

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

Docket No. UE-111048

Docket No. UG-111049

PUGET SOUND ENERGY, INC.'S
MOTION OBJECTING TO THE
CONFIDENTIALITY STATUS OF THE
INDUSTRIAL CUSTOMERS OF
NORTHWEST UTILITIES

I. INTRODUCTION

1 Pursuant to the Protective Order with Highly Confidential Provisions entered in this docket on June 17, 2011 ("Protective Order"), Puget Sound Energy, Inc. ("PSE" or "the Company") objects to the request to revise the confidentiality status of the Industrial Customers of Northwest Utilities ("ICNU") filed by ICNU on August 17, 2011. As discussed in more detail below, Ms. Davison, ICNU's counsel, should be bound to the obligations set forth in the Highly Confidentiality Information Agreement that she signed on June 27, 2011. ICNU's request that the Commission disregard this signed Highly Confidential Information Agreement should be denied, particularly in light of the significant discovery undertaken in this case—including numerous highly confidential responses to data requests that PSE provided to Ms. Davison. PSE further requests that the Commission require all attorneys and consultants for a given intervenor

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to have the same confidentiality status in order to avoid inadvertent disclosures of highly confidential information between attorneys and consultants representing a single intervenor. Alternatively, at a minimum, ICNU should be required to provide a detailed plan as to how it intends to protect PSE's highly confidential information from disclosure when certain of its attorneys have signed Highly Confidential Information Agreements while other of its attorneys (as well as all but one of its consultants) have signed confidentiality agreements and may not review highly confidential information.

II. BACKGROUND FACTS

2 On June 27, 2011, the following individuals filed signed confidentiality agreements on behalf of ICNU in this docket: Melinda Davison, Jesse E. Cowell, S. Bradley Van Cleve, Irion A. Sanger, Donald W. Schoenbeck, Robynn Woodbury, Michael Gorman, and James Leyko. On that same day, ICNU attorneys Melinda Davison and Jesse E. Cowell each also filed Highly Confidential Information Agreements that they had signed. On August 1, 2011, ICNU filed a confidentiality agreement and a Highly Confidential Information Agreement signed by its consultant Ellen Blumenthall on July 18, 2011.

3 On July 6, 2011, PSE provided Ms. Davison and Mr. Cowell with the highly confidential versions of all testimony, exhibits, and workpapers; and prior to that, on June 30, 2011, PSE began providing Ms. Davison and Mr. Cowell with highly confidential versions of PSE's data request responses. *See* Declaration of Sheree Strom Carson at ¶ 4. ICNU has propounded 95 data requests to PSE, and because ICNU has requested copies of all of PSE's responses to other

parties' data requests in this proceeding, ICNU has received more than 360 total data request responses so far in this proceeding—several of which contain highly confidential material. *Id.* at ¶ 6.

4 On August 15, 2011, counsel for PSE sent an email to Ms. Davison expressing concern regarding the varying levels of confidentiality for the attorneys and consultants for ICNU and the need to avoid inadvertent disclosure of highly confidential information. *Id.* at ¶ 5, Exh. A. Specifically, PSE was concerned because two attorneys representing ICNU (Mr. Van Cleve and Mr. Sanger) had signed the Agreement Concerning Confidential Information and two attorneys representing ICNU (Ms. Davison and Mr. Cowell) had signed both the Agreement Concerning Confidential Information and the Highly Confidential Information Agreement. In response to this email, Ms. Davison notified PSE's counsel by email that she had not intended to sign the Highly Confidential Information Agreement and that Mr. Cowell, a junior associate in her office, is the only attorney for ICNU who signed and will review highly confidential material. The email further stated that Mr. Cowell would "take all necessary precautions to ensure that there is no inadvertent disclosure." *Id.* at ¶ 5, Exh. B. Neither PSE nor its attorneys responded to this email. *See id.* at ¶ 5.

5 On August 17, 2011, Ms. Davison filed a letter with the Commission requesting that the Commission "disregard the Highly Confidential status of Melinda J. Davison" and stating that the signature page for Exhibit C for Ms. Davison was "filed in error." The letter further stated that "Jesse E. Cowell alone should receive Highly Confidential information for this case," that "Ms. Davison had not reviewed any Highly Confidential information in this case," and that

"ICNU had spoken with Puget Sound Energy, Inc. and the Company has agreed to revoke Ms. Davison's Highly Confidential status."

6 PSE is filing this objection first and foremost to make clear to the Commission that PSE has *not* "agreed to revoke Ms. Davison's Highly Confidential status." Counsel for PSE did not speak to ICNU's counsel or otherwise communicate with Ms. Davison on this issue other than in the emails provided as exhibits to this motion. *See id.* at ¶ 5. Nor has any PSE employee spoke with ICNU's counsel and agreed to "revoke Ms. Davison's Highly Confidential status." Ms. Davison is contractually bound to uphold the terms of the Highly Confidential Information Agreement that she signed and filed in this proceeding. Further, PSE requests that the Commission require all attorneys and consultants for an intervenor to sign the same level of confidentiality agreement in order to avoid inadvertent disclosures.

III. ARGUMENT

7 Exhibit B and Exhibit C to the Protective Order allow PSE to object to the confidential status of a person signing the confidentiality agreements to the Protective Order within ten days of the date the confidentiality agreements are signed. In this case, PSE is objecting to Ms. Davison's attempt to revoke her previously executed Highly Confidential Information Agreement, and PSE is objecting within ten days of Ms. Davison's August 17, 2011 request to the Commission.

8 Ms. Davison signed a Highly Confidential Information Agreement in which she agreed to certain obligations.¹ Whether or not Ms. Davison receives any additional highly confidential information, she should be obligated to comply with the requirements she agreed to when she signed the Highly Confidential Information Agreement.

9 PSE did not agree to revoke Ms. Davison's highly confidential status or excuse her from compliance with her contractual obligations set forth in the Highly Confidential Information Agreement she signed, and PSE is not willing to rescind this agreement, particularly given the extensive highly confidential materials that have been provided to Ms. Davison in reliance on her signing the Highly Confidential Information Agreement. In addition to highly confidential testimony and exhibits received on July 6, 2011, Ms. Davison received several emails from PSE clearly designated as containing highly confidential responses to data requests, but did not advise PSE that she had signed the Highly Confidential Information Agreement in error prior to August 15. *See id* at ¶ 6, Exh. C.

¹ Ms. Davison signed Exhibit C (Highly Confidential Information Agreement) to the Protective Order entered June 27, 2011, which states as follows:

"I . . . hereby declare under penalty of perjury under the laws of the State of Washington that the following are true and correct:

a. I am not now involved, and will not for a period of two years involve myself in, competitive decision making with respect to which the documents or information may be relevant, by or on behalf of any company or business organization that competes, or potentially competes, with the company or business organization from whom they seek disclosure of highly confidential information with respect to the development or purchase of energy resources; and

b. I have read and understand, and agree to be bound by, the terms of the Protective Order in this proceeding, including this Section C of the protective Order.

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Further, PSE questions whether its highly confidential material can be adequately protected by ICNU under the scenario Ms. Davison describes in her email and letter to the Commission. Ms. Davison is a named partner at the firm Davison Van Cleve PC, which represents ICNU, and she is lead counsel for ICNU in this proceeding. Mr. Cowell is an associate with Davison Van Cleve PC and, as stated on the firm website, has been with the firm a "short-time."² PSE questions how ICNU can litigate issues involving highly confidential information provided by PSE, while at the same time ensuring that the lead counsel on the case and the majority of ICNU's consultants do not have access to this highly confidential information.³ Under this scenario, Ms. Davison would not be able to: review PSE's highly confidential testimony, exhibits or data request responses; participate in preparing or reading the testimony of Ellen Blumenthal—the one ICNU witness who signed a Highly Confidential Information Agreement—to the extent Ms. Blumenthal's testimony contains highly confidential information; or participate in cross-examination of PSE's witnesses regarding highly confidential information. In fact, Ms. Davison would be excluded from the hearing room in such case, leaving Mr. Cowell to conduct cross examination on highly confidential issues. Additionally, Ms. Davison would not be able to prepare or read any portion of an ICNU brief (or other parties' testimony or briefs) that contain highly confidential information. All this responsibility would

² See <http://davisonvancleve/attorneys>.

³ In past PSE general rate cases, none of ICNU's attorneys or consultants signed Highly Confidential Information Agreements, and so the issue presented here was not present.

fall to Mr. Cowell, who would not be able to consult any partner or other attorney in the firm regarding highly confidential information.

11 It is not PSE's concern how ICNU and its counsel staff this case. However, PSE must become concerned when it appears that the staffing of a case by an intervenor may result in inadvertent disclosure of PSE's highly confidential information within the law firm or to consultants outside the law firm. To avoid such inadvertent disclosure, PSE requests that the Commission require consultants and attorneys for a given intervenor—in this case ICNU—to sign the same level of confidentiality agreement. In the alternative, the Commission should require ICNU to demonstrate that adequate safeguards have been put in place within the Davison Van Cleve law firm and between Davison Van Cleve and ICNU's consultants, to ensure that PSE's highly confidential information is not inadvertently disclosed to an ICNU attorney or consultant who has not signed a Highly Confidential Information Agreement. Safeguards need to be in place for preparation of response testimony involving highly confidential information, cross examination of witnesses on highly confidential materials, as well as briefing on highly confidential issues.

IV. CONCLUSION

12 For the reasons set forth above, PSE respectfully requests that the Commission deny ICNU's request to disregard Ms. Davison's Highly Confidential Information Agreement and require Ms. Davison to comply with the obligations contained in the agreement she signed. PSE also requests that the Commission require all attorneys and consultants representing ICNU to

sign the same level of confidentiality agreement; or in the alternative, that ICNU present a specific and detailed plan as to how it will protect PSE's highly confidential materials from inadvertent disclosure given the varying levels of access to highly confidential information among the attorneys and consultants representing ICNU.

DATED: August 25, 2011

Respectfully Submitted,

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