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July 6, 2004

Via Facsimile, Electronically, and U.S. Mail

Ms. Cheryl Walker
Oregon Public Utility Commission
P.O. Box 2148
Salem OR 97308-2148

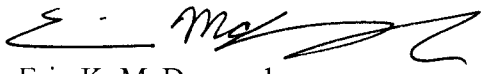
Re: In the Matter of Oregon Electric Utility Company, LLC, et al., Application for Authorization to Acquire Portland General Electric Company
Docket No. UM 1121

Dear Ms. Walker:

Enclosed please find an original and six copies of the Brief on In Camera Review on behalf of the Industrial Customers of Northwest Utilities in the above-captioned Docket.

Please return a file-stamped copy of this document in the self-addressed, stamped envelope provided. Thank you for your assistance.

Sincerely,



Erin K. McDonough

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Brief on In Camera Review on behalf of the Industrial Customers of Northwest Utilities upon the parties, shown below, on the official service list for Docket No. UM 1121, by causing the same to be electronically served on all parties whom have an email address on the official service list, and by U.S. Mail, postage-prepaid, to those parties who do not have an email address on the official service list.

Dated at Portland, Oregon, this 6th day of July, 2004.

Erin K. McDonough

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1121

In the Matter of OREGON ELECTRIC UTILITY COMPANY, LLC, et al., Application for Authorization to Acquire Portland General Electric Company	)	THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES' BRIEF ON *IN CAMERA* REVIEW OF DISPUTED MATERIALS

INTRODUCTION

Pursuant to the Stipulation Regarding Deposition ("Stipulation") executed by the Industrial Customers of Northwest Utilities ("ICNU") and Portland General Electric Company ("PGE" or the "Company") on July 2, 2004, ICNU submits this Brief on *In Camera* Review of Disputed Materials in Oregon Public Utility Commission ("OPUC" or the "Commission") Docket No. UM 1121. ICNU requests that Administrative Law Judge ("ALJ") Logan determine that PGE has: 1) inappropriately designated as confidential certain materials provided in response to ICNU data request ("DR") 5.1;[1/] and 2) unjustifiably redacted or withheld certain information from the response to DR 5.1 as non-responsive or subject to the attorney-client privilege, work product doctrine, and/or joint defense. These determinations are appropriate for the following reasons:

1. PGE designated every document provided in response to DR 5.1 as confidential even though many documents contain information that is publicly available or known in the public domain. PGE has assigned confidentiality to these

[1/] ICNU DR 5.1 states: "Please provide copies of all e-mail and other communications regarding the proposed transaction that was sent to or from Peggy Fowler since July 1, 2002."

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documents on the basis that they were sent or received by the Company's Chief Executive Officer ("CEO") rather than according to the definition of confidential information under the standard protective order in this Docket;

2. PGE has redacted or withheld a large volume of materials in response to DR 5.1 on the basis of the attorney-client privilege, work product doctrine, and/or joint defense. PGE's discussion of these privileges in its Brief on *In Camera* Review ("PGE Brief") reveals that the Company has applied these doctrines out of context and in an overly broad manner. The ALJ should apply a reasonable interpretation of these doctrines and order PGE to produce all discoverable information; and

3. PGE's claim that certain information was withheld on the basis that it is non-responsive should be viewed in context. DR 5.1 was a broad request for all e-mail and other communications "regarding the proposed transaction . . ." and the OPUC's discovery policies favor disclosure of all materials that are reasonably calculated to lead to admissible evidence, not just those that are relevant. Under these circumstances, PGE should not be permitted to withhold discoverable information merely because it is sensitive, embarrassing, or damaging to the Company's position.

The resistance to disclosure in this Docket has been evident from the number of discovery disputes that the ALJ has already resolved at this early stage of the case. ICNU submitted DR 5.1 in advance of Ms. Fowler's deposition in order to gain a better understanding of Ms. Fowler's role in the proposed transaction. The ALJ recently denied a request by PGE to prevent the deposition of Ms. Fowler altogether. The Company should not now be permitted to limit ICNU's ability to explore permissible areas of inquiry by withholding information that is properly discoverable.

BACKGROUND

On June 10, 2004, ICNU submitted DR 5.1 to PGE, requesting "copies of all e-mail and other communications regarding the proposed transaction that was sent to or from Peggy Fowler since July 1, 2002." The due date for DR 5.1 was June 24, 2004.[2/] After the close

[2/] ICNU sent DR 5.1 as part of ICNU's fifth set of DRs to PGE in Docket No. UM 1121. PGE provided partial responses to the fifth set of DRs on June 24, 2004, but did not provide a response to DR 5.1.

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of business on Friday June 25, 2004, PGE provided ICNU with a partial response to DR 5.1. PGE provided additional e-mails in response to DR 5.1 on Sunday June 27, 2004. PGE designated all documents provided in response to DR 5.1 "confidential." PGE also stated that it had redacted certain information in the e-mails on the basis that it was non-responsive or subject to the attorney-client privilege, work product doctrine, and/or joint enterprise. PGE only provided e-mail communications to ICNU in response to DR 5.1.

On June 28, 2004, counsel for PGE and counsel for ICNU met, and ICNU stated its objections to the Company's response to DR 5.1. The parties agreed to reschedule Ms. Fowler's deposition as a result of the dispute but were unable to reach agreement on ICNU's objections. On June 29, 2004, ICNU sent a letter to PGE stating ICNU's specific objections to the redactions and confidential designations and reasserting a request that PGE provide ICNU with a privilege log.[3/] On June 30, 2004, PGE provided ICNU with a privilege log, identifying numerous e-mail communications that were withheld from the Company's response to DR 5.1 on the basis of attorney-client privilege, work product doctrine, or joint defense.

ICNU and PGE conferred a number of times regarding ICNU's objections to the response to DR 5.1 but were unable to reach agreement. As a result, on July 2, 2004, ICNU and PGE executed the Stipulation, which establishes a process by which the ALJ may resolve this dispute on an expedited basis. Pursuant to that Stipulation, ICNU and PGE agreed that PGE would provide the materials related to the dispute ("Disputed Materials") to the ALJ, and the ALJ would review those materials to determine the following:

[3/] ICNU requested on June 25, 2004, that PGE provide a privilege log of all information withheld from any ICNU DR on the basis of attorney-client privilege.

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a) whether information redacted by PGE is properly non-responsive to ICNU Data Request 5.1;

b) whether materials (including some redacted material) is properly protected by Attorney Client, Attorney Work Product or Joint Defense Privileges; and

c) whether material designated confidential by PGE is properly confidential under the Protective Order, Order 04-139.

Stipulation at 1-2.

ARGUMENT

A. PGE's Designation of all Materials Provided in Response to DR 5.1 as Confidential is Not Warranted under the Protective Order

PGE designated every document provided in response to DR 5.1 as confidential even though many of the documents are publicly available and do not contain trade secrets or other commercially sensitive information. The protective order in this docket defines "confidential information" as "information that falls within the scope of ORCP 36(C)(7)," which includes "a trade secret or other confidential research, development, or commercial information." The Oregon Court of Appeals and the Commission have adopted the following six-part test to determine whether information is a trade secret or confidential commercial information:

1. The extent to which the information is known outside the business;

2. The extent to which it is known by employees and others involved in the business;

3. The extent of measures taken to safeguard the secrecy of the information;

4. The value of the information to the business or its competitors;

5. The amount of effort or money expended by the business in developing the information; and

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6. The ease or difficulty with which the information could be properly acquired or duplicated by others.

Citizens' Util. Bd. v. OPUC, 128 Or. App. 650, 658-59 (1994) ("CUB"); Re Investigation Into the Portland Extended Area Service Region, OPUC Docket No. UM 261, Order No. 91-958 at 7 (July 31, 1991). Applying the CUB factors to many of the Disputed Materials in this case reveals that most of the confidential designations are unwarranted.[4/]

PGE explains its reasoning for designating every e-mail provided in response to DR 5.1 confidential as follows:

> By their very nature, most e-mails with PGE's CEO and President are confidential. E-mails are private correspondence and not publicly available. Many of the communications refer to drafts and proposals containing numbers and concepts, which is confidential commercial information.

PGE Brief at 14-15. PGE's rationale does not reflect the definition of confidential information under the protective order or the implications of the CUB factors stated above. Instead, PGE apparently applied the confidential designation on the basis that the e-mails at issue were sent or received by the Company's CEO, and communications by a CEO are confidential by nature.

The "nature" of some of the communications at issue belies PGE's claims. For instance, many of the e-mails address newspaper articles, press releases, or other documents that were publicly distributed, including documents that ICNU created and distributed to the service list in this Docket. See Disputed Materials, Bates Nos. 202932-934; 203214-216; 203239-241; 203254-258; and 203245-247. Such communications and documents are not properly designated confidential merely because they were sent or received by Ms. Fowler. Neither the protective

[4/] ICNU does not challenge the confidential designation of certain documents presented to the PGE Board of Directors, which are marked with bates numbers: 1) 202980–203010; 2) 203013–038; and 3) 203039–066.

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order nor the CUB factors indicate that the nature of the originator or the recipient of the information confers confidential status.

Furthermore, PGE also appears to justify the confidential designation for certain documents on the basis that they are in "draft" form. PGE Brief at 14-15. Regardless of whether certain of the Disputed Materials relate to draft versions of a document, those materials must include "a trade secret or other confidential research, development, or commercial information" to warrant confidential status. Neither the protective order nor the CUB factors include whether the information is contained in a document marked "draft" in defining confidential information.[5/] ICNU urges the ALJ to rely on the CUB factors to determine whether the "draft" documents provided in response to DR 5.1 are properly designated confidential.[6/]

B. PGE Has Applied an Overly Broad Interpretation of the Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Privilege

1. Attorney-Client Privilege Applies to Communications Made to Facilitate the Rendition of Legal Services

PGE's Brief does not explain the manner in which the Company applied the attorney-client privilege to either redact or withhold information in response to DR 5.1. In fact, the discussion of the attorney-client privilege in PGE's Brief consists of little more than citation of the rule that codifies the privilege and identification the various lawyers who could be named

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5/ The OPUC has previously ordered disclosure of draft documents over objections that the information was non-discoverable attorney work product. Re U.S. West Communications, Inc., OPUC Docket No. UM 823, Order No. 97-248 (Nov. 3, 1997).

6/ The protective order provides that "[t]o the extent practicable, the party shall designate as confidential only those portions of the document that fall within ORCP 36(C)(7)." PGE's response to DR 5.1 reveals that the Company made no attempt to identify only those portions of certain e-mails that are confidential. In the event that the ALJ determines that only certain portions of a communication are confidential, ICNU urges the ALJ to order PGE to limit its confidential designation to that material only, not the entire page.

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in the Disputed Materials. This discussion indicates, however, that PGE's interpretation of the privilege is overly broad.

The attorney-client privilege is codified in Oregon Evidence Code ("OEC") 503, which states: "[a] client has a privilege to refuse to disclose . . . confidential communications made for the purpose of facilitating the rendition of professional legal services to the client" between the client or the client's representative and the lawyer or the lawyer's representative. OEC 503(2)(a). In order to successfully invoke the attorney-client privilege, the person seeking to exclude the evidence must show: 1) the communication is confidential within the meaning of OEC 503(1)(b); 2) the communication was made for the purpose of facilitating the rendition of professional legal services to the client; and 3) the communication was between persons described in OEC 503(2)(a) through (e). State ex. rel. OHSU v. Haas, 325 Or. 492, 501 (1997). Confidential communication is defined as "a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonable necessary for the transmission of the communication." OEC 503(1)(b).

PGE emphasizes that the attorney-client privilege applies to communications "within the same entity" and that, for purposes of the privilege, communications with Enron should be considered "within the same entity" as well. PGE Brief at 5. The element of the privilege that is noticeably absent from PGE's discussion, however, is that the communication must be made "for the purpose of facilitating the rendition of professional legal services to the client." PGE lists no less than ten lawyers "representing" or "involved in communications with PGE"; however, the listing of any of these lawyers on a particular e-mail is of no consequence if

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the communication is not made for the purpose of providing legal advice. PGE Brief at 5-6; OEC 503(2). Furthermore, a non-legal communication is not subject to attorney-client privilege merely because a lawyer has been included on an e-mail. See Roger S. Haydock & David F. Herr, Discovery Practice 137 (2d ed. 1988). Many of the communications identified in the privilege log as attorney-client privileged appear to be e-mails that either do not involve legal advice or merely are communications on which a lawyer was copied. Such communications do not invoke the privilege.

2. The Work Product Doctrine Does Not Protect Against Disclosure of all Communications Regarding the Proposed Transaction

PGE claims that many of the documents sought by ICNU are subject to the "work product privilege" in that they were prepared in anticipation of litigation. PGE Brief at 6. PGE's claims regarding the work product doctrine, which is not a "privilege" in the sense of the attorney-client privilege, are similarly overly broad.

Unlike materials that are subject to the attorney-client privilege, the Oregon Rules of Civil Procedure ("ORCP") do not prohibit discovery of all materials considered attorney "work product." ORCP 36B(3) permits discovery of documents or other tangible items "prepared in anticipation of litigation or for trial" upon a showing of substantial need and an inability to obtain a substantial equivalent without undue hardship. However, the courts are required to protect against disclosure of mental impressions, conclusions, or legal theories of an attorney. ORCP 36B(3). The work product doctrine does not protect documents prepared in the regular course of business unless those documents also were prepared in anticipation of litigation. United Pac. Ins. Co. v. Trachsel, 83 Or. App 400, 404 (1987). In addition, the entity asserting the work product doctrine must demonstrate that there was a reasonable anticipation of

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litigation at the time the document was created based on the totality of the circumstances. Restatement (Third) of the Law Governing Lawyers § 87 (2000).

PGE emphasizes that the work product doctrine extends to administrative proceedings and to materials produced by non-lawyers; however, PGE's Brief does not demonstrate that the communications at issue fit within the work product doctrine. PGE claims that many of the Disputed Materials are protected work product because they "contain impressions and subjective judgments and communications" regarding this proceeding and others before the Federal Energy Regulatory Commission and the Securities Exchange Commission. PGE Brief at 6-7. Mere "communications" regarding the proposed transaction do not fall within the protections of the work product doctrine. Indeed, all e-mails responsive to DR 5.1 would be work product under such a broad interpretation. Similarly, PGE does not explain how "subjective judgments" fall within the work product rule if they do not reflect the mental impressions, conclusions, or legal theories of PGE's attorneys.

Determinations of work product in this case also require a distinction between general communications or impressions about issues surrounding the proposed transaction, PGE, Texas Pacific Group ("TPG"), and Enron, and impressions that relate to the unidentified anticipated administrative proceedings. General observations regarding the status of affairs at PGE or Enron are not work product. Finally, the ALJ must determine some point at which the anticipated litigation was reasonably certain. The work product doctrine does not apply to materials created when there was a mere potential for litigation—there must be a reasonable anticipation of litigation. Restatement (Third) of the Law Governing Lawyers § 87 (2000). For the purposes of this proceeding, it appears that the OPUC and FERC litigation regarding the

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proposed transaction was reasonably certain at the time that TPG and Enron executed the Stock Purchase Agreement.

3. PGE Has Not Demonstrated that the Joint Defense Privilege Applies in this Proceeding or in the Absence of the Attorney-Client Privilege

PGE has withheld certain e-mail communications on the basis of the "joint defense/common interest privilege" but the Company does not demonstrate that this rule applies in this proceeding. In fact, PGE's only explanation for asserting this privilege is to say that it applies to matters "of common interest." PGE Brief at 7. PGE's reliance on the joint defense privilege in the context of DR 5.1 is misplaced.

The joint defense privilege, also known as the "common interest rule," is an extension of the attorney-client privilege and acts to protect the waiver of the attorney-client privilege when attorneys are acting in concert to assert the common interests of their clients. PGE Brief, Exhibit C at 1-2. The rationale behind the rule is that persons with common interests in a proceeding should be able to coordinate their positions without destroying the attorney-client privilege. PGE Brief, Exhibit C at 2. Thus, "communications by a client to his own lawyer remain privileged when the lawyer subsequently shares them with co-defendants for purposes of a common defense." Waller v. Financial Corp. of Am., 828 F.2d 579, 583 n.7 (9th Cir. 1987) (internal quotations omitted). The joint defense privilege "is not an independent basis for privilege, but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party." Cavallaro v. U.S., 284 F.3d 236, 250 (1st Cir. 2002) (internal quotations omitted); PGE Brief, Exhibit C at 2. In order to assert the joint defense privilege: 1) the document must be subject to the attorney-client privilege; and 2) the document must be shared by co-defendants for the purposes of a common defense.

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PGE's claims that certain of the Disputed Materials are privileged based on joint defense are improper. First, PGE has not demonstrated that the Company and TPG and/or Enron share common interests for the purposes of the rule. For example, PGE and TPG do not share the same party status in this Docket; TPG is an Applicant but PGE is an intervenor. Furthermore, PGE has not demonstrated that TPG, PGE, and Enron share common interests on all issues.

Second, the initial privilege log sent by PGE to ICNU asserted the joint defense privilege without a related claim of attorney-client privilege. The privilege log included in PGE's Brief now adds claims of attorney-client privilege and the work product doctrine to legitimize the claim of joint defense.

Finally, PGE cites the materials attached to its brief to claim that the joint defense privilege also extends from the work product doctrine, but the materials cited by PGE state no such connection. PGE Brief at 7. In fact, the materials that PGE attached to its Brief state that the foundation of the joint defense privilege is the attorney-client privilege. PGE Brief, Exhibit C at 1-2. Under these circumstances, the ALJ should review all material to which PGE has applied the joint defense privilege to determine if they are subject to the attorney-client privilege and to ensure that they involve the joint litigation of this proceeding.

C. PGE's Claim that Certain Materials are Non-responsive Should be Viewed in Context

PGE argues that non-responsive materials should be withheld or redacted from the Company's response; however, the Company's view of what information is non-responsive must be viewed in context. DR 5.1 was a broad request for all communications sent to or from Peggy Fowler "regarding the proposed transaction" since July 1, 2002. Furthermore, the OPUC

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discovery rules permit discovery of all information that is reasonably calculated to lead to the discovery of admissible evidence. PGE should not be permitted under these circumstances to withhold information regarding the proposed transaction merely because the Company considers it sensitive or damaging to its position.

CONCLUSION

The primary message conveyed by PGE's Brief is that the Company should be allowed to keep communications with Ms. Fowler confidential or privileged based on Ms. Fowler's status as PGE's President and CEO. The ALJ should reject this approach. The protective order in this Docket determines the standard by which PGE is permitted to designate certain communications as confidential, not the nature of the recipient of those communications. In addition, the ALJ should apply the understanding of the attorney-client privilege and work product doctrine in the ORCP and the OEC rather than the overly broad interpretations put forth by PGE. Finally, PGE's identification of materials that are "non-responsive" must be viewed in the context of the breadth of DR 5.1 and the OPUC rules that favor disclosure.

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Respectfully submitted,

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