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 PUBLIC COUNSEL REPLY TO OPPOSITION OF JOINT APPLICANTS, INC. AND RESPONSE BY COMMISSION STAFF TO PUBLIC COUNSEL MOTION CHALLENGING CONFIDENTIALITY

I. INTRODUCTION

The Public Counsel Section of the Washington Attorney General's Office (Public Counsel) files this reply to two documents: the Opposition of Puget Sound Energy, Inc. (PSE) and Puget Holdings, LLC (together Joint Applicants)[1], and the Response of Commission Staff (Staff)[2], both regarding Public Counsel's (Corrected) Motion Challenging the Confidentiality of Certain Materials Provided in Discovery by Joint Applicants[3]. Public Counsel maintains that the information at issue is not entitled to designation as highly confidential and responds to a number of points made by Staff and Joint Applicants below.

[1] *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 (filed September 8, 2008) (hereinafter *Joint Applicants' Opposition*).
[2] Response By Commission Staff to Public Counsel's Motion Challenging the Confidentiality of Certain Materials Proved in Discovery By Joint Applicants (hereinafter *Staff Response*).
[3] Hereinafter *Public Counsel Motion*.

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II. REPLY

A. Staff Inaccurately Portrays the Burden of Proof in This Matter.

In its response, UTC Staff states that Public Counsel's motion should be denied because it has failed to counter the Joint Applicants' *prima facie* case that the information in Mr. Hill's testimony is entitled to highly confidential treatment.[4] Staff mischaracterizes the burden of proof applicable to challenges of confidential designations. The Commission's rules and the Protective Order issued in this case provide that the Joint Applicants, *not* Public Counsel, carry the full burden to show that information it has designated as highly confidential is entitled to such treatment.[5] Paragraph 20 of the Protective Order states:

> 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.

Thus, Staff's argument, for example, that Public Counsel should have filed declarations in support of its motion is not well founded. Public Counsel has raised a legitimate challenge to the Joint Applicants' designation of the information at issue; the Commission's determination of whether such designation is proper now depends on whether Joint Applicants can prove that such designation is proper.

B. Joint Applicants Overstate the Potential Harm that Could Result From Disclosure.

In its response, the Company describes the information at issue as trade secrets because it consists of full modeling tools, compilations of financial information, marketing presentations,

[4] *Staff Response*, ¶ 12.
[5] WAC 480-07-160(4). Staff accurately quotes this rule earlier in its response. *See Staff Response*, ¶ 9.

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and transactions structuring information.[6] Whether or not this is true of more substantial portions of the full discovery responses cited in Mr. Hill's testimony such as the debt and equity offering memoranda or the financial model, the information at issue here is much narrower. Mr. Hill's testimony contains only limited excerpts and items of information. The Joint Applicants have not identified with any specificity whatsoever how public disclosure of the specific, limited facts included in Mr. Hill's testimony would make available to any outside party the models, compilations, presentations, or transaction structuring information that *may* fit the definition of trade secrets. The Joint Applicants must show that disclosure of specific elements rather than whole documents will nevertheless disclose underlying models, compilations, and/or assumptions which are trade secrets and which could cause competitive harm.

It appears possible, or even likely, that disclosure of limited portions of information taken from such documents will not create the alleged harm equal to that of disclosure of the responses in their entirety. The Joint Applicants have been willing to withdraw confidentiality designation for specific pieces of information, both in earlier conferences with Public Counsel[7] and during the evidentiary hearing in this docket[8]. This casts doubt on whether public disclosure of limited portions of the materials at issue here poses the level of risk claimed for full disclosure of the underlying documents.[9]

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[6] *Joint Applicants' Opposition*, ¶¶ 7-8.
[7] *See* HIGHLY CONFIDENTIAL and NON-CONFIDENTIAL Appendices A to *Public Counsel Motion.*
[8] *See* TR. 486 (regarding Exh. No. 50); TR. 487 (regarding ten-year term of investment); TR. 488 (regarding extension options); TR. 494 (regarding "investment objective"); and TR. 562 (regarding accordion financing). Earlier in the proceeding, Joint Applicants also agreed at Staff's request to withdraw confidentiality from Exh. No. 167, discussed at Exh. No. 161 THC, p. 13:17-21. Joint Applicants have also agreed to withdraw the confidentiality designation for p. 13 of Exh. No. 76C (Key Assumptions: Regulatory Plan), PSE's October 2007 Business Plan Update.
[9] At paragraph eight (8) of its *Opposition*, Joint Applicants also argue that disclosure of this information would have a chilling effect because competitors would have access to important information about how the Joint Applicants

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The Joint Applicants' broad brush response to Public Counsel's motion does not meet the burden of proof required.[10] The Commission may wish to consider an *in camera* hearing to allow for more detailed argument on the specific items contained in Mr. Hill's testimony.

C. Staff and Joint Applicants Incorrectly Characterize the Role Public Policy Concerns May Have on The Commission's Determination of Whether Information Should be Confidential.

Contrary to Staff and Joint Applicants' assertions, Public Counsel does not take the position that the level of public interest or importance of this case trumps the statutory standards for confidential designations. The Commission's determination of whether this information should or should not be disclosed is governed by the standards enumerated in its own Protective Order, as well as applicable WACs and RCWs. However, policy concerns also play a role in the Commission's consideration.

As the Commission stated in *U.S. West,* "[w]e base our decision on statute and rule, and not directly on public policy concerns. However, in our view, public policy considerations militate strongly in favor of this agreement being treated as an open public record."[11] In its conclusion, the Commission again reiterates that public policy is an important factor in its determination; finding that certain agreements between parties were not entitled to confidential designation, it stated that such a conclusion was "consistent with statute, rule, our Protective Order, and public policy considerations."[12]

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analyzed the proposed transaction. The Joint Applicants fail to acknowledge that, as a regulated monopoly, PSE does not operate in a competitive market. Thus, PSE does not face a similar harm from disclosure of financial information.

[10] *Protective Order*, ¶ 20; RCW 42.56.030.

[11] *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, ¶ 81.

[12] *Id.*, ¶ 91.

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Indeed, the overarching policy regarding public disclosure is that limitations on disclosure must be narrowly construed. The Construction Section of Washington's Public Records Act[13] declares in full:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. *The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy* and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

III. CONCLUSION

For the reasons stated in its previously filed Motion and those discussed above, Public Counsel respectfully requests that the highly confidential designation be removed from all information in the pre-filed direct testimony of Stephen G. Hill.

DATED this 15th day of September, 2008.

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[13] RCW 42.56.030 (emphasis added).