

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

RIDE THE DUCKS OF SEATTLE, L.L.C.
d/b/a SEATTLE DUCK TOURS,

Respondent.

DOCKET TE-151906

MOTION OF RESPONDENT FOR
PROTECTIVE ORDER

I. RELIEF REQUESTED

1 RTDS respectfully requests that a protective order be entered that prohibits the disclosure of
RTDS’s financial information, and that any documents submitted in this proceeding first
require the redaction of RTDS’s financial information. Before filing this motion, the
Parties’ respective counsel have conferred in good faith.

II. STATEMENT OF FACTS

2 Ride the Ducks of Seattle, LLC (“RTDS”) is a privately held company. Declaration of
Brian Tracey ¶ 2. RTDS is not publicly traded and does not rely on public funding. Brian
Tracey ¶ 2.

3 RTDS has worked cooperatively with the Staff of the Washington Utilities and
Transportation Commission (“WUTC Staff”), and other governmental investigators, since
the accident on September 24, 2015 on the Aurora Bridge involving one “Stretch Duck”

vehicle. Brian Tracey ¶ 3.

4 During this investigation the WUTC came into possession of documents and records
containing RTDS's private, closely-held financial information. Brian Tracey ¶ 3.

5 RTDS understands that its private, closely-held financial information has been, or may be,
included in reports or documents that will be submitted in this proceeding. *See* Brian Tracey
¶ 3.

6 Disclosure of RTDS's private, closely-held financial information will cause RTDS to be at a
competitive disadvantage in the future. Brian Tracey ¶ 4. Disclosure of RTDS's financial
information will adversely affect RTDS's ability to negotiate, maintain, and revise various
agreements and contracts. Brian Tracey ¶¶ 4-5.

III. STATEMENT OF ISSUES

7 Should the Commission enter a protective order prohibiting the disclosure of RTDS's
financial information, and requiring the redaction of any of RTDS's financial information in
documents that will be filed publicly in this proceeding?

IV. EVIDENCE RELIED UPON

8 Respondent relies on the Declaration of Brian Tracey, and the papers previously filed or
submitted to the Commission in this matter.

V. ARGUMENT AND LEGAL AUTHORITY

9 WAC 480-07-010 provides that scope of WAC 480-07 concerns, among other things,
adjudicative proceedings, and that WAC 480-07 establishes procedural rules that should be
read in "conjunction with the Administrative Procedure Act and Titles 81 RCW." WAC
480-07-010. The enabling statute for WAC 480-07-010, RCW 80.01.040, provides that the
Commission shall perform all duties under Title 81 RCW. Thus presumably, the procedural

rules in WAC 480-07 apply to adjudications under Title 81 RCW. If not, then the ‘default’ procedural rules of Washington’s Administrative Procedures Act, RCW 34.05.446, apply. In either instance, a protective order is appropriate.

A. A protective order is appropriate under WAC 480-07-420(1).¹

10 Under WAC 480-07-420(1), the Commission may enter a standard protective order when the parties reasonably anticipate that discovery in a proceeding will call for the production of “confidential information.” WAC 480-07-420(1). While commercial information is not specifically defined within WAC 480-07-420, its definition may be gleaned from how “commercial information” is defined elsewhere in WAC 480-07, and related statutory authority. WAC 480-07-160(2) defines “confidential information” as including “financial information” as well as information meeting an exemption requirement under the Public Records Act. WAC 480-07-160(2)(a) & (c); *see e.g.* RCW 80.04.095 (protection for records containing commercial information and listing “financial information” as including in the definition of commercial information) and RCW 81.77.210 (same).²

11 Here, RTDS requests redaction of its financial information, including its “gross income.” RTDS’s “financial information” is unquestionably “confidential information” as that term is used under WAC 480-07-420(1). Thus, for this reason alone entry of the standard protective order is appropriate.

12 Additionally the financial information is confidential because it meets an exemption requirement under the Public Records Act. *See* RCW 42.56.050. RCW 42.56.050 prohibits

¹ WAC 480-07-420(3) also permits the entry of a protective order to prevent the disclosure of “commercial information” such as the financial information here. WAC 480-07-420(3)(g) mirrors Civil Rule 26(c) which is discussed in greater detail below in Section B, *infra*.

² **Importantly**, RCW 81.70.310 expressly adopts all provisions in Title 81 that relate to “procedure [and] powers of the commission” unless there is a specific conflict with RCW 81.70. RCW 81.77.210 relates to procedure and/or the powers of the commission. Thus, RCW 81.70.310 adopts RCW 81.77.210, which expressly calls for protection of financial information, and is another grounds for entry of a protective order.

the disclosure of private information that would be highly offensive to a reasonable person and is not a legitimate concern of the public. *Id.* Protective orders are regularly entered in civil litigation in accordance with Washington's Public Disclosure Act's exemption for one's privacy rights, including orders that protect: tax returns, financial statements, banking records, and similar financial information. *E.g. Aexel v. Seattle Financial Group, Inc.*, No. 1023720832014, WL 2457807 (Wash. Super. March 23, 2014) (Inveen, J.).³

13 First, requiring public disclosure and thus scrutiny of RTDS's financial information, and by extension portions of the private financial information of its ownership, is highly offensive just as would be asking a private individual to disclose their salary or how much debt they have. Not only would disclosure be highly offensive, disclosure of RTDS's financial information could cause RTDS real and significant damage to its ability to negotiate various contacts in the future. Public knowledge of a small, privately held company's financial information causes a competitive disadvantage for such companies. Indeed, one of the primary reasons companies choose to remain privately held rather than go public is the right of non-disclosure of financial information. Disclosure of RTDS's financial information in this proceeding would eviscerate its right of non-disclosure, and put it at a competitive disadvantage. Disclosure of RTDS's financial information would compromise its ability to compete fairly with other private companies that are not required to disclose their financial information, and would unfairly prejudice RTDS's ability to negotiate future contracts.

14 Second, RTDS's financial information is not of legitimate public concern, and opening its financial information to scrutiny by the general public, its competitors, and vendors is highly offensive to its privacy interests. RTDS is a small, privately held company. It is not publically traded, and does not rely on government funding for its operations. Its financial

³ See also Article I, Section 7 of the Washington State Constitution.

information is therefore not a matter of public record, nor is it a matter of public concern.

15 An order requiring the redaction of RTDS's financial information from any public available record submitted in this proceeding will not cause any prejudice. The Parties' joint goal of ensuring public safety will not be impacted by the requested protective order. Indeed, when confidential income data that would violate one's privacy interest can be redacted from a public record, the proper course is to redact the confidential income data and release the rest of the record. *See* RCW 42.56.210(1).

B. A protective order is appropriate under RCW 34.05.446.

16 The relevant portion of Washington's Administrative Procedures Act, RCW 34.05, also allows the presiding officer to enter protective orders under the superior court civil rules. RCW 34.05.446. Civil Rule 26(c) allows a protective order to be entered to protect a party from undue burden or expense including that "commercial information not be disclosed or be disclosed only in a designated way." CR 26(c).

17 A trial court has substantial latitude to decide when a protective order is appropriate and what degree of protection is required given the unique character of the discovery process. *King v. Olympic Pipeline Co.*, 104 Wash.App. 338, 16 P.3d 45, *amended on reconsideration, review denied*, 143 Wash.2d 1012, 21 P.3d 290 (2000). The commission routinely enters protective orders pursuant to RCW 34.05.446. *See e.g., In the Matter of the Petition of Olympic Pipe Line Co. et al.*, No. TO-031973 & TO-081785 (October 14, 2008). And the courts uphold those protective orders. *See TRACER v. Washington Utilities and Transp. Com'n*, 2002 WL 1608448, at *10 (Wn. App., 2002).⁴

18 CR 26(c) permits a trial court to forbid publication of information obtained through

⁴ The Commission entered a protective order pursuant to RCW 34.05.446. The Court ruled the "protective order was an appropriate means of balancing protecting [sic] the confidential business information against the procedural rights of the parties to the hearing."

discovery upon a showing of “good cause.” *Rhinehart v. Seattle Times* 98 Wash.2d 226, 654 P.2d 673 (1982). To determine if “good cause” exists for a protective order, the court must balance the interests served by protecting the confidentiality of the information (e.g., ensuring the full and truthful disclosure of relevant facts and protecting individuals’ legitimate privacy interests in avoiding unwanted publicity) against the interests served by allowing publication of the information (e.g., informing the public of matters of legitimate public concern) under the circumstances.

19 In *Rhinehart*, the Washington Supreme Court ruled that there has never been a question that commercially valuable information, such as financial information, warrants protection under CR 26(c). *Id.* at 236.


20 Here, in accordance with *Rhinehart* and as discussed at length above, allowing the publication of the financial information obtained during the Commission Staff’s investigation intrudes upon RTDS’s right to privacy. Disclosure of the financial information will cause RTDS very real and immediate financial consequences. At the same time, disclosure of the financial information will serve no legitimate public interest, nor is it relevant to any fact finding in this adjudication to determine the partial reinstating of RTDS’s operating certificate. Accordingly, the balancing of the applicable interests supports entry of the requested protective order requiring the redaction of RTDS’ financial information in any publicly filed document in this proceeding.

VI. CONCLUSION

21 RTDS respectfully requests that a protective order be entered that prohibits the disclosure of RTDS’s financial information, and that any documents submitted publicly in this proceeding first require the redaction of RTDS’s financial information.

DATED this 20th day of November, 2015.

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