

[Service Date November 13, 2008]

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

In the Matter of the Joint Application of	)	DOCKET U-072375
	)	
PUGET HOLDINGS LLC AND	)	ORDER 07
PUGET SOUND ENERGY, INC.,	)	
	)	
For an Order Authorizing Proposed	)	DENYING PUBLIC COUNSEL’S
Transaction	)	MOTION CHALLENGING
	)	CONFIDENTIALITY
.....	)	

**MEMORANDUM**

**I. Proceedings; Motion Challenging Confidentiality**

- 1 This proceeding concerns an application by Puget Holdings LLC (Puget Holdings) and Puget Sound Energy, Inc. (PSE) (collectively “Joint Applicants”) for an order authorizing the proposed transfer of ownership and control of Puget Energy and its wholly owned subsidiary, PSE, to Puget Holdings. The Joint Applicants filed their application with the Washington Utilities and Transportation Commission (Commission) on December 17, 2007. The Commission set the matter for hearing.
  
- 2 The Commission convened a prehearing conference on January 14, 2008, to consider various procedural matters, including a request that it enter a protective order to promote the expeditious exchange of confidential information by the parties. The Commission entered Order 02—Protective Order with “Highly Confidential” Provisions on January 18, 2008.

- 3 During the course of discovery, Joint Applicants provided significant amounts of information to the parties, including the Public Counsel Section of the Attorney General's Office (Public Counsel). Pursuant to statute, Commission rules and Order 02, the Joint Applicants designated certain of this information "confidential" or "highly confidential."<sup>1</sup>
- 4 On June 18, 2008, Public Counsel filed the written direct testimony of Mr. Steven G. Hill, Exhibit 251 THC (Testimony-Highly Confidential), which included information designated confidential or highly confidential. Public Counsel redacted the confidential information from the "public" version of the exhibit, as required under the Commission's rules and the terms of the protective order. The confidential, un-redacted version of Mr. Hill's testimony was provided to the parties, who executed appropriate affidavits as required under the protective order, and to the Commission.
- 5 On July 25, 2008, the Commission received a public records request for Mr. Hill's un-redacted testimony. On August 1, 2008, the Joint Applicants instituted an action in Thurston County Superior Court, pursuant to RCW 80.04.095, to bar the Commission from disclosing the confidential information included in Mr. Hill's testimony. On August 21, 2008, making reference to the public records request and the pending action in the Superior Court, Public Counsel filed a motion with the Commission seeking to "declassify" all information designated confidential in Exhibit 251 THC.
- 6 On September 4, 2008, Public Counsel filed a motion to intervene in the Superior Court matter. In lieu of oral arguments, the parties executed a stipulation for the entry of a proposed order granting Public Counsel's motion to intervene and granting a preliminary injunction pending the outcome of Public Counsel's motion challenging the confidentiality of the documents before the Commission. The parties agreed that

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<sup>1</sup> Documents and information designated highly confidential are afforded a higher degree of protection in terms of the allowed breadth of their dissemination to counsel and experts. This designation "is reserved for information the dissemination of which, for example, imposes a highly significant risk of competitive harm to the disclosing party without enhanced protections provided in the commission's protective order." WAC 480-07-423(3)(b). The distinction between the two categories is not particularly significant for purposes of this Order because the relief sought would remove any cloak of confidentiality from the challenged information. Thus, when the word "confidential" appears in this Order, it includes both categories.

if the Commission determines that all or part of the testimony should be deemed highly confidential, the Commission will notify the court. In that case, the preliminary injunction will remain in place until further action by the Court as to such documents.

- 7 On the other hand, if the Commission determines that all or part of the testimony should not be deemed confidential, the Commission also will notify the court. If no party petitions for judicial review of the Commission's decision within the statutory period for appeal, then the Court will lift the preliminary injunction by further order and the documents in question will be ordered to be made public. In other words, the parties to the Thurston County Superior Court action deferred to the Commission to determine whether the information at issue was properly designated as highly confidential and the court agreed to await the Commission's decision.<sup>2</sup>

## II. Determination

- 8 The Commission, for the reasons discussed below, determines that Joint Applicants properly designated as highly confidential the information in certain source documents from which Mr. Hill developed the redacted portions of his testimony, consistent with the terms of the protective order entered in this proceeding. The information marked as highly confidential in Mr. Hill's testimony is entitled to that status and should be withheld from public disclosure to avoid the "significant risk . . . that confidential information might become available to persons who have no legitimate need for such information and that injury to the information provider or third parties could result."<sup>3</sup>

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<sup>2</sup> *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).

<sup>3</sup> 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, Order 02-Protective Order with "Highly Confidential Provisions" ¶ 1 (January 18, 2008).

### III. Discussion

#### A. Introduction and Background

9 Washington’s declared policies include the principles that government should be conducted in public and records of public agencies should be publically accessible. The statutes that embody these principles<sup>4</sup> apply to administrative agencies such as the Commission, subject to specific, carefully drawn exceptions. The Legislature has long recognized, for example, that it is regularly necessary for the Commission to have access to information that is commercially sensitive in one way or another. It accordingly passed RCW 80.04.095, which states:

Records, subject to chapter 42.56 RCW, filed with the commission or the attorney general from any person which contain valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information, shall not be subject to inspection or copying under chapter 42.56 RCW: (1) Until notice to the person or persons directly affected has been given; and (2) if, within ten days of the notice, the person has obtained a superior court order protecting the records as confidential. The court shall determine that the records are confidential and not subject to inspection and copying if disclosure would result in private loss, including an unfair competitive disadvantage. When providing information to the commission or the attorney general, a person shall designate which records or portions of records contain valuable commercial information. Nothing in this section shall prevent the use of protective orders by the commission governing disclosure of proprietary or confidential information in contested proceedings.

10 Thus, the Legislature recognized that companies regulated by the Commission would be routinely required to file documents that “contain valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information.” The statute provides by its terms the means by which the regulated

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<sup>4</sup> RCW 42.30; RCW 42.56.040 *et seq.*

companies can seek to maintain the confidentiality of such information when they deem it necessary to protect their interests or the interests of third parties.

- 11 The statute authorizing our jurisdictional utilities to file information confidentially is important because, while the companies are monopoly providers of electricity and natural gas in their service territories, they operate their businesses in highly competitive markets, such as the market for wholesale power and the markets for capital. They engage in major acquisitions, such as the purchase of generating assets (*e.g.*, wind farms, cogeneration facilities, combined cycle combustion turbine generation plants), in competition with other utilities and non-utility operators of such assets. Regulated utilities also become involved from time to time in merger and acquisition transactions affecting ownership of their companies.<sup>5</sup> These types of transactions routinely involve the use of proprietary financial models, sensitive financial data and other information that must be kept confidential to allow the regulated companies to negotiate effectively to secure the best terms and lowest costs possible, which directly benefits their customers.
- 12 When the Commission is called upon to review and take action with respect to the types of transactions identified above, it does so in quasi-judicial proceedings, which are most often contested cases, at least initially.<sup>6</sup> In its final sentence, RCW 80.04.095 provides that in contested adjudicative proceedings the Commission has the authority to enter protective orders.
- 13 The Commission does, in fact, routinely use protective orders in contested proceedings. These most often are entered at the outset of a proceeding and follow a standard form developed by the Commission over a number of years in consultation

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<sup>5</sup> See, *e.g.*, *In the Matter of the Joint Application of MDU RESOURCES GROUP, INC. AND CASCADE NATURAL GAS CORPORATION For an Order Authorizing Proposed Transaction*, Order 06-Approving and Adopting Stipulation; Approving Transaction, Docket UG-061721 (June 27, 2007); *In the Matter of the Joint Application of MIDAMERICAN ENERGY HOLDINGS COMPANY AND PACIFICORP, d/b/a PACIFIC POWER & LIGHT COMPANY For an Order Authorizing Proposed Transaction*, Order 07- FINAL ORDER APPROVING AND ADOPTING SETTLEMENT STIPULATION; REQUIRING SUBSEQUENT FILING, Docket UE-051090 (February 22, 2006).

<sup>6</sup> The Commission does consider settlement agreements among parties for possible approval and adoption in resolution of the issues in a proceeding.

with parties who regularly appear before us. The reason for this is to promote the free and expeditious exchange during discovery of all potentially relevant information in the proceeding without regard to whether it might include “valuable commercial information, including trade secrets or confidential marketing, cost, or financial information.” Based on our experience, this practice facilitates discovery of information considered by parties to be confidential, including information a non-party might deem confidential and which the parties could not voluntarily produce absent the protective order. As Staff states in its opposition to Public Counsel’s motion:

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.<sup>7</sup>

14 Protective orders are particularly useful in cases such as this one because information that may be relevant to our decisions, and which parties will seek during discovery, is held not only by one of the companies we regulate, but also by one or more third parties who become subject to our jurisdiction only in connection with the transaction at hand. These private entities may possess significant amounts of information that parties wish to examine during discovery, and from which they may glean data relevant for our consideration in an evidentiary hearing. However, because these entities are subject to our jurisdiction only for purposes of the transaction at issue that may or may not be consummated, they will be reluctant to produce any information they consider to be commercially sensitive, or not in their view directly relevant, absent a protective order that allows them to designate such information as confidential.

15 This sometimes leads to the designation of material as confidential when, in fact, it does not meet the standard entitling it to such protection.<sup>8</sup> Our protective orders and the statute recognizing the propriety of their use in Commission proceedings

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<sup>7</sup> Staff Response ¶ 8.

<sup>8</sup> See, e.g., *In re 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 (June 19, 2000) (hereafter “*U.S. West/Qwest Merger*”).

accordingly include provisions allowing any party to challenge the designation of information as confidential. In practice this rarely occurs, in part because the parties typically wish to use the unquestionably sensitive information in their testimony or briefs rather than information that arguably should not be entitled to confidential treatment. There is little likelihood of successfully challenging the former and no practical reason to challenge the latter because the information is often immaterial to the determination of any issue in the proceeding. Further, parties who routinely appear before the Commission generally recognize the importance of protective orders and do not wish to unnecessarily undermine their usefulness in creating an environment that promotes efficient discovery and the production of relevant evidence in contested cases.

- 16 Public Counsel accepted the benefits of having a protective order in place during the course of this proceeding and conducted wide-ranging discovery, but raised no formal challenge to the parties' designations of significant amounts of information as confidential until just before the evidentiary hearing commenced on August 25, 2008. Then, ostensibly prompted by a public records request filed by a private citizen nearly a month earlier,<sup>9</sup> Public Counsel filed on August 21, 2008, its motion challenging broadly, and indirectly, Joint Applicant's designation of certain information provided during discovery as highly confidential.<sup>10</sup>
- 17 Public Counsel's *direct* challenge is to the confidentiality of all information designated as highly confidential by its own witness, Mr. Steven G. Hill, in his prefiled response testimony, Exhibit No. [251] (SGH-1THC).<sup>11</sup> Mr. Hill's testimony is based in part on information designated as highly confidential when provided during discovery by Joint Applicants in six documents identified in a footnote to Public Counsel's motion.<sup>12</sup> It is the designation of these source documents as highly confidential that Public Counsel *indirectly* challenges. Public Counsel identified in

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<sup>9</sup> Public Counsel Motion ¶ 3.

<sup>10</sup> Public Counsel acknowledged that the timing of its motion, effectively one business day before the evidentiary hearing was scheduled to begin, was such that it was impractical to consider it until after the evidentiary hearing was concluded. *See* Public Counsel Motion ¶¶ 3-5.

<sup>11</sup> *Id.* ¶ 1.

<sup>12</sup> *Id.*, n.2.

footnote 2 the sources of some of the confidential information included in Mr. Hill's testimony, as follows:

"Private Placement Memorandum," Joint Applicants' Response to Public Counsel Data Request No. 3005 Attachment A. Information from this Memorandum appears on pages 33, 34, 36, and 37 [of Exhibit 251 THC].

"Presentation to the Investment Consortium," PSE Response to Public Counsel Data Request No. 3008 Attachment A. Information from this Presentation appears on pages 34 and 35 [of Exhibit 251 THC].

"Debt Agreement," Joint Applicants' Response to Public Counsel Data Request No. 3027. Information from this Agreement appears on pages 21, 39-41, 42-44, and 54 [of Exhibit 251 THC].

Joint Applicants' Supplemental Response to Public Counsel Data Request No. 3166. Information from this Supplemental Response appears on pages 47, 49, 50, 52, 53, 55, and 56 [of Exhibit 251 THC].

Joint Applicants' Response to Staff Data Request No. 1047. Information from this Response appears on page 35 [of Exhibit 251 THC].

"Letters from Moody's and Standard and Poor's," Joint Applicants' Response to ICNU Data Request No. 3.32, Attachments B, E, F. Information from these letters appears on pages 60, 61, 62-65, 67, and 69 [of Exhibit 251 THC].

18 Unfortunately, Public Counsel's motion was incomplete and lacked detail. For example, Public Counsel's motion stated at footnote 4 that certain information as to which PSE agreed to waive confidentiality could be found in "Appendices [sic] A." However, no appendix was attached to the motion. Indeed, it appears Public Counsel's filing was made before Appendix A was even prepared. Public Counsel filed Appendix A with its "corrected" motion five days later, on August 26, 2008. Neither Public Counsel's original motion nor its revised motion<sup>13</sup> identified by exhibit numbers where in the record of this proceeding the six documents described in

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<sup>13</sup> It is the revised motion that the Commission considers in this Order when referring to "Public Counsel's motion" or, simply, "the motion."



footnote 2 can be found<sup>14</sup> Even where Public Counsel refers to a page of Mr. Hill's testimony that includes confidential information taken from one of the cited documents, he does not identify the page in the document from which each item of confidential information was derived.<sup>15</sup>

19 Finally, Public Counsel's motion refers in footnote 2 to information on 28 pages of Mr. Hill's testimony, three of which (*i.e.*, 21, 39 and 40) currently include no confidential information, but does not refer to or include argument concerning an additional 10 pages of Exhibit 251 THC that include information marked highly confidential (*i.e.*, pages 20, 32, 38, 45, 46, 48, 57, 58, 59, 70). Because Public Counsel did not challenge the confidential designation of this information it follows that his motion must be denied with respect to these pages of Mr. Hill's testimony.

20 Turning to the 25 pages of Mr. Hill's testimony that include information that is at issue by virtue of Public Counsel's motion (*i.e.*, pages, 33-37, 41-44, 47, 49, 50, 52-56, 60-65, 67 and 69), we have conducted as thorough an *in camera* review as is possible under the circumstances. Our analysis below is in three parts. First, we will consider generally the arguments made by the parties. Next, we will consider the six documents cited by Public Counsel, to the extent they are in our record, in light of the arguments and the terms of the protective order. Finally, we will consider the individual items of information marked as confidential on the subject pages of Mr. Hill's testimony.

### ***B. General Arguments***

21 Under the terms of the protective order and consistent with the structure of RCW 80.04.095, Joint Applicants bear the burden to show the information they designated as confidential is entitled to that designation. Joint Applicants state that the documents cited by Public Counsel as the sources of confidential information redacted from the public version of Mr. Hill's testimony include:

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<sup>14</sup> Responses to data requests provided in discovery are not routinely filed with the Commission. Accordingly, if a document Public Counsel refers to was not made an exhibit in the proceeding or attached to his motion, it is unlikely it is in the Commission's possession as an official record.

<sup>15</sup> Several of the cited documents are more than 100 pages long.

- Information from an offering document developed in part using proprietary financial modeling tools and used by Puget Holdings and its investors to evaluate potential investments, including the acquisition of Puget Energy and PSE.
- Marketing, structuring, trade secrets and cost information.
- Information from an investor presentation containing material non-public information including financial projections relating to Puget Energy, a publicly traded company, as well as proprietary transaction structuring information, which are trade secrets, and the structure, terms and pricing of financing.
- Information from a memorandum prepared for marketing purposes relating to the financing of, and in connection with, a pending transaction. The information contains highly sensitive pricing, structuring, terms of financing, and trade secrets, as well as material non-public information, including financial projections relating to Puget Energy, a publicly traded company.

22 Joint Applicants point out that Puget Holdings and its investors have gone to great lengths to protect this information from public disclosure. The information has been treated as confidential by the Joint Applicants, their lenders, investors, consultants, and third parties whom they engaged to provide information necessary for the financial modeling and structuring of the acquisition, even prior to the submission of these documents to the Commission in this proceeding. The terms of the documents at issue contain confidentiality agreements and are marked as confidential.<sup>16</sup>

Joint Applicants argue that requiring disclosure of the challenged information would give competitors of Puget Holdings and its investor-members access to valuable commercial information regarding, among other things, how these investors:

- Use financial models to value companies that they seek to acquire.
- Structure acquisitions, including negotiation strategies used to obtain competitive terms from lenders.
- Structure and negotiate terms of non-public investment funds in order to attract investors.

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<sup>16</sup> See, e.g., Exh. No. 54HC, Attach A, B & C, p. 1; Exh. No. 54HC, Attach D, E & F, p. 6; Exh. No. 46HC, Attach A, p. 1; Exh. No. 50HC, Attach A, p. i; Exh. No. 47HC, Attach B, p. 106, sec. 10.08; Exh. No. 52HC, Attach A, p. 1; Exh. No. 49HC, Attach A, p. 2.

- Project future earnings and financial and operational metrics of the companies they seek to acquire.

- 23 According to Joint Applicants, if this information becomes public, competing financial investors will learn how the investors involved in the transaction proposed here value businesses through financial modeling, assemble potential investors and negotiate terms for their investments, negotiate favorable financing terms, and work with third-parties to structure acquisitions.
- 24 Joint Applicants argue that the release of this information would cause private harm to the investors in Puget Holdings as well as their financial advisor, Macquarie Capital (USA), Inc., banks involved in financing the proposed transaction, and other advisors and third parties who have provided information and opinions with the understanding that such information would be kept confidential. Joint Applicants emphasize that the subject information was designated as confidential among the entities by whom and for whom it was prepared, outside of this docket. Under separate confidentiality and non-disclosure agreements, the limited set of individuals allowed to review the information remain obligated to treat the documents as confidential and to not disclose them, or their contents, to third parties.
- 25 Joint Applicants additionally assert that the release of this information would cause private harm to PSE, which is a wholly owned subsidiary of Puget Energy, a publicly-traded company. As a publicly-traded company, Puget Energy is subject to U.S. Securities and Exchange Commission regulations including “Regulation Fair Disclosure.” Regulation Fair Disclosure requires that when any non-public, material information is released, it must be done in such a way that the general public has access to it at the same time as institutional investors and analysts. This prevents certain types of “insider” transactions. Under Regulation Fair Disclosure, even if information is released through no fault of the company to specific parties, the company must disseminate that information widely within 24 hours. This could negatively affect the price of Puget Energy’s common stock, to the company’s detriment.<sup>17</sup>

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<sup>17</sup> Joint Applicants’ Response, Exhibit B (Affidavit of Tom DeBoer) ¶¶ 13-15.

26 Public Counsel argues that even if the claim is true that the information at issue contains trade secrets because it consists of full modeling tools, compilations of financial information, marketing presentations, and transactions structuring information, Mr. Hill's testimony includes only excerpts from the documents on which it is based. Public Counsel contends the Joint Applicants must show specifically how public disclosure of the information 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. According to Public Counsel:

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.*<sup>18</sup>

27 Considering the nature of the individual documents on which Mr. Hill relied in developing the confidential portions of his testimony, and the sensitive information he takes from those documents, we do not agree with Public Counsel's analysis. It does not seem in the slightest appropriate that we establish a standard whereby we test in the public arena the mere possibility that partial disclosure of the confidential information won't do as much harm as full disclosure. Once the proverbial horse has left the barn, its unbridled excursion through the market has done its harm and cannot be undone. We can find nothing in the law or equity to support Public Counsel's suggestion that disclosure turns on finding some degree of private loss that would be acceptable.

28 Turning last to the dispute concerning the significance, if any, of the Commission's statements about the public policy supporting disclosure of confidential information in the *U.S. West/Qwest* order cited above,<sup>19</sup> Public Counsel concedes the point that public interest does not trump legal requirements, stating:

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<sup>18</sup> Public Counsel Reply at 3-4 (emphasis added).

<sup>19</sup> *See supra* fn. 8.

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.<sup>20</sup>

Indeed, this is true, and while we recognize here as in the earlier case that the context in which this dispute arose is one that starts with the premise that public disclosure is favored, the dispute must be resolved in accordance with the law and the terms of our protective order. It is in this context that we consider next the individual documents on which Mr. Hill relied and, following that, the specific information he included as part of his testimony.

*C. The Six Documents*

29 **Document 1:** The first document is identified as “Private Placement Memorandum, Joint Applicants’ Response to Public Counsel Data Request No. 3005 Attachment A,” which turns out to be Exhibit 50 HC, tendered by Public Counsel as a cross-examination exhibit for Mr. Leslie. This 102 page document was prepared by Macquarie Infrastructure Partners. It is, by its terms, a confidential document provided on that basis to prospective investors who might consider purchasing limited partnership interests in one or more of the three unlisted funds that together constitute Macquarie Infrastructure Partners, one of the principals in Puget Holdings. Everyone to whom Macquarie provided this private placement memorandum was required to agree to keep confidential all information it contained that was not already in the public domain. In other words, as Joint Applicants state in their response to Public Counsel’s motion:

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<sup>20</sup> Public Counsel Reply at 4.

This Highly Confidential Information was designated as confidential separate and apart from this proceeding, and the parties to these agreements are obligated to treat these documents as confidential by confidentiality and/or non-disclosure agreements in the documents.

- 30 The purpose of this document is marketing. It provides detailed insights into the marketing strategies of members of the Macquarie group of investment funds including minimum investment requirements and other terms of investment, fees, fund management, returns, performance, investment strategies and similar classes of information. It appears from the portions of Mr. Hill's testimony cited in the above-referenced footnote 2 to Public Counsel's motion that the information he extracted falls into the class of information the protective order is meant to protect from public disclosure. Disclosure of the private placement memorandum or specific terms and data it includes could cause significant competitive harm to Macquarie by giving its competitors insights into how Macquarie assembles potential investors and negotiates terms for their investments.
- 31 WAC 480-07-160(2) and RCW 80.04.095 define confidential information to include "valuable commercial information, including trade secrets or confidential marketing, cost, or financial information..." Here, the highly confidential information is properly designated because it (1) contains valuable trade secrets; and (2) contains confidential marketing, cost and financial information that, if disseminated imposes a highly significant risk of competitive harm and truly might impose a serious business risk to Macquarie.
- 32 The information included in Exhibit 50 HC, the confidentiality of which Public Counsel challenges indirectly, meets the requirements of the protective order that the designation of information as highly confidential is limited to information that, if disclosed, "imposes a highly significant risk of competitive harm to the disclosing party or third parties," and that "truly might impose a serious business risk if disseminated without the heightened protections."

33 **Document 2:** The second document, described by Public Counsel as “Presentation to  
the Investment Consortium,” PSE Response to Public

34 Counsel Data Request No. 3008 Attachment A,” is Exhibit 49 HC, also tendered by  
Public Counsel as a cross-examination exhibit for Mr. Leslie. This 80 page  
document, like Exhibit 50 HC, was prepared as a strictly confidential presentation to  
potential investors concerning the transaction at issue in this proceeding.

35 In addition to disclosing Macquarie’s marketing strategies and detailed information  
concerning a pending transaction, this document includes a significant amount of  
detailed financial information about Puget Energy and Puget Sound Energy, including  
projections concerning future performance. It appears this is the very information Mr.  
Hill extracted from the document and included in his testimony. This is exactly the  
kind of information the protective order is meant to protect from public disclosure,  
while allowing the parties to the proceeding unrestricted access to it for purposes of  
developing their testimony and exhibits.

36 **Document 3:** Public Counsel describes the third document as: “Debt Agreement,”  
Joint Applicants’ Response to Public Counsel Data Request No. 3027.” Public  
Counsel tendered the non-confidential part of this data request response as Exhibit 86  
HC, but did not tender “Attachment A,” which is the part designated as highly  
confidential. It appears, however, that this confidential document is in the record as  
part of Exhibit 51 HC, tendered by Public Counsel as a cross-examination exhibit for  
Mr. Leslie. Exhibit 51 HC is Joint Applicants’ response to Public Counsel Data  
Request No. 3020 and includes as “Attachment A” a highly confidential document  
described as “Confidential Information Memorandum” concerning “\$3,575,000,000  
Senior Credit Facilities January 2008.”

37 This 82 page document is confidential by its own terms, as indicated at page 2, a  
Special Notice Regarding Publicly Available Information, which states:

This confidential information memorandum may contain material non-  
public information concerning the company or its securities. By  
accepting this confidential information memorandum, the recipient  
agrees to use any such information in accordance with its compliance

policies, contractual obligations and applicable law, including federal and state securities laws.

- 38 It appears from the references to Mr. Hill's testimony in footnote 2 of Public Counsel's motion, and from Attachment A to the motion, that a significant part of the information Mr. Hill took from this document and designated in his testimony as highly confidential is not, in fact, asserted by Joint Applicants to be confidential at all (*e.g.*, Joint Applicants do not currently assert confidentiality as to any of the information on pages 39 and 40, and only a part of the information on page 41 of Mr. Hill's testimony).
- 39 The remaining information is again the kind of information the protective order is meant to protect from public disclosure. The document is essentially a marketing tool used by Macquarie and its partners to secure the debt financing that is part of this pending transaction. It includes financial projections, investment considerations, and the investors' perspectives on the retail energy business and the industry. Public disclosure of this information could compromise the ability of the investors, Puget Energy and/or PSE to access the credit markets now or in the future on the most favorable terms, in competition with other, similarly situated companies seeking potentially limited capital in those markets.
- 40 **Document 4:** Public Counsel describes the fourth document as: "Joint Applicants' Supplemental Response to Public Counsel Data Request No. 3166." This is Exhibit 47 HC, another Public Counsel cross examination exhibit for Mr. Leslie. It consists of 57 pages but is, in fact, only an excerpt from the full data request response. Although Public Counsel cites to seven pages of Exhibit 251 THC that include information ostensibly taken from this data request response, there is only one citation to it in Mr. Hill's testimony. Although it is not possible to be certain given the incompleteness of Public Counsel's motion and the spare citation in Mr. Hill's testimony, it appears some or all of these data were derived from parts of the data request response that Public Counsel did not tender. The Commission, however, obtained these two lengthy loan documents from Joint Applicants in response to



Bench Request 24 and thus was able to examine them in connection with its consideration of Public Counsel's motion.<sup>21</sup>

41 These loan documents include commercially sensitive financial information, including pricing, covenants and other credit terms that should be afforded confidential treatment, particularly because the information relates to a pending transaction that may or may not be consummated. Disclosure of such information could do substantial harm to Puget Holdings, Puget Energy and/or PSE if the transaction is not approved and the Company is required to explore alternative options, including possibly a different purchaser. The detailed terms of these credit agreements, if disclosed, could impair the companies' respective abilities to obtain other or additional credit in the future on the most favorable terms.

42 **Document 5:** Public Counsel describes the fifth document as: "Joint Applicants' Response to Staff Data Request No. 1047." This is Exhibit 52 HC. It is the financial model used by the Investor Consortium in the debt syndication process in late January 2008. Public Counsel states in footnote 2 to its motion that Mr. Hill relied on this document for information that appears on page 35 of his testimony. All of the seven items included there are either financial data or related directly to financial data, including projections of future results, or are data concerning fees Macquarie charges to its investors.

43 The financial model is proprietary and should not be disclosed to competitors. Release of this model into the public sector could cause significant competitive harm to Puget Holdings, Puget Energy, PSE and the investors by showing how they evaluate and test assumptions concerning potential acquisitions, and how they develop information for presentation to potential creditors when seeking debt in connection with infrastructure transactions. These data are the types of information the protective order is meant to protect from public disclosure.

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<sup>21</sup> This was a significant undertaking. The Credit Agreement among Puget Merger Sub Inc, as Borrower, Barclays Bank PLC, as Facility Agent, and The Lenders Party (the "Holdco Credit Agreement") includes 342 pages. The Credit Agreement among Puget Sound Energy Inc, as Borrower, Barclays Bank PLC, as Facility Agent, and The Lenders Party (the "Opco Credit Agreement") includes 193 pages.

44 **Document 6:** The sixth and final document Public Counsel identifies as a source of highly confidential information included in Mr. Hill’s testimony is described as: “Letters from Moody’s and Standard and Poor’s,” Joint Applicants’ Response to ICNU Data Request No. 3.32, Attachments B, E, F.” This 36 page document is Exhibit 54 HC. These documents consist of evaluations of a pending transaction by leading credit rating agencies. The letters, by their terms, include strict disclosure and use limitations. The letters disclose potential ratings actions depending on various scenarios concerning the proposed transaction, but are merely “indicative” and not definitive. Release of this information into the public domain would violate the terms under which the ratings agencies agreed to develop it and could harm Puget Holdings, Puget Energy and PSE during the pendency of this transaction and later, if the transaction is consummated and one or more of these companies seeks to refinance all or a portion of its debt.

***D. Individual Data***

45 We turn last to the most detailed level of our *in camera* review; consideration of the specific information redacted from Mr. Hill’s testimony.

46 **Page 33:** The redacted information on page 33 is a quote that carries over from page 32 of Mr. Hill’s testimony. The quote is taken from Document 1, discussed in the preceding section. The quoted information discloses a part of Macquarie’s business strategy as it relates to potential investors in Macquarie Infrastructure Partners. Public disclosure of this information could cause significant competitive harm to Macquarie by giving its competitors insights into how Macquarie assembles potential investors and negotiates terms for their investments. The quoted information includes discussion of potential strategies concerning the management of Macquarie’s investments that may be employed in the future. The disclosure of these strategies could cause significant competitive harm to Macquarie and its investors if known to third parties, including potential counter-parties, who might be involved in the execution of one or more of these strategies in the future. This information is entitled to continued designation as “highly confidential” under the terms of the protective order and RCW 80.04.095.

- 47 **Page 34:** Public Counsel identifies the redacted information on page 34 as having been taken from Documents 1 and 2. However, it appears on close examination that Document 2 is the source for all of the redacted information on this page of Mr. Hill’s testimony because the information all concerns the proposed investment in PSE. Document 2 is a presentation to potential investors concerning the possible acquisition of PSE. Document 1 is a more general presentation to investors, is not tied to the proposed acquisition of PSE and, indeed, never mentions this specific acquisition as a possibility. The redacted information on page 34 consists of specific projections of future performance including annual yield, internal rate of return, revenue growth, operating costs and changes in equity value. This information concerns a pending transaction that would take private a corporation that currently is publicly traded. Disclosure of this information could affect the performance of Puget Energy stock during the pendency of the transaction and, to comply with SEC regulations, would have to be widely disseminated if not held confidential in the context of this proceeding and otherwise. Public disclosure of this commercially sensitive information poses a significant business risk to Puget Energy and PSE, as well as to the members of the Investor Consortium who are participating in Puget Holdings LLC’s proposed acquisition of those companies. This information is entitled to continued designation as “highly confidential” under the terms of the protective order and RCW 80.04.095.
- 48 **Page 35:** According to Public Counsel, the redacted information on page 35 is taken from Documents 2 and 5. Much of this information is of the same character as discussed in the preceding paragraph and is entitled to continuing designation as highly confidential for the same reasons discussed there. The balance of the redacted information concerns certain fees Macquarie charges to its investors (not the members of the Investor Consortium). Some of the redacted information is taken from Public Counsel cross examination Exhibit 52 HC, a run of the financial model used in the debt syndication process undertaken in connection with the proposed transaction in late January 2008. The model and its contents are proprietary. A Macquarie company retains all intellectual property rights to the model, excluding any third party intellectual property rights upon which it depends. The model and its contents were provided to potential lenders and investors subject to individual confidentiality agreements that include requirements for tight control over the disclosure of

information even within the recipient organizations. Public disclosure of this information could cause significant competitive harm to Macquarie by giving its competitors insights into how Macquarie assembles potential investors and negotiates terms for their investments and arranges for credit in connection with its investment activities. This information is entitled to continued designation as “highly confidential” under the terms of the protective order and RCW 80.04.095.

49 **Page 36:** The redacted information on page 36 is taken from Document 1. The information discloses specific terms proposed by Macquarie to potential investors and thus reveals in part Macquarie’s strategies in attracting capital for its investments. Public disclosure of this information could cause significant competitive harm to Macquarie by giving its competitors insights into how Macquarie assembles potential investors and negotiates terms for their investments. This information is entitled to continued designation as “highly confidential” under the terms of the protective order and RCW 80.04.095.

50 **Page 37:** The redacted information on page 37 is taken from Document 1. It consists of disclosures that inform potential investors concerning risks and potential conflicts of interests associated with any investment they might make in Macquarie Infrastructure Partners (not investment in Puget Energy or PSE, the acquisition of which is beyond the subject matter of Document 1). Public disclosure of this information could cause significant competitive harm to Macquarie by giving its competitors insights into how Macquarie assembles potential investors and negotiates terms for their investments. This information is entitled to continued designation as “highly confidential” under the terms of the protective order and RCW 80.04.095.<sup>22</sup>

51 **Pages 41- 44, 54:** The redacted information Mr. Hill included from Document 3 at pages 41 – 44 of his testimony concerns the proposed collateral for certain credit facilities that were being negotiated with banks in connection with the pending transaction, projections concerning debt ratings, debt covenants, lock-up provisions, treatment of cash flow and capital expenditures to be funded, in part, by the subject

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<sup>22</sup> We note that this information carries over to page 38 of Mr. Hill’s testimony, though Public Counsel’s motion fails to identify the information on page 38 as being subject to his challenge. In any event, the information on page 38 is equally entitled to continuing treatment as being highly confidential.

debt. In other words, the information Public Counsel challenges consists of the detailed terms and requirements of the credit facilities that are the subject of the confidential memorandum. The subject information also discloses the assumptions underlying various financial projections, tests of those assumptions, and outputs from a proprietary financial model that uses these assumptions. Public disclosure of the terms and requirements of the proposed credit facilities, such as coverage ratios and lock-up provisions, could affect the companies' ability to renegotiate this debt in the future thus causing significant commercial harm and perhaps having a detrimental effect on PSE's cost of debt. Public disclosure of the functions and assumptions in Macquarie's financial model could cause competitive harm to Macquarie in credit markets and could give its direct competitors information that would disadvantage Macquarie in negotiating future transactions. This information is entitled to continued designation as "highly confidential" under the terms of the protective order and RCW 80.04.095.

52 **Pages 47, 49, 50, 52, 53, 55 and 56:** The confidential information Mr. Hill took from the credit facility agreements the Commission obtained via Bench Request 24 and included in his testimony at these pages is very similar to the information discussed in the preceding paragraph. Indeed, these credit facility agreements followed from the confidential information memorandum identified in this Order as Document 3 and reflect the terms and requirements discussed in the confidential memorandum, albeit with some changes. In short, the information Public Counsel challenges consists of the detailed terms and requirements of the credit facilities. As in the case of the confidential information memorandum discussed above, public disclosure of the terms and requirements of the credit facilities could affect the future renegotiation of Puget Energy and PSE's debt thus causing significant commercial harm and perhaps having a detrimental effect on PSE's cost of debt. For example, if prospective lenders know the detailed assumptions upon which existing debt was negotiated, such as PSE's expected returns, costs and interest margins, this could give them an advantage if PSE seeks to refinance the debt using different assumptions.<sup>23</sup> This information is entitled to continued designation as "highly confidential" under the terms of the protective order and RCW 80.04.095.

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<sup>23</sup> See, e.g., pages 52, 53 and 56 of Mr. Hill's testimony.

53 **Pages 60-65, 67 and 69:** The redacted information on these pages is taken from Document 6, which is Exhibit 54 HC. The exhibit includes six private letter opinions from Moody’s Investors Service and Standard & Poor’s. This information is confidential by its terms; the letters include strict limitations on dissemination and disclosure. The information expresses the opinions of these ratings agencies concerning the possible impact on Puget Energy and PSE’s debt ratings under various scenarios related to the proposed transaction. In addition, the information reflects information concerning possible future dividends from PSE to Puget Energy. Some of the redacted information includes Mr. Hill’s calculations based on data provided to the rating firms by Macquarie. Disclosure of the information could affect the Puget Energy’s and PSE’s ability to obtain credit on favorable terms during the pendency of the transaction and in the future. Public disclosure of this commercially sensitive information poses a significant business risk to Puget Energy and PSE. This information is entitled to continued designation as “highly confidential” under the terms of the protective order and RCW 80.04.095.

*E. Conclusion*

54 Thirty-eight pages of Mr. Hill’s testimony initially included one or more pieces of information designated as highly confidential. Public Counsel’s motion directs us to 28 of these pages, 25 of which continue to include confidential information. Thus, there are 10 pages of Exhibit 251 THC that include information designated as confidential, but which Public Counsel does not specifically challenge. Considering this, and the fact that Public Counsel challenges the confidential designation of all of the information highlighted in Mr. Hill’s testimony, we find Public Counsel’s motion deficient on its face. We deny Public Counsel’s motion with respect to the redactions on pages 20, 32, 38, 45, 46, 48, 57, 58, 59, 70 of Exhibit 251 THC because they are not expressly challenged by Public Counsel.

55 For the redactions Public Counsel does expressly challenge, the Commission has undertaken *in camera* review of the information highlighted in Mr. Hill’s testimony and designated highly confidential, and the documents Public Counsel cites as the sources of this information. The Commission has done its best to consider Public Counsel’s challenges with the greatest level of granularity possible under the circumstances. At that level, as discussed above, we find all of the information

properly designated as confidential under the terms of the protective order, our rules, and RCW 80.04.095. The confidentiality of this information should be maintained to avoid the risk of significant competitive and other commercial harm to Joint Applicants and to third parties who are not direct participants in this proceeding. Public Counsel' motion should be denied.

**ORDER**

56 THE COMMISSION DENIES the “(Corrected) Public Counsel Motion Challenging the Confidentiality of Certain Materials Provided in Discovery by Joint Applicants.”

Dated at Olympia, Washington, and effective November 12, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner