital expenditure)

²¹ RCW 80.04.080.

²² RCW 80.08.040.

²³ WAC 480-90-238 and 480-100-238.

requirement is that all of this information is public unless it can be protected under the exceptions provided in RCW 80.04.095.

14. Although some of the information at issue may be defined as commercial or financial under RCW 80.04.095, it is not necessarily entitled to confidential treatment. Under the terms of the Protective Order in this case, cost or financial information may only be kept confidential if disclosure could result in harm to the Company or a third party. Here, neither the Joint Applicants nor any third party will face a serious risk of potential harm if this information is publicly available. PSE operates as a monopoly and does not face competitive harm from disclosure of this information. PSE's status as a monopoly provider of essential services, coupled with the fact that the Commission regulates the Company in pursuit of assuring the public interest, together create a presumption that all information is open to public review.

D. Public Policy Requires that This Information Not be Hidden

15. The Commission has denied confidentiality to information where the information “concern[ed] matters that are of public import.”²⁴ The acquisition of our state's largest and oldest electric utility by private equity investors, with all that entails for the economy and infrastructure, is of serious public import. The information at issue is essential to determining whether the proposed acquisition is in the public interest. It consists mainly of plans, assumptions, and projections used by Macquarie to analyze the proposed acquisition, including: the duration of the Macquarie partnership and when Macquarie is likely to “dispose” of Puget Energy, how much Macquarie anticipates receiving in management fees and dividends after the acquisition, the intended near total reliance on debt to finance future PSE capital expenditures,

²⁴ Docket No. UT-991358, Eighth Supplemental Order, ¶80.
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Macquarie’s determination of what future expenditures are “discretionary” and thus not necessary, and various financial impacts of the proposed acquisition on PSE, such as the potential reduction in its credit, investment and bond ratings.

16. Public interest in this case is significant. News coverage began before the Joint Applicants even filed their request and is on-going.²⁵ The media coverage focuses on issues directly to the information at issue; i.e. will this transaction undermine PSE’s ability to provide reliable, affordable gas and electricity service to Washington customers in the future?

17. PSE’s own customers have amplified these concerns in the over 3,300 written comments that have been sent to the Commission regarding this case alone. PSE’s customers also attended the three Public Comment Hearings held in this case in overwhelming numbers.²⁶ In total, over 100 PSE customers gave oral testimony, almost unanimously opposing, expressing concern, and asking questions about the sale. Not surprisingly, the public has concerns about the “massive redactions” in the filed documents, as demonstrated by a recent news article²⁷ and letters sent to Public Counsel.²⁸ The secrecy shrouding much of this case only amplifies public concern,

²⁵ Bill Virgin, “Debate on PSE deal goes beyond foreign buyer—Effect on Public Biggest Concern,” *Seattle Times*, April 9, 2008. Dan Richmond, “Puget Sound Energy to be sold,” *Seattle Times*, October 26, 2007. Editorial, “Bye to Safeco, PSE, here in name only,” *Seattle Post-Intelligencer*, May 5, 2008, stating in part, “[t]he cumulative decline in local ownership of this region’s companies is troubling.” Television coverage includes stories by all major Puget Sound area news stations. See e.g.,

http://www.king5.com/topstories/stories/NW_032808BUB_pse_puget_sound_energy_rates_JM.ad2ff59.html.

²⁶ UTC Consumer Affairs has informed Public Counsel that over 330 people signed in at the three Public Comment Hearings, held across Western Washington on May 15, 20, and June 4, 2008.

²⁷ “Official goes to bat for public over PSE plan,” *Skagit Valley Herald*, August 15, 2008, available at <http://www.goskagit.com/home/print/11439/>.

²⁸ Public Counsel has received six emails from PSE customers since publication of the *Skagit Valley Herald* article raising concerns over the amount of information redacted from the documents filed in this case.

concerns which can only be fully addressed if this information is publicly accessible.

III. CONCLUSION

18. For the foregoing reasons, Public Counsel respectfully requests that the highly confidential designation be removed from all information in the pre-filed direct testimony of Stephen G. Hill so that the entire testimony may be publicly available.
19. DATED this 26th day of August, 2008.

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