

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 U-072375

RESPONSE BY COMMISSION
STAFF TO PUBLIC COUNSEL'S
MOTION CHALLENGING THE
CONFIDENTIALITY OF
CERTAIN MATERIALS
PROVIDED IN DISCOVERY BY
JOINT APPLICANTS

1 Public Counsel has filed a motion asking the Commission to remove the confidentiality designation given to certain information contained in one exhibit filed by Public Counsel in this docket. For the reasons stated below, Commission Staff¹ (Staff) recommends the Commission deny Public Counsel's motion.

Background

2 During the course of discovery in this docket, Puget Sound Energy, Inc. (PSE) and Puget Holdings, LLC (Joint Applicants), provided information to the parties, including Public Counsel. Pursuant to Commission rules and the protective order issued by the Commission in this docket, the joint Applicants designated certain of that information "confidential" or "highly confidential."

3 On June 18, 2008, Public Counsel filed with the Commission the written direct testimony of Mr. Hill, Exhibit ___ (SGH-1THC), which contained some of that information

¹ Under the *ex parte* statute, RCW 34.05.455, Commission Staff is distinct from the three commissioners who will decide Public Counsel's Motion as the Commission. Therefore, Staff's position in this response is not that of the Commission, nor is Staff's position binding on the Commission.

designated confidential. Pursuant to those same rules and protective order, Public Counsel redacted the confidential information from the “public” version of that exhibit.

4 On July 25, 2008, the Commission received a public records request for Mr. Hill’s un-redacted direct testimony. On August 1, 2008, the Joint Applicants instituted an action in superior court to bar the Commission from disclosing the confidential information in that exhibit. On August 21, 2008 (well after the Joint Applicants instituted the court action, and over two months after Public Counsel filed Mr. Hill’s direct testimony), Public Counsel filed the instant motion with the Commission, seeking to “declassify” all information designated confidential in that same exhibit.

5 In essence, the superior court has deferred to the Commission for consideration of the matter.²

Statutes and Rules

6 As relevant here, RCW 80.04.095 protects from public disclosure information filed with the Commission that constitutes “trade secrets or confidential marketing, cost or financial information ...” if disclosure would result in “private loss, including an unfair competitive disadvantage.”

7 RCW 80.04.095, RCW 34.05.446(4) and WAC 480-07-160 contemplate the Commission’s use of protective orders to protect confidential information. Under WAC 480-07-160(2), “confidential information” includes information protected under RCW 42.56 (Public Records Act), information described in RCW 80.04.095, and information protected under a protective order.

² See Attachment 1: *Puget Sound Energy, Inc. v. Wash. Utilities and Transp. Comm’n*, Thurston County Docket 08-2-01816-1, Order Granting Preliminary Injunction and Granting Public Counsel’s Motion to Intervene (September 5, 2008) at 2:17 to 3:18. Public Counsel is an intervenor in this court case.

8 The Commission has issued a protective order in this case. *Order 02, "Protective Order with 'Highly Confidential' Provisions" (January 18, 2008)*.³ In this case, as in many others, such an order is essential to assure the parties have the information they need to test the utility's evidence, and the Commission has access to all the information necessary to make a proper decision.

9 Under WAC 480-07-160, a party may challenge the confidential designation given to information filed in cases such as this. Public Counsel is a party to this docket and its motion makes such a challenge. Because the joint Applicants provided the information and designated it confidential, the burden is on them "to show that part or all of a document should be protected from disclosure under chapter 42.56 RCW, RCW 80.04.095, or a protective order." *WAC 480-07-160(4)*. If the Commission "declassifies" this information, it will be available to the general public.

Discussion

10 Public Counsel argues at length that all information filed with the Commission should be publically available unless that information is protected from disclosure under applicable statutes. Staff agrees. As we explained above, the applicable procedures require the Commission to make a determination whether protection from disclosure is justified. This calls for the Commission to make a fact-based determination based on the nature of the information and the need to protect it from disclosure.

³ Public Counsel is incorrect to refer to the protective order as "Order 03" (Public Counsel Motion at 1, footnote 1).

11 Staff has reviewed the declarations the Joint Applicants filed in the superior court action described in footnote 2 above.⁴ Based on that review, the Joint Applicants have made a *prima facie* case justifying the confidential designation of the information at issue.

12 Public Counsel's motion does not counter that *prima facie* case. For example, Public Counsel provides no declarations to support its motion. Staff searched the text of Public Counsel's motion for any facts addressed specifically to the issue whether the Joint Applicants properly designated as confidential the redacted information in Mr. Hill's direct testimony. Staff found only Public Counsel's bare allegation that "neither the Joint Applicants nor any third party will face serious risk of potential harm if this information is publically available."⁵ Because Public Counsel's allegation is not supported by facts, it is nothing more than speculation, and the Commission must disregard it.⁶

13 Public Counsel goes on to argue that the Joint Applicants may not designate the information at issue as confidential because certain statutes require Commission-regulated companies to file annual reports, budgets and similar documents.⁷ However, no law renders the protections in RCW 80.04.095 or RCW 42.56 inapplicable if the information at issue is contained in a document required to be filed with the Commission. Indeed, it is not unusual for Commission-regulated companies to designate as confidential certain information contained in such annual reports and other required filings.⁸

⁴ Staff confirmed that the Joint Applicants plan to use the same or substantially the same information to support the Joint Applicants' response to Public Counsel's motion in this case.

⁵ Public Counsel Motion at 7, ¶ 14, third sentence. We assume that Public Counsel intends the phrase "substantial risk of potential harm" to mean the same thing as the operative words in RCW 80.04.095: "private loss, including an unfair competitive advantage."

⁶ Public Counsel's statement is not that of an expert. Even if it were, an expert's conclusion must be supported by facts before a court will consider it. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 787 (1991).

⁷ Public Counsel Motion at 6, ¶ 13.

⁸ See Attachment 2: Declaration of Joni Higgins (Commission Records Center employee) at ¶ 4: "In my experience, many Commission-regulated companies use a 'confidential' designation for certain information contained in the annual reports and/or budgets they file with the Commission."

14 In any event, Public Counsel makes no attempt to prove that the information in such regularly-filed documents is substantially similar to the information designated “confidential” in Mr. Hill’s testimony. For example, it is not self-evident that an internal analysis of a proposed acquisition of a utility is the same as historical financial information or the financial outlook of senior utility management typically found in a utility’s annual report.

15 To find some support for its motion, Public Counsel tries to invoke the Commission’s Eighth Supplemental Order in *In re Application of US WEST, Inc.*, Docket UT-991358 (*US WEST*). Public Counsel says that in that order, the Commission denied confidentiality because the matter was “of public import.”⁹ Not so. In fact, the Commission denied the confidentiality designation in *US WEST* because the information did not meet the statutory definition: “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.”¹⁰ Not only that, the Commission emphasized that its decision was *not* based on the public importance of the matter: “We base our decision on statute and rule, and not directly on public policy concerns.”¹¹

16 Besides gaining no support from the *US WEST* order, Public Counsel’s argument for a “public import” exemption makes no sense. Virtually all (if not all) matters before the Commission are of “public import.” If Public Counsel’s argument were valid, it would swallow the statutory protections from disclosure the Legislature has provided in RCW 80.04.095 and RCW 42.56.

⁹ Public Counsel Motion at 7, ¶ 15, first sentence (Public Counsel did not number this paragraph, but it is located between paragraphs numbered 14 and 16, so we designate it “15”).

¹⁰ *In re Application of US WEST, Inc.* Docket UT-991358, 8th Supplemental Order (June 19, 2000) at 22, ¶ 80.

¹¹ *Id.* at 22, ¶ 81.

17 For its final point, Public Counsel refers to the many comments filed by the public in this docket, as well as media coverage. In particular, Public Counsel refers to six emails and a newspaper article that, apparently, express a general concern about confidential information in this docket.¹² From all this, Public Counsel opines that these concerns of the public “can only be fully addressed if this information is publicly available.”¹³

18 The Commission will observe that Public Counsel neglects to cite any statute, rule or other provision of law for the proposition that a party’s perceived level of public interest in information designated confidential is grounds for the Commission to find that such information is subject to disclosure. Indeed, there is no such law.

19 Moreover, while it is usually inappropriate to impute opinions to the public, the public surely expects the Commission to make a decision based upon the law, rather than one party’s perception of public concern, whatever that perception might be.¹⁴ In short, under WAC 480-07-160, the Commission has a duty to determine whether, under applicable statutes and rules, the Joint Applicants properly designated the information at issue as confidential. Therefore, the Commission should do what it did in the *US WEST* case relied on by Public Counsel here: apply the law to the relevant facts and determine whether the Joint Applicants have properly designated the information at issue as confidential.

¹² Public Counsel Motion at 8-9, ¶¶ 16-17, including footnotes 27 & 28.

¹³ *Id.* at 9, ¶ 17, last sentence.

¹⁴ In other words, if a person improperly designates information confidential, the Commission should remove that designation, whether the public is highly interested in that information, or is completely bored by it. Conversely, if a party properly designates information confidential, that designation is not forfeited just because another party thinks there is a high level of public interest in that information.

Conclusion

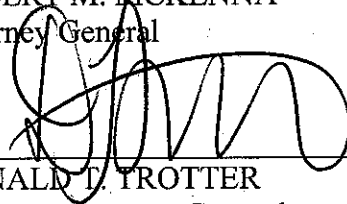
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For the reasons stated above, the Commission should deny Public Counsel's motion.

DATED this 8th day of September, 2008.

Respectfully submitted,

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read 'D. Trotter', is written over a horizontal line. The signature is stylized and cursive.

DONALD T. TROTTER
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