

**BEFORE THE**  
**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NO. UE-111048
	)	
Complainant,	)	INDUSTRIAL CUSTOMERS OF
	)	NORTHWEST UTILITIES' RESPONSE
v.	)	IN OPPOSITION TO PUGET SOUND
	)	ENERGY, INC.'S MOTION
	)	OBJECTING TO THE
PUGET SOUND ENERGY, INC.,	)	CONFIDENTIALITY STATUS OF THE
	)	INDUSTRIAL CUSTOMERS OF
Respondent.	)	NORTHWEST UTILITIES
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**I. INTRODUCTION**

1 Pursuant to WAC § 480-07-375(4), the Industrial Customers of Northwest Utilities (“ICNU”) hereby responds in opposition to Puget Sound Energy, Inc.’s (“PSE”) Motion Objecting to the Confidentiality Status of ICNU (“Motion”), and respectfully asks that the Washington Utilities and Transportation Commission (“WUTC” or “Commission”) deny PSE’s Motion in its entirety. Counsel for PSE did not confer with Counsel for ICNU regarding the Motion in violation of WAC 480-07-425. This is a discovery dispute or similar to a discovery dispute which requires conferring with opposing counsel under WAC 480-07-425.

2 The Commission should deny PSE’s Motion for several additional reasons. Most notably, ICNU counsel Melinda J. Davison has offered to revoke her confidential status, and PSE accepted this offer by removing Ms. Davison from the highly confidential service list, literally within the same hour in which Ms. Davison informed PSE that she had mistakenly signed the highly confidential protective order agreement and affirmed that she had not reviewed any highly confidential material. PSE has continued to omit Ms. Davison from its highly

confidential service list even after filing its Motion. PSE's rationale for compelling Ms. Davison to resubmit to the highly confidential agreement is unpersuasive.

3 In addition, any objection PSE has toward the confidential status of other ICNU attorneys or consultants could have and should have been lodged within the ten day period afforded by the Protective Order. WUTC v. PSE, Docket No. UE-111048, Order 01 at Exs. B and C (June 17, 2011) ("Order 01"). Therefore, any objection related to those individuals has been waived. Moreover, the Protective Order explicitly allows some, but not all, of ICNU's consultants and attorneys to have access to highly confidential information.

4 Further, the attached affidavit of Ms. Davison makes clear that she has not reviewed any highly confidential information in this proceeding. Ms. Davison did not intend to sign the highly confidential protective order and did so by mistake. It is very early in this proceeding and the inferences and accusations lodged by PSE are simply false. Finally, even PSE's alternate, "minimum" request that ICNU provide a detailed plan to safeguard PGE's highly confidential information is unwarranted under the Protective Order. ICNU's attorneys and consultants take their requirements to keep documents confidential very seriously. It is offensive to suggest otherwise. Finally, there is no indication that the extreme position advocated by PSE is being followed by PSE's own legal counsel or other parties to this proceeding.

## II. BACKGROUND

5 PSE correctly states that four ICNU attorneys and four ICNU consultants filed signed confidentiality agreements on June 27, 2011, with the exception of ICNU consultant Ellen Blumenthal, whose agreement was filed on August 1, 2011. Motion at 2. PSE is also correct in

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observing that only ICNU attorneys Ms. Davison and Mr. Cowell, as well as ICNU consultant Ms. Blumenthal, signed highly confidential information agreements. Id. Critically, however, during the ten day window for objecting to ICNU counsel/consultant confidentiality status, PSE never made an objection or stated their current concern that all attorneys and all consultants must sign the highly confidential protective order. ICNU has never had all consultants and attorneys sign the highly confidential protective order in previous proceedings.

6           On August 15, 2011, Ms. Davison informed PSE’s counsel that she signed the highly confidential protective order by mistake. Further, Ms. Davison explains that she had not even reviewed any *confidential* material in the case to date—much less “highly” confidential material—and that ICNU would correct the matter. Finally, Ms. Davison assured PSE that Mr. Cowell would be the only ICNU attorney reviewing highly confidential material and confirmed that Mr. Cowell “will take all necessary precautions to ensure that there is no inadvertent disclosure” within her firm. Declaration of Sheree Strom Carson in Support of PSE’s Motion (“Carson Declaration”), Ex. B.

7           Within the same hour in which it received Ms. Davison’s reply, PSE removed Ms. Davison from the service list for highly confidential material, thereby confirming the revocation of Ms. Davison’s highly confidential status by simple performance. Ms. Davison assumed that by PSE’s actions there was no further issue with this request. Noticeably, Ms. Carson neither emailed nor called Ms. Davison to express her client’s concern or to try to work out a solution. The first notice ICNU and its counsel received regarding the confidentiality concerns was receipt of PSE’s Motion Objecting to the Confidentiality Status of ICNU, which was filed on August 25, 2011.

8 Exhibit A of the Declaration of Jesse E. Cowell in Support of ICNU’s Response  
in Opposition to PSE’s Motion (“Cowell Declaration”) shows that, at 5:50 pm on August 15,  
2011, electronic service of PSE’s highly confidential responses to ICNU data requests was made  
to Mr. Cowell *only*. Exhibit B to the Cowell Declaration, which is an electronic service email  
dated August 5, 2011, demonstrates that Ms. Davison had previously been a recipient of highly  
confidential data request responses.

9 On August 17, 2011, Ms. Davison filed a letter requesting that the WUTC  
disregard her highly confidential status. For convenience, this letter can be found as Exhibit D to  
the Cowell Declaration. Ms. Davison accurately informed the Commission that ICNU had  
spoken to PSE (via email) about the matter and that, based on PSE’s prompt removal of her  
address from its highly confidential service list, the Company had also agreed to revoke her  
highly confidential status.

10 On August 25, 2011, PSE filed its Motion and the accompanying Carson  
Declaration and Exhibits, objecting to the confidentiality status of Ms. Davison and other ICNU  
attorneys and consultants. PSE stated that Ms. Davison’s “request that the Commission  
disregard this Highly Confidential Information Agreement should be denied.” Motion at 1.  
Notwithstanding, even after filing its Motion, PSE itself continues to confirm Ms. Davison’s  
revocation request by omitting her from highly confidential service. Cowell Declaration, Ex. E  
(showing electronic service by Ms. Barnett to Mr. Cowell but not to Ms. Davison on August 26,  
2011).

11 Moreover, the objection to Ms. Davison’s status aside, PSE’s Motion objecting to  
the disparate status of other ICNU counsel/consultants comes nearly *two months* after all but one

of ICNU’s counsel/consultants filed confidentiality agreements (and over three weeks after the lone exception, Ms. Blumenthal, filed her agreement). Cf. Order 01, Exs. B and C (Construing a failure to file an objection to a signed confidentiality agreement within ten days as a waiver to objection). Pursuant to WAC § 480-07-375(4), ICNU’s response is timely filed within five business days of PSE’s Motion.

### III. STANDARD OF REVIEW

12 According to Order 01, ¶ 2, the Protective Order was entered to “govern the discovery and use of proprietary and confidential documents in this proceeding.” Likewise, Order 01 provides: “All access, review, use, and disclosure of any material designated by a party to this proceeding as confidential . . . is governed by this Order and by WAC 480-07-160.” Order 01 at ¶ 3.

13 The protective order provides for parties seeking access to or the disclosure of highly confidential material, “one *or more*” outside counsel or consultants of that party must be designated to receive such material. Id. at ¶ 14 (emphasis added). Further, both Exhibits B and C to Order 01 (confidential and highly confidential agreements, respectively) provide that failure to file an objection to a signed agreement within ten days constitutes a waiver of objection.

### IV. ARGUMENT

#### A. Ms. Davison Properly Withdrew her Highly Confidential Signature Page

14 Ms. Davison proposed to withdraw her highly confidential signature page based on the fact that she had mistakenly signed it. Ms. Davison confirmed that she has not reviewed any confidential or highly confidential information, given that this case is in an early stage. PSE accepted the withdrawal by removing Ms. Davison from the highly confidential service list.

There is no legitimate reason to require Ms. Davison to be bound by the highly confidential provisions of the protective order if she has not and does not intend to review or use highly confidential information.

**B. A Request to Compel All ICNU Attorneys and Consultants to Share a Common Confidentiality Status Violates the Protective Order and Is Supported by Inaccurate Representations**

15 In requesting that every ICNU attorney and consultant be compelled to agree to the same degree of confidentiality status, PSE invites the WUTC to undermine the structure of its own Protective Order. Worse still, to support this request, lead PSE counsel Ms. Carson misrepresents ICNU’s confidential status in prior cases. In the many years Davison Van Cleve attorneys have practiced before this Commission, we have never seen a utility to attempt to control who is required to sign the highly confidential protective order. This approach is novel at best and more likely an offensive mechanism to force Davison Van Cleve out of the case as it relates to highly confidential material.

16 First and foremost, PSE long ago passed up any opportunity it legitimately had to object to the confidentiality status of ICNU attorneys and consultants. Both exhibits B and C to the Protective Order (the consultant confidential agreement and the highly confidential agreement, respectively) provide that, once such agreements are filed with the Commission, a responding party must file any objection “within 10 days of receipt.” Order 01, Exs. B and C. Further, “failure to do so will constitute a waiver.” Id.

17 If PSE had any objection to the disparate confidentiality arrangement among ICNU counsel and between ICNU counsel and some ICNU consultants—an arrangement which was immediately apparent when all but one ICNU confidentiality agreement was filed on June

27, 2011—PSE could have objected within 10 days per Exhibit C, which both Ms. Davison and Mr. Cowell initially filed. Also, when the signed Exhibit B of ICNU consultant Ms. Blumenthal was filed on August 1, 2011, PSE could had have objected within 10 days to the disparate confidentiality status immediately apparent among ICNU consultants and between Ms. Blumenthal and certain ICNU counsel.

18 PSE availed itself of neither option, however, and instead has filed the present Motion nearly two months after almost all confidentiality agreements were filed (and over three weeks after the last was filed). In brief, PSE’s present objections are untimely and have now been waived; the Company’s request to forcibly compel all counsel and consultants to adopt a similar status should be denied on this basis alone.

19 Second, the Protective Order plainly allows a party to designate certain counsel or consultants to one level of confidential status, while designating others to a different level. “Parties who seek access to or disclosure of Highly Confidential documents or information must designate *one or more* outside counsel and *one or more* outside consultant, legal or otherwise, to receive and review materials marked ‘Highly Confidential . . .’” Order 01 at ¶ 14 (emphasis added). The protective order clearly contemplates that some but not all attorneys and consultants may execute a highly confidential protective order.

20 Far more troubling than the legal inadequacy of PSE’s request, however, are the factually incorrect statements Ms. Carson has filed with the Commission in support the Motion. In Ms. Carson’s August 15, 2011 email to ICNU which she includes as Exhibit A to her “Declaration in Support of PSE’s Motion,” Ms. Carson claimed: “In recent cases, *all* of ICNU attorneys and consultants have signed confidentiality agreements allowing them to review *the*

*same* level of confidentiality (i.e., ‘confidential,’ rather than ‘highly confidential’ material).” (Emphasis added). This factually inaccurate claim both severely undermines the rationale behind PSE’s request for uniformity among all ICNU counsel and consultants, and puts into grave doubt the equity of PSE’s alternative request that ICNU counsel provide a detailed plan to safeguard PSE’s highly confidential information, given that the request is based on a misrepresentation.

21                   Exhibit F to the Cowell Declaration and the record of the case indicate that ICNU elected to designate its counsel and consultants to disparate levels of confidential access in UE-070725. In the months of December 2009 and January 2010, Brad Van Cleve, as lead ICNU counsel in the proceeding, only signed a “confidential information” access agreement, while ICNU counsel Irion Sanger and Jesse Cowell, as well as ICNU consultant Don Schoenbeck, all signed highly confidential agreements. PSE did not object in that case to such an arrangement, despite the “named partner” and “lead counsel” not being able to confer with ICNU’s expert consultant or more “junior” attorneys about highly confidential information. Cf. Motion at ¶ 10.

22                   Likewise, in UE-050870, at least one ICNU consultant, Raymond D. Bliven, signed only a confidential agreement while ICNU counsel and ICNU consultant Don Schoenbeck signed highly confidential agreements. Cowell Declaration, Ex. G. This arrangement is noteworthy because Mr. Bliven and Mr. Schoenbeck *both* worked at Regulatory & Cogeneration Services, Inc. (“RCS”). Nevertheless, PSE did not object to such an arrangement or demand that all consultants at RCS be forced into the same confidentiality status.



23 In light of these examples, Ms. Carson’s claim that “all of ICNU attorneys and consultants have signed confidentiality agreements allowing them to review the same level of confidentiality” in recent cases is obviously incorrect.

24 Significantly, PSE does not make a single charge that ICNU’s previous confidentiality arrangements, including disparate degrees of confidential access between and among ICNU counsel and consultants in recent cases, has *ever* resulted in a prior disclosure of protected information. This is the key issue here. Assurances have been given that all precautions will be taken to protect all confidential and highly confidential information from disclosure. Still, the absence of such a claim in PSE’s Motion is telling, demonstrating emphatically that good cause does not exist for the WUTC to grant PSE’s “uniformity” request.

**C. Requiring ICNU Counsel to Create a Detailed Protection Plan Is Unnecessary under the Protective Order**

25 As a “minimum” alternative to its Motion requests, PSE states that “ICNU should be required to provide a detailed plan as to how it intends to protect PSE’s highly confidential information when certain of its attorneys have signed Highly Confidential Agreements while other” attorneys have not. Motion at ¶ 1. Such a measure is wholly unnecessary and unwarranted under the Protective Order. On its face, it appears to be singling out a party known to fully participate in ensuring PSE’s rates are fair, just and reasonable.

26 Persons receiving access to confidential information already warrant, *without the need to file a detailed protection plan*, “that they will exercise all reasonable diligence to maintain the documents consistent with the claim of confidentiality.” Order 01 at ¶ 10 (emphasis added). Second, as already explained, the Protective Order allows ICNU to designate “one or more” attorneys to review highly confidential material, and does not compel parties to an “all or

nothing” designation. Id. at ¶ 14. Therefore, ICNU has done nothing extraordinary or disconcerting which might, *arguendo*, even potentially justify additional protective measures.

## V. CONCLUSION

27 PSE accepted ICNU counsel Ms. Davison’s offer to revoke her highly confidential agreement by taking her off the service list, an action only permissible under the Protective Order if an individual is *not* subject to a highly confidential protective agreement. PSE’s supporting rationale, attempting to positively compel Ms. Davison to agree, once more, to the highly confidential agreement, is insufficient to justify such an unprecedented action on the Commission’s part. Since Ms. Davison has not and does not intend to review highly confidential information, she should not be subject to the highly confidential provisions of the protective order.

28 Moreover, PSE also has long since passed up its opportunity to object to the confidential status of other ICNU attorneys and consultants whom ICNU has permissibly designated under varying levels of confidentiality status, as provided under the Protective Order. Such disparate arrangements have occurred in the past and PSE has never previously objected to such designations, nor does PSE justify its current objections with reference to any unauthorized disclosure of highly confidential information in the past.

29 Finally, the Protective Order already requires counsel and consultants to use protective measures to prevent the disclosure of confidential information, while at the same time contemplating that disparate levels of confidentiality may exist among individual representatives of a single party.

WHEREFORE, ICNU respectfully asks that the Commission deny PSE's Motion in its entirety.

Dated in Portland, Oregon, this 1st day of September, 2011.

Respectfully submitted,

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/s/ Melinda J. Davison

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