

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

OPPOSITION OF PUGET HOLDINGS,  
LLC AND PUGET SOUND ENERGY, INC  
TO PUBLIC COUNSEL MOTION  
CHALLENGING THE  
CONFIDENTIALITY OF CERTAIN  
MATERIALS PROVIDED IN DISCOVERY  
BY JOINT APPLICANTS

1 Puget Sound Energy, Inc. ("PSE") and Puget Holdings, LLC ("Puget Holdings")  
(collectively the "Joint Applicants"), by and through undersigned counsel, hereby submit this  
Opposition to Public Counsel Motion Challenging the Confidentiality of Certain Materials  
Provided in Discovery by Joint Applicants. As stated in detail below, the information at issue  
has been properly designated as Highly Confidential Information under the terms of the  
Protective Order entered in this case, and under Washington law. The information at issue is  
valuable commercial information and trade secrets, as well as information which the Joint  
Applicants are obligated to keep confidential under the terms of applicable confidentiality and  
nondisclosure agreements with third parties. If the Joint Applicants are required to release this  
Highly Confidential Information they will suffer a competitive disadvantage. For the reasons set  
forth below, Public Counsel's motion should be denied.

**I. BACKGROUND**

2 On July 25, 2008, the Washington Utilities and Transportation Commission (the  
"Commission") received a request for public records from Dianne Woody. Ms. Woody  
requested copies of Highly Confidential testimony of Stephen G. Hill submitted on behalf of the

Public Counsel Section of the Washington State Attorney General's Office ("Public Counsel") in Docket No. U-072375. On July 29, 2008, the Commission sent a letter to PSE and Public Counsel advising that the Commission had received the public records request under Chapter 42.56 RCW and that the records would be released to Ms. Woody absent a court order. On August 1, 2008, the Joint Applicants initiated an action with the Thurston County Superior Court, obtained a Temporary Restraining Order prohibiting the Commission from releasing the Highly Confidential Information, and set a hearing date of September 5, 2008, for hearing the Joint Applicants' Motion for Preliminary Injunction.

3 On or about August 21, 2008 Public Counsel filed with the Commission the subject Motion Challenging the Confidentiality of Certain Materials Provided in Discovery by Joint Applicants. In the motion, Public Counsel asks that the Commission determine whether the highly confidential testimony of Mr. Stephen G. Hill, which references documents designated by the Joint Applicants as Highly Confidential, is appropriately designated.

4 On or about September 4, 2008, Public Counsel filed a Motion to Intervene in the Superior Court matter, and in lieu of oral arguments the parties executed a Stipulation for the entry of a proposed order (1) granting Public Counsel's motion to intervene; and (2) granting the Preliminary Injunction pending the outcome of Public Counsel's motion challenging the confidentiality of the documents before the Commission. The parties agreed that if the Commission determines that all or part of the documents in question should be deemed Highly Confidential, the Commission will so notify the court. In that case, the preliminary injunction will remain in place until further action by this court as to such documents. If the Commission determines that all or part of the documents in question should not be deemed confidential, the Commission will so notify the court. If no party petitions for judicial review of the



Commission's decision within the statutory period for appeal, then the court will lift this preliminary injunction by further order and the documents in question will be ordered to be made public.

5 Therefore, the parties to the Thurston County Superior Court action have deferred to the Commission to determine whether the Confidential Information was properly designated as Highly Confidential.

## II. ARGUMENT

### A. **The Confidential Data and Information Contained in the Prefiled Testimony of Stephen G. Hill is Properly Designated as Highly Confidential Because it is Valuable Commercial Information**

6 In issuing a protective order in this case the Commission anticipated a significant risk 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. *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, Order 02 (Protective Order with "Highly Confidential" Provisions) (hereinafter "Protective Order"). The Protective Order therefore restricts the dissemination of valuable commercial information through its designation of such as "Highly Confidential Information." *See id.* at ¶11. The Protective Order requires Highly Confidential information to be limited to information that, if disclosed, "imposes a highly significant risk of competitive harm to the disclosing party or third parties," and that "truly might impose a serious business risk if disseminated without the heightened protections." *See id.* at ¶11-12. WAC 480-07-160(2) and RCW 80.04.095 define confidential information to include valuable commercial information, including trade secrets or confidential marketing, cost, or financial information..." Here, the Highly Confidential Information is properly designated because it (1) contains valuable trade secrets; and (2) contains confidential marketing, cost and financial information that, if disseminated imposes a highly significant risk of competitive harm and truly might impose a serious business risk.

**B. The Highly Confidential Information is Exempt From Disclosure Because it Contains Valuable Trade Secrets**

7 Trade secrets are protected by the State Uniform Trade Secrets Act (UTSA), Chapter 19.108 RCW.

Under the UTSA, a "trade secret" is information, including a formula, pattern, compilation, program, device, method, technique, or process, that (a) derives actual or potential independent economic value from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use, and (b) is subject to reasonable efforts to maintain secrecy. RCW 19.108.010(4);

*Woo v. Fireman's Fund Ins. Co.*, 137 Wn. App. 480, 487 (2007). Submission of trade secrets to a government agency does not make information available to public on demand; "[o]n the contrary, such information is exempt from public disclosure because it could substantially harm the competitive position of the entity which was required to submit the information". *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 52 (1987)

8 Here, the Highly Confidential Information includes, among other things, trade secrets. The information contains proprietary financial trade secrets, such as: (1) highly confidential information from an offering document which has proprietary financial modeling tools used by Puget Holdings and its investors when evaluating potential investments, including the acquisition of Puget Energy; (2) highly confidential marketing, structuring, trade secrets and cost information; (3) highly confidential information from an investor presentation containing material non-public information including financial projections relating to Puget Energy, a publicly traded company, as well as proprietary transaction structuring information, which are trade secrets, and the structure, terms and pricing of financing; and (4) highly confidential information from a memorandum prepared, for marketing purposes relating to the financing of, and in connection with, the Proposed Transaction. The information contains highly sensitive pricing, structuring, terms of financing, and trade secrets, as well as *material* non-public information, including financial projections relating to Puget Energy, a publicly traded company.



See Affidavit of Robinson Kupchak, (filed in the Superior Court matter), attached hereto as Exhibit A. To require such confidential proprietary information relating to financial modeling, funding terms and partnership terms to be made available to the public at large—including competitors of the investors—would have a chilling effect on any future transactions that require regulatory approval in this state. Potential investors would not be willing or able to seek regulatory approval of transactions in this state in the future, with the knowledge that their proprietary financial modeling tools, competitively negotiated financing terms, and confidential partnership structure would be made available to all competitors.

9 Moreover, Puget Holdings and its investors have gone to great lengths to keep this model secret.<sup>1</sup> "Reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on 'need to know basis', and controlling plant access." *Woo*, 137 Wn. App. at 490; *see also Burlington*, 888 F.2d at 1232 (holding that company "had gone to considerable lengths" to keep contract secret where (1) it had not disclosed the information to persons not directly involved in developing the contract; (2) it negotiated the contract with a strict confidentiality requirement in it; and (3) it instituted and vigorously prosecuted the action to prevent disclosure.). The above described information has been treated as confidential by the Joint Applicants, their lenders, investors, consultants, and third parties whom they engaged to provide information necessary for the financial modeling and structuring of the acquisition, even prior to the submission of these documents to the Commission in this proceeding. The terms of the documents at issue contain confidentiality agreements and are marked as confidential.<sup>2</sup>

10 Requiring disclosure of the Highly Confidential Information would allow competitors of Puget Holdings and its investors access to valuable commercial information regarding, *inter alia*,

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<sup>1</sup> See Kupchak Affidavit at ¶ 11, lines 40-47.

<sup>2</sup> See, e.g., Exh. No. 54HC, Attach A, B & C, p. 1; Exh. No. 54HC, Attach D, E & F, p. 6; Exh. No. 46HC, Attach A, p. 1; Exh. No. 50HC, Attach A, p. i; Exh. No. 47HC, Attach B, p. 106, sec. 10.08; Exh. No. 52HC, Attach A, p. 1; Exh. No. 49HC, Attach A, p. 2.

how these investors (1) use financial models to value companies that they seek to acquire, (2) structure the acquisition, including the negotiation of and obtaining competitive terms from lenders, (3) structure and negotiate membership terms among investors in order to attract investors, and (4) project future earnings and financial and operational metrics of the companies they seek to acquire. If this information becomes public it is likely to be used in a competitive manner against the investors in this transaction. Other competing financial investors would have a roadmap showing how these investors value businesses through financial modeling, assemble potential investors and negotiate terms for such investment, negotiate favorable financing terms, and work with third-parties to structure the acquisition. Such disclosure would cause significant private loss to the investors in this transaction as it would disclose trade secrets and proprietary information and would place them at a competitive disadvantage. This would be contrary to the purpose behind the confidentiality provisions, and would be contrary to the public interest.

**C. The Confidential Information Contains Highly Confidential Marketing, Cost and Financial Information**

11 As demonstrated, the Highly Confidential Information cited in Mr. Hill's testimony contains confidential marketing, cost and financial information. It includes information that is not the type of information which would ordinarily be made available to the public such as (1) highly confidential information from an offering document which has proprietary financial modeling tools used by Puget Holdings and its investors when evaluating potential investments, including the acquisition of Puget Energy; (2) highly confidential marketing, structuring, cost information; (3) highly confidential information from an investor presentation containing material, non-public information including financial projects relating to Puget Energy, a publicly traded company, as well as proprietary transaction structuring information and the pricing of financing; (4) highly confidential information from a memorandum prepared for marketing purposes relating to the financing of, an in connection with, the Proposed Transaction.



12 The release of this information would cause private harm to the investors in Puget Holdings as well as their financial advisor, Macquarie Capital (USA), Inc., banks involved in financing the Proposed Transaction, and other advisors and third parties who have provided information and opinions with the understanding that such information would be kept confidential. This Highly Confidential Information was designated as confidential separate and apart from this proceeding, and the parties to these agreements are obligated to treat these documents as confidential by confidentiality and/or non-disclosure agreements in the documents.

13 The release of this information would also cause private harm to PSE, which is a wholly owned subsidiary of Puget Energy, Inc., a publicly-traded company. As a publicly-traded company, Puget Energy is subject to U.S. Securities and Exchange Commission ("SEC") regulations including "Regulation Fair Disclosure" ("Reg FD"). Regulation Fair Disclosure requires that when any non-public, material information is released, it must be done in such a way that the general public has access to it at the same time as institutional investors and analysts. Even if information is released through no fault of the company to specific parties, the company must disseminate that information **widely** within 24 hours. *See* Affidavit of Tom DeBoer, (filed in the Superior Court matter), attached hereto as Exhibit B.

14 Public Counsel incorrectly relies on *In re 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 (June 19, 2000) (hereafter "*U.S. West/Qwest Merger*") for the proposition that the Commission may deny confidential designation of documents if the documents are of public import. *See* Public Counsel motion at ¶ 11. The *U.S. West/Qwest Merger* does not support this proposition. In paragraph 80 the Commission stated as follows:

We have considered carefully the written and oral argument concerning the AT&T agreement, and have examined the document in camera. *We find nothing that persuades*

*us that the agreement includes valuable commercial information within the meaning of RCW 80.04.095. We find nothing in the agreement that meets the Protective Order's definition of "Confidential" or "Highly Confidential" or the related definitions in our statute or rule. To the contrary, the agreement concerns matters that are of public import, and the parties' conduct under the agreement will be publicly observable and ultimately disclosable by the parties. It is only the nature of the agreement—not the performance of its basic terms—that the parties aim to keep confidential for the time being. Accordingly, the agreement is not entitled to confidential treatment by the Commission either in this proceeding under the Protective order, or otherwise.*

*U.S. West/Qwest Merger* at ¶80. (emphasis added). As stated clearly by the Commission, confidentiality was denied in the *U.S. West/Qwest Merger* because the agreement in question did not include "valuable commercial information within the meaning of RCW 80.04.095," and the parties seeking confidential designation did not even assert that this standard had been met. *Id.* ¶¶ 80, 77. While the Commission noted in that case that the agreement concerned matters of public import, it did not – as Public Counsel claims – deny designating the agreement as confidential because of this fact. The appropriate question before this Commission in determining the confidentiality of information is not whether it is of "public import", but whether it contains valuable commercial information under Washington law.<sup>3</sup>

15 In contrast to the confidentiality dispute in the *U.S. West/Qwest Merger*, in this case the Joint Applicants have demonstrated that the information at issue meets the standard for designation as Highly Confidential. There is a highly significant risk of competitive harm to the Joint Applicants and third parties with whom they have contracted if the documents are disclosed. The Protective Order is put in place for precisely this reason. It allows the Commission and the parties who sign the applicable confidentiality agreement to review the

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<sup>3</sup> Public Counsel's reliance on RCW 80.04.070, 080, 090, 300, 320, and RCW 80.08.040 are also misplaced. These statutes are silent on the issue of confidentiality, but RCW 80.04.095 and WAC 480-07-160 sets forth the terms by which documents produced under these and other statutes may be treated as confidential. *The fact that the Commission has the authority to access PSE's books and records does not mean that all of these documents must be made available to the public.*



documents in full, but it limits the disclosure of this Highly Confidential Information that is not otherwise available in the public domain, absent this regulatory proceeding.

16 Public Counsel argues that public policy should trump statutory law, and even though the information at issue is protected under Washington law, it should be disclosed as a matter of public policy. Public Counsel's argument fails on two counts. First, Public Counsel's vision of public policy cannot override statutory law that allows trade secrets and valuable commercial information to be protected as confidential. Second, many of the "issues" that Public Counsel raises as a matter of public policy are misrepresented and not consistent with the record in this case. For example, Public Counsel statement that "Macquarie is likely to 'dispose' of Puget Energy" is misleading and contrary to testimony in the record. *See* Leslie, Exh. No. 38HCT at 6:14-7:9. Further, Macquarie management fees are paid by investors, to the extent such fees are applicable. *See id.* at 31:3-20. Additionally, Macquarie has not made "a determination of what future capital expenditures are 'discretionary' and thus not necessary" as Public Counsel asserts. This is a misrepresentation of the evidence in this case. *See* Kupchak, Exh. No. 11 HC at 9:3-10:18. Finally, the capital expenditure credit facilities have been disclosed as demonstrated by Exhibit A to Public Counsel's motion and there is not evidence of an "intended near total reliance on debt to finance future PSE capital expenditures." *See id.* at 11, 16-21. Public Counsel ignores the fact that the Joint Applicants have made several hundred pages of information publicly available in this case. The Commission can respect both the public policies of (1) open government, and (2) protection of confidential trade secrets and valuable commercial information, by rejecting Public Counsel's motion and allowing the confidential proprietary information at issue in this case to remain confidential.

### III. CONCLUSION

17 The Commission has recognized the need to protect commercially sensitive information from public view. The information at issue here is precisely the type of commercially sensitive information and trade secrets that should be protected because it will cause private harm and competitive disadvantage if it is disclosed. The information at issue has been treated as confidential by the Joint Applicants even before it was submitted to the Commission in this proceeding. If the Commission orders disclosure of this Highly Confidential Information, it will cause private harm and competitive disadvantage to the investors in Puget Holdings by allowing competitors to have access to proprietary financial modeling tools, and competitively negotiated financing terms and business structures. Additionally, an order from the Commission requiring PSE to divulge non-public, material information relating to future earning and financial projections would require such information to be made available to the general public. The Joint Applicants have carefully scrutinized the information they have designated as Highly Confidential to ensure it properly protects only that information that might impose a serious business risk if disclosed to the public. For these and the other reasons set forth above, the Joint Applicants request that the Commission deny Public Counsel's motion.



Respectfully submitted this 8th day of September, 2008.

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