

[Service Date August 2, 2005]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of)	
)	DOCKET NO. UE-051090
MIDAMERICAN ENERGY)	
HOLDINGS COMPANY AND)	ORDER NO. 02
PACIFICORP, d/b/a PACIFIC POWER)	
& LIGHT COMPANY)	
)	PROTECTIVE ORDER WITH
For an Order Authorizing Proposed)	"HIGHLY CONFIDENTIAL"
Transaction)	PROVISIONS
.....)	

- 1 The Washington Utilities and Transportation Commission (Commission) finds, in accordance with a proposal jointly agreed upon by the parties and upon the Commission’s evaluation of the circumstances of this proceeding, that a protective order to govern disclosure of proprietary and confidential information is necessary in this proceeding. Specifically, the Commission finds as follows:
 - a. It is likely that proprietary and confidential information will be required to resolve the issues in this proceeding;
 - b. Absent a protective order, a significant risk exists that confidential information might become available to persons who have no legitimate need for such information and that injury to the information provider could result.
 - c. In accordance with WAC 480-07-420(2), the Commission finds that it is necessary to create a separate designation and a higher degree of protection for certain documents asserted by parties to be highly confidential. This is consistent with the Commission’s practice in prior cases involving contentions that certain documents require heightened protection to facilitate discovery, and is consistent with the requirements of WAC 480-07-423.

d. The Commission finds that the time available for completion of this Docket and the consequent immediate need for parties to gain access to relevant information render the immediate entry of this Order in the public interest.

2 Accordingly, the Commission enters this Protective Order to govern the discovery and use of proprietary and confidential documents in this proceeding:

A. General Provisions

3 **Confidential Information.** All access, review, use, and disclosure of any material designated by a party to this proceeding as confidential (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. The Commission requires the parties to redact such information from the pre-filed testimony, exhibits, briefs, and all other documents filed with the Commission, and provide complete versions of the documents that include the redacted material, under separate cover in the manner described below. The Commission may reject a filing or any other submission that fails to segregate Confidential Information, or categorizes public information as confidential.

4 Parties must scrutinize potentially confidential material, and limit the amount they designate "Confidential Information" to only information that truly might compromise their ability to compete fairly or that otherwise might impose a business risk if disseminated without the protections provided in this Order. The first page and individual pages of a document determined in good faith to include Confidential Information must be marked by a stamp that reads: **"Confidential Per Protective Order in WUTC Docket No. UE-051090."** Placing a Confidential Information stamp on the first page of an exhibit indicates only that one or more pages contains Confidential Information and will not serve to protect the entire contents of the multi-page document. Each page that contains Confidential Information must be marked separately to indicate where confidential information is redacted. Confidential Information shall be provided on yellow or buff-colored paper with references to where Confidential Information is redacted in the original document.

- 5 **Confidential and Redacted Versions.** Parties must file complete confidential and redacted versions of testimony, exhibits, and briefs with the Commission. This includes electronic versions, and requires that all diskettes and all electronic mail specify whether the file is confidential, redacted, or public.
- a. If a witness has a confidential portion of her testimony, the sponsoring party must provide a complete redacted version of the testimony and a complete confidential version, with confidential pages on yellow or buff-colored paper.
 - b. Parties must submit (at least) two diskettes and e-mail attachments one with the electronic version of the confidential text and one with the electronic version of the redacted text.
 - i. Parties **MUST** identify the confidential diskettes with prominent red markings and the word "confidential" in addition to the contents and the docket number. The others must be prominently labeled "redacted" or "public".
 - ii. Parties **MUST** identify each confidential digital file with a "C" in the file name and **MUST** have the legend "CONFIDENTIAL PER PROTECTIVE ORDER IN WUTC DOCKET NO. UE-051090" prominently displayed on the first page (i.e., the page that appears on the computer screen when the file is opened).
- 6 **Purpose of Access and Use; Confidentiality.** No Confidential Information distributed or obtained pursuant to this Protective Order may be requested, reviewed, used, or disclosed, directly or indirectly, by any party, expert or counsel or any other person having access pursuant to this Order, except for purposes of this proceeding. Persons having access to the Confidential Information pursuant to this Order must request, review, use or disclose Confidential Information only by or to persons authorized under this Order, and only in accordance with the terms specified in this Order. Without limiting the foregoing, persons having access to Confidential Information shall not use any Confidential Information to design, develop, provide, or market any product, service, or business strategy that would compete with any product or service of the party asserting confidentiality.

B. Disclosure of Confidential Information

- 7 **Persons Permitted Access.** No Confidential Information will be made available to anyone other than Commissioners, Commission Staff, the presiding officer(s), and counsel for the parties for this proceeding, including counsel for Commission Staff, and attorneys' administrative staff such as paralegals. However, counsel may authorize those persons designated as their party's experts in this matter to access any Confidential Information solely for the purposes of this proceeding. Except for the Washington Utilities and Transportation Commission Staff (Commission Staff) and the Public Counsel Section of the Washington State Attorney General's Office (Public Counsel), no such expert may be an officer, director, direct employee, major shareholder, or principal of any party or any competitor of any party (unless this restriction is waived by the party asserting confidentiality). Any dispute concerning persons entitled to access Confidential Information must be brought before the presiding officer for resolution.
- 8 **Nondisclosure Agreement.** Before being allowed access to any Confidential Information designated for this docket, each counsel or expert must agree to comply with and be bound by this Order on the form of Exhibit A (counsel and administrative staff) or B (expert) attached to this Order. Counsel for the party seeking access to the Confidential Information must deliver to counsel for the party producing Confidential Information a copy of each signed agreement, which must show each signatory's full name, permanent address, the party with whom the signatory is associated and, in the case of experts, the employer (including the expert's position and responsibilities). The party seeking access must also send a copy of the agreement to the Commission and, in the case of experts, the party providing Confidential Information shall complete its portion and file it with the Commission or waive objection as described in Exhibit B.
- 9 **Access to Confidential Information.** Copies of documents designated confidential under this Order will be provided in the same manner as copies of documents not designated confidential, pursuant to WAC 480-07-400 and 480-07-405. Requests for special provisions for inspection, dissemination or use of confidential documents must be submitted to the presiding officer if not agreed by the parties. The parties must neither distribute copies of Confidential Information to, nor discuss the contents of confidential documents with, any person not bound by this Order. Persons to whom copies of documents are

provided pursuant to this Order warrant by signing the confidentiality agreement that they will exercise all reasonable diligence to maintain the documents consistent with the claim of confidentiality.

C. Highly Confidential Information

- 10 **Designation and Disclosure of Highly Confidential Information.** Information relevant to the resolution of this case is expected to include sensitive competitive information. Parties to this proceeding may receive discovery requests that call for the disclosure of highly confidential documents or information, the disclosure of which imposes a highly significant risk of competitive harm to the disclosing party. Parties may designate documents or information they consider to be Highly Confidential and such documents or information will be disclosed only in accordance with the provisions of this Section.
- 11 Parties must scrutinize carefully responsive documents and information and limit the amount they designate as Highly Confidential Information to only information that truly might impose a serious business risk if disseminated without the heightened protections provided in this Section. The first page and individual pages of a document determined in good faith to include Highly Confidential Information must be marked by a stamp that reads: **“HIGHLY CONFIDENTIAL PER PROTECTIVE ORDER IN WUTC DOCKET NO. UE-051090.”** Placing a “Highly Confidential” stamp on the first page of a document indicates only that one or more pages contains Highly Confidential Information and will not serve to protect the entire contents of a multi-page document. Each page that contains Highly Confidential Information must be marked separately to indicate where Highly Confidential Information is redacted. The unredacted versions of each page containing Highly Confidential Information and provided under seal also must be stamped “Highly Confidential” and submitted on light blue paper with references (*i.e.*, highlighting) to where Highly Confidential Information is redacted in the original document.
- 12 Parties other than Public Counsel and Commission Staff who seek access to or disclosure of Highly Confidential documents or information must designate one outside counsel and no more than one outside consultant, legal or otherwise, in each subject matter area to receive and review materials stamped “Highly Confidential.” Subject matter areas may include, but are not limited to, policy

matters, financial aspects of the proposed transaction, and impacts of the proposed transaction on customers. Additional counsel within the same firm who are assisting the party's lead counsel may be designated for review of Highly Confidential documents. In addition to executing the Agreement required by this Protective Order for "Confidential Information," each person so designated as outside counsel or consultant for review of Highly Confidential documents or information must execute a Highly Confidential Information Agreement, in the form prescribed by Exhibit C of this Order, certifying that they have read and understand, and agree to be bound by, the terms of the Protective Order in this proceeding, including this Section of the Protective Order.

- 13 Any party may object in writing to the designation of any individual counsel or consultant as a person who may review Highly Confidential documents or information. Any such objection must demonstrate good cause, supported by affidavit, to exclude the challenged counsel or consultant from the review of Highly Confidential documents or information. Written response to any objection must be filed with the Commission within five days after receipt of the objection. If, after receiving a written response to a party's objection, the objecting party still objects to disclosure of the Highly Confidential Information to the challenged individual, the Commission shall determine whether the Highly Confidential Information must be disclosed to the challenged individual.
- 14 Designated outside counsel will maintain the Highly Confidential documents and information and any notes reflecting their contents in a secure location to which only designated counsel and other attorneys within the same firm who are assisting designated counsel have access. Designated outside counsel may provide one copy of Highly Confidential documents or information related to a subject matter to the outside consultant who has been designated to receive Highly Confidential Information related to that subject matter area. Such designated outside consultant will also maintain the Highly Confidential documents or information in a secure location to which only the designated outside consultant has access. No additional copies will be made, EXCEPT FOR USE DURING HEARING AND THEN SUCH COPIES SHALL ALSO BE SUBJECT TO THE PROVISIONS OF THIS ORDER.
- 15 Staff of designated outside counsel and staff of designated outside consultants who are authorized to review Highly Confidential Information may have access to Highly Confidential documents or information for purposes of processing the

case, including but not limited to, receiving and organizing discovery, and preparing prefiled testimony, hearing exhibits, and briefs. Outside counsel and consultants are responsible for appropriate supervision of their staff to ensure the protection of all confidential information consistent with the terms of this Order.

- 16 Any testimony or exhibits prepared that include or reflect Highly Confidential Information must be maintained in the secure location until filed with the Commission or removed to the hearing room for production under seal and under circumstances that will ensure continued protection from disclosure to persons not entitled to review Highly Confidential documents or information. Counsel will provide prior notice (at least one business day) of any intention to introduce such material at hearing, or refer to such materials in cross-examination of a witness. The presiding officer will determine the process for including such documents or information following consultation with the parties.
- 17 The 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.
- 18 At the conclusion of this proceeding, and the exhaustion of any rights to appeal, designated outside counsel, upon written request by Joint Applicants, must return all Highly Confidential documents and information provided during the course of the proceeding, and must certify in writing that all notes taken and any records made regarding Highly Confidential documents and information have been destroyed by shredding or incineration.
- 19 Highly Confidential documents and information will be provided to Staff and Public Counsel under the same terms and conditions of this Protective Order as govern the treatment of Confidential Information provided to Commission Staff and Public Counsel and as otherwise provided by the terms of the Protective Order other than this Section.

D. Use of Confidential Information in This Proceeding

20 Unless specifically addressed in this Section, Part D of this Order applies to Confidential Information and to Highly Confidential Information.

21 **Reference to Confidential Information.** If counsel or persons afforded access to Confidential Information refer to such information orally or in writing during any part of this proceeding, any public reference (i.e., any reference that will not be placed in a sealed portion of the record) shall be solely by title, exhibit reference, or some other description that will not disclose the substantive Confidential Information contained in the document. Any other written reference shall be segregated and marked "Confidential Information," and access to it shall be given solely to persons who are authorized access to the information under this Order. The parties must not disclose to any person not bound by the terms of this Order any Confidential Information that has been referenced in this proceeding.

22 Parties intending to publicly refer to Confidential Information in oral testimony, cross-examination, or argument, must provide as much prior notice as is feasible to the affected party and the presiding officer. Unless alternative arrangements are in place to protect the Confidential Information as provided below, there must be sufficient notice to permit the presiding officer an opportunity to clear the hearing room of persons not bound by this Order or take such other action as is appropriate in the circumstances.

23 **Protected Use by Agreement.** Any party who intends to use any Confidential Information in the course of this proceeding, including but not limited to testimony to be filed by the party, exhibits, direct and cross-examination of witnesses, rebuttal testimony, or a proffer of evidence, shall give reasonable notice of such intent to all parties and to the presiding officer, and attempt in good faith to reach an agreement to use the Confidential Information in a manner which will protect its trade secret, proprietary, or other confidential nature. The parties shall consider such methods as: (1) use of clearly edited versions of confidential documents, (2) characterizations of data rather than disclosure of substantive data, and (3) aggregations of data. The goal is to protect each party's rights with respect to Confidential Information while allowing all parties the latitude to present the evidence necessary to their respective cases.

- 24 If the parties cannot reach agreement about the use of Confidential Information, they must notify the presiding officer. The presiding officer will determine the manner of best protecting the Confidential Information while ensuring that all parties are afforded their rights to due process, including the right to cross-examine witnesses.
- 25 **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.
- 26 **Right to Challenge Confidentiality.** Any party may challenge another party's contention that information should be entitled to protection under this Order. The presiding officer will conduct an *in camera* hearing to determine whether the information shall be accorded protection under the terms of this Order. The party asserting confidentiality bears the burden of proving that confidential designation is proper. Pending determination, the challenged information shall be treated in all respects as protected under the terms of this Order.
- 27 The presiding officer may challenge a party's assertion of confidentiality by notice to all parties.
- 28 If the presiding officer determines the challenged information is not entitled to protection under this Order, the information continues to be protected under this Order for ten days thereafter to enable the producing party to seek Commission or judicial review of the determination, including a stay of the decision's effect pending further review.
- 29 **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, and must not be examined by any person except under conditions of this Order, 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.
- 30 **Return of Confidential Information.** Within thirty (30) days after the conclusion of this proceeding, including any administrative or judicial review, every person who possesses any Confidential Information (including personal

notes that make substantive reference to Confidential Information and transcripts of any depositions to which a claim of confidentiality is made), must return all Confidential Information to the party that produced it, or at the producing party's election, must certify in writing that all copies and substantive references to Confidential Information in notes have been destroyed. These provisions apply to all copies of exhibits that contain Confidential Information and for that reason were admitted under seal. The only exceptions are that counsel may retain exhibits as counsel records, for only so long as they represent the participant in this proceeding, and that the Commission will retain a complete record of the testimony and documentary evidence admitted to the record or refused admission, including Confidential Information, as part of the Agency's official records.

- 31 **Notice of Compelled Production in Other Jurisdictions.** If a signatory to this Protective Order is compelled to produce confidential documents in any regulatory or judicial proceeding by the body conducting the proceeding, the signatory must provide notice to the party that provided the confidential information. Such confidential information must not be produced for at least ten days following notice, to permit the party that provided the information an opportunity to defend the confidential nature 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.
- 32 **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.
- 33 **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 divulgence of Confidential or Highly Confidential Information may subject such party or person to liability for damages and shall subject such party to penalties as generally provided by law, including, but not limited to, the provisions of RCW 80.04.380-.405.

DATED at Olympia, Washington and effective this 2nd day of August, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

EXHIBIT A (ATTORNEY AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET NO. UE-051090
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 No. UE-051090, and acknowledge
that I have reviewed the Protective Order and fully understand its terms and
conditions.

Signature

Date

Address

EXHIBIT B (EXPERT AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET NO. UE-051090
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as expert, witness,
consultant, or advisor 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 No. UE-051090 and acknowledge that I have reviewed
the Protective Order and fully understand its terms and conditions.

Signature

Date

Employer

Permanent 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, consultant, or
advisor having access to Confidential Information under the terms and
conditions of this Protective Order.

_____ No objection.

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

Signature

Date

EXHIBIT C (HIGHLY CONFIDENTIAL INFORMATION AGREEMENT)

AGREEMENT CONCERNING HIGHLY CONFIDENTIAL INFORMATION
IN DOCKET NO. UE-051090
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as

- In-house attorney
- In-house expert outside counsel
- Outside expert
- Small company employee or in-house expert

in this proceeding for _____ (a party to this proceeding) in the subject matter area of _____ hereby agree to comply with and be bound by the Protective Order entered by the Washington Utilities and Transportation Commission in Docket No. UE-051090 and acknowledge that I have reviewed the Protective Order and fully understand its terms and conditions.

Signature

Date

Employer

Permanent 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 a person having access to Highly Confidential Information under the terms and conditions of this Protective Order.

_____ No objection.

_____ Objection. The responding party objects to the above-named person having access to Highly Confidential Information. The objecting party shall file a motion with the Commission, supported by affidavit, setting forth the basis for objection and asking exclusion of the person from access to Highly Confidential Information.

Signature

Date