PACIFIC POWER
A DIVISION OF PACIFICORP

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June 11, 2020

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Attn: Filing Center
201 High Street SE, Suite 100
Salem, OR 97301-3398

RE: UE 374—PacifiCorp's Response in Opposition to Sierra Club's Motion to Compel Discovery Responses

In accordance with OAR 860-001-0420(4), PacifiCorp d/b/a Pacific Power provides the enclosed response to Sierra Club's Motion to Compel Discovery Responses.

Please direct questions on this filing to Cathie Allen at (503) 813-5934.

Sincerely,

Michael Wilding
Director, Net Power Costs & Regulatory Policy

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UE 374

In the Matter of PACIFICORP d/b/a PACIFIC POWER Request for a General Rate Increase.	**PACIFICORP'S RESPONSE IN OPPOSITION TO SIERRA CLUB'S MOTION TO COMPEL DISCOVERY RESPONSES**

I. INTRODUCTION

On May 27, 2020, Sierra Club filed a Motion to Compel Discovery Responses (Motion to Compel), seeking the disclosure of documents in response to Sierra Club Data Request 2.3. The documents that Sierra Club seeks to compel contain legal counsel's analysis of PacifiCorp's ability to successfully challenge the installation of selective catalytic reduction (SCR) pollution controls at Craig Unit 2, pursuant to the Craig Units 1 and 2 Participation Agreement (Participation Agreement). Despite having access to the Participation Agreement itself, Sierra Club claims that it must also have access to PacifiCorp's legal analysis in order to evaluate the prudence of the Company's decision not to challenge the Craig Unit 2 SCR project.[1] Sierra Club's Motion to Compel should be denied because the request is moot, the documents are unnecessary, and PacifiCorp has not disclosed any significant portion of its communications with counsel. Nonetheless, to avoid further controversy, PacifiCorp proposes an errata to the Direct Testimony of Chad A. Teply, which clarifies that the Company's testimony sought to present PacifiCorp's own reasoning and conclusions—not those of counsel.

[1] Motion to Compel at 11-12.

II. BACKGROUND

PacifiCorp owns a minority (19.28 percent) interest in Craig Units 1 and 2, a coal-fired electrical generating facility in Moffat County, Colorado.[2] The joint ownership of Craig Unit 2 is governed by the Participation Agreement, which requires a majority vote to approve capital expenditures.[3] In 2013, the Craig Unit 2 operator, Tri-State, requested approval for capital expenditures associated with the Craig Unit 2 SCR project.[4] While PacifiCorp voted against the SCR installation, the project nonetheless received majority approval from the remaining joint owners of Craig Unit 2.[5] As a result, under the terms of the Participation Agreement, PacifiCorp remained obligated to pay its share of the Craig Unit 2 SCR project.

During this same period, PacifiCorp carefully examined its rights and obligations under the Participation Agreement to determine whether it could successfully challenge the majority's decision. This analysis and review process included consulting with internal and external legal counsel, as well as carefully examining the Participation Agreement itself.[6] PacifiCorp ultimately determined that "there was little to no opportunity to successfully challenge the project through arbitration or litigation."[7] While the Company reached this determination in consultation with legal counsel, the conclusion was PacifiCorp's own and was rooted in the clear requirements of the Participation Agreement.

During discovery, Sierra Club asked PacifiCorp to provide the legal review documents prepared by counsel on this topic.[8] PacifiCorp objected that Sierra Club's request

[2] PAC/800, Teply/43.
[3] PAC/800, Teply/45.
[4] PAC/800, Teply/45.
[5] PAC/800, Teply/45-46.
[6] PAC/800, Teply/46.
[7] PAC/800, Teply/47.
[8] Motion to Compel, Exh. A (Sierra Club Data Request 2.3).

sought materials protected by attorney-client privilege.[9] Sierra Club then filed this Motion to Compel, seeking disclosure on the basis that the Company (1) affirmatively waived privilege by voluntarily disclosing a significant part of PacifiCorp's communications with counsel;[10] and (2) implicitly waived privilege by putting the information "at issue."[11] The Commission should reject Sierra Club's request and accept PacifiCorp's clarifying errata.

III. DISCUSSION

A. Sierra Club's Request is Moot.

Whether an issue is moot depends on "whether a decision will have practical effect" in a given case.[12] Here, Sierra Club claims to need PacifiCorp's legal analysis to determine whether PacifiCorp prudently declined to challenge the Craig Unit 2 SCR project.[13] However, Sierra Club does not actually dispute PacifiCorp's prudence in its testimony, meaning that any decision on Sierra Club's request for related evidence would have no practical effect in this case.[14] Sierra Club's Motion to Compel is therefore moot.

Sierra Club may claim a right to belatedly raise new challenges to PacifiCorp's prudence in its later rebuttal testimony. Logically, however, "rebuttal" involves responding to what came before—not establishing new points or raising new concerns. Raising new issues on rebuttal would also be inconsistent with the iterative nature of the procedural schedule in this case, which depends on each party fully stating its case to allow other parties

[9] Motion to Compel, Exh. A (Sierra Club Data Request 2.3).
[10] Motion to Compel at 4.
[11] Motion to Compel at 7.
[12] *Brumnett v. Psychiatric Sec. Review Bd.*, 315 Or 402, 406 (1993) (citing *Warren v. Lane County*, 297 Or 290, 686 P2d 316 (1984)); *see also Indus. Customers of Nw. Utils. and Citizens' Util. Board of Or. v. PacifiCorp*, Docket No. UCB 5, Order No. 03-534 (Aug. 29, 2003) ("The issue of mootness turns on whether a remedy is available under the facts presented in this case.").
[13] Motion to Compel at 11.
[14] Sierra Club Opening Testimony (June 4, 2020) (including no specific challenge to PacifiCorp's prudence with respect to the Craig Unit 2 SCR project).

to fairly respond. While other parties have reserved the right to modify or elaborate on certain issues in rebuttal testimony—which does not obviate the prejudice to PacifiCorp from the untimely and incomplete development of their adjustments—at least these parties appear to recognize that all relevant concerns must be raised and addressed in opening testimony.[15] In contrast, Sierra Club's testimony is completely silent as to the Craig Unit 2 SCR project.

Sierra Club's lack of access to the privileged communications did not prevent Sierra Club from evaluating the Craig Unit 2 SCR project and raising concerns in testimony. Sierra Club had PacifiCorp's testimony, economic analysis, and the underlying Participation Agreement. Sierra Club had the ability to review the actual terms in the Participation Agreement to identify the Company's potential legal options, and weigh those against the economic analysis provided by PacifiCorp. There was more than sufficient information for Sierra Club to evaluate the issue and raise any concerns in its testimony, without reviewing the advice provided by legal counsel to PacifiCorp decision-makers.

Given that Sierra Club can be reasonably expected to have raised any concern regarding PacifiCorp's prudence in connection with the Craig Unit 2 SCR project in opening testimony, and given that no such concern was raised, Sierra Club's request for documents on this issue is now moot.

B. PacifiCorp Has Not Affirmatively Waived Attorney-Client Privilege Because the Company's Testimony Addressed PacifiCorp's Own Reasoning.

Sierra Club urges the Commission to find that PacifiCorp waived attorney-client privilege by partially disclosing the substance of the legal opinions provided by PacifiCorp's

[15] Staff/1000, Fox/28 (stating that Staff "may propose updated assumptions in rebuttal testimony"); Staff/1400, Hanhan-Rashid-Muldoon/31 (stating that "Staff is still verifying cost overruns and reserves the right to correct this in rebuttal testimony"); AWEC/100, Mullins/12 (asking PacifiCorp to calculate the impact of the Alliance of Western Energy Consumers (AWEC)'s proposed adjustment "in Rebuttal Testimony," and stating that AWEC "will provide responsive analysis, as necessary[,] in Sur-rebuttal Testimony").

counsel.[16] Under Oregon Evidence Code (OEC) 511, a person claiming attorney-client privilege "waives that privilege if the person voluntarily discloses or consents to disclosure of any significant part of the matter or communication."[17] Whether waiver has occurred is a question of fact, and a reviewing court will consider "whether the disclosure was inadvertent, whether any attempt was made to remedy any error promptly and whether preservation of the privilege will occasion unfairness to the proponent."[18] For instance, the Oregon Court of Appeals has stated that privilege may be disclosed where a party testifies to what "his lawyer told him about the law[.]"[19] However, privilege is not waived "merely by disclosing a *subject* which the person has discussed with an attorney[.]"[20]

In *State v. Taylor*, the Oregon Court of Appeals concluded that attorney-client privilege was not waived when a party testified regarding the factual nature of conversations with counsel,[21] reasoning that the party "did not testify to anything his lawyer told him about the law, the process of trial, or testifying."[22] In contrast, where a party's testimony "disclosed substantially all of the information" in a privileged report, the Oregon Court of Appeals has concluded that privilege is waived.[23]

Federal courts have similarly concluded that testifying about the general substance of privileged communications does not waive privilege under OEC 511. In *Roberts v. Legacy Meridian*, the district court considered whether a defendant waived his attorney-client

[16] Motion to Compel at 1.
[17] OEC 511; *see also State v. Taylor*, 247 Or App 339, 345 (2011).
[18] *GPL Treatment, Ltd. v. Louisiana-Pac. Corp*., 133 Or. App. 633, 639 (1995), *aff'd*, 323 Or. 116 (1996).
[19] *Taylor*, 247 Or App at 345.
[20] *Taylor*, 247 Or App at 345 (quoting Legislative Commentary to OEC 511, *reprinted in* Laird C. Kirkpatrick, *Oregon Evidence* § 511.02, 401 (5th ed 2007)) (emphasis added).
[21] *Taylor*, 247 Or App at 344-45.
[22] *Taylor*, 247 Or App at 345.
[23] *Oregonian Publ'g Co. v. Portland Sch. Dist. No. 1J*, 152 Or App 135, 142 (1998).

privilege protections by "filing a declaration describing the substance of [the defendant's] communications with [counsel]."[24] The court found that no waiver occurred, explaining that:

> The case law is well settled that disclosing the fact that there were confidential communications between a client and his or her attorney—or even disclosing that certain subjects confidentially were discussed between a client and his or her attorney—does not constitute a waiver by partial disclosure.[25]

Given that the defendant had disclosed only the existence of the communications and the nature of the subjects discussed, the court held that the communications themselves remained privileged.[26]

Here, PacifiCorp's testimony stated that legal counsel was consulted and stated the subject of this consultation. However, PacifiCorp's testimony was not intended to communicate the conclusions and determinations of counsel, but rather the Company's *own* conclusions. These conclusions, in turn, were ultimately based on PacifiCorp's assessment of the clear provisions of the Participation Agreement that govern the joint owners of Craig Unit 2.

C. PacifiCorp Has Not Implicitly Waived Attorney-Client Privilege Because Sierra Club Does Not Need the Requested Documents.

While Sierra Club recognizes that Oregon courts have not adopted the federal approach to implicit waiver, it nonetheless urges the Commission to conclude that the Company has implicitly waived privilege by "selectively using protected documents in its testimony to prove a point[.]"[27] As Sierra Club describes, the federal standard for implicit waiver consists of a three-part test (also known as the *Hearn* test), wherein: (1) a party

[27] Motion to Compel at 11.
[27] Motion to Compel at 11.
[27] Motion to Compel at 11.
[27] Motion to Compel at 11.

affirmatively asserts privilege; (2) that party makes the protected information relevant to the case; and (3) upholding privilege would deny the opposing party access to "vital" information.[28] In applying this test, the "overarching consideration is whether allowing the privilege to protect against disclosure of the information would be 'manifestly unfair' to the opposing party."[29]

For instance, where a party brought a claim that relied entirely on privileged communications, but then claimed privilege protections to avoid disclosing the only relevant evidence, the Ninth Circuit held that the party implicitly waived privilege.[30] In contrast, in *Home Indemnification Co. v. Lane Powell Moss & Miller*, the Ninth Circuit found that a plaintiff had not waived privilege because the privileged communications were not "sufficiently vital" to the parties' dispute.[31] While the court recognized that the privileged communications were relevant to the claim, the privilege was not implicitly waived because there was other relevant documentation available.[32]

Here, as in *Home Indemnification*, there is other highly relevant documentation available to support or refute PacifiCorp's claim of prudence—specifically, the Participation Agreement. As explained above, PacifiCorp's decision not to challenge the Craig Unit 2 SCR project was based on the Company's understanding and interpretation of the Participation Agreement, which clearly requires all joint owners to fund projects that are

[28] *Hearn v. Rhay*, 68 FRD 574, 581 (ED Wash 1975); *see also Rich v. Bank of Am., N.A.*, 666 Fed. App'x 635 (9th Cir. 2016) (applying the *Hearn* test); *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999) (same); *Home Indem. Co. v Lane Powell Moss and Miller*, 43 F.3d 1322 (9th Cir. 1995) (same).
[29] *Home Indem.*, 43 F.3d at 1326.
[30] *Amlani*, 169 F3d at 1195-96 (Amlani "cannot invoke the attorney-client privilege to deny [the government] . . . access to the very information that [the government] . . . must refute in order to demonstrate that" Amlani did not discharge Katz because of the prosecutor's allegedly disparaging statements.).
[31] *Home Indem.*, 43 F.3d at 1326.
[32] *Home Indem.*, 43 F.3d at 1326.

approved by a majority vote. PacifiCorp has already provided Sierra Club with a copy of the Participation Agreement, thus allowing for a straightforward assessment of the prudence of PacifiCorp's decision. The details of PacifiCorp's discussions with legal counsel are not "vital" to Sierra Club's ability to rebut the Company's claim of prudence, and therefore PacifiCorp's privilege was not implicitly waived.[33]

D. To Avoid Controversy, PacifiCorp Proposes an Errata Clarifying its Direct Testimony.

As explained above, PacifiCorp's direct testimony was intended to explain PacifiCorp's decision not to challenge the majority decision to invest in the Craig Unit 2 SCR project, based on the Company's analysis of the Participation Agreement and after discussing the issue with counsel. To clear up any ambiguity, PacifiCorp proposes making a clarifying errata to the relevant portion of the Direct Testimony of Chad A. Teply,[34] as follows:

Q. Did PacifiCorp also independently assess its legal options with respect to the capital expenditures approval process incorporated into the Participation Agreement?

A. Yes. In June 2013, PacifiCorp engaged internal and external counsel to independently assess PacifiCorp's rights under the Participation Agreement with respect to payment options and dispute resolution that may occur with a majority decision on capital expenditures that was not supported by PacifiCorp. ~~The~~ PacifiCorp's ultimate determination ~~of the~~

[33] *Amlani*, 169 F3d at 1195 ("Finally, the court evaluates whether allowing the privilege would deny the opposing party access to information vital to its defense.") (internal marks omitted). Sierra Club also relies on the Ninth Circuit's decision in *Chevron Corp. v. Pennzoil Co.* to argue that PacifiCorp implicitly waived attorney-client privilege. Motion to Compel at 8-9 (summarizing *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992)). However, as Sierra Club notes, the Ninth Circuit's decision in *Chevron* was made three years *before* that court adopted the *Hearn* test. *Home Indem.*, 43 F.3d at 1326. Since the adoption of the *Hearn* test, the fact that privileged information is "at issue" is insufficient to trigger waiver, so long as there is other information available to refute or support the party's claim. *Id.* Moreover, unlike in *Chevron*, here PacifiCorp is not claiming that its actions were reasonable *because* they reflected the advice of counsel, but rather claims that the Company reasonably consulted counsel, and that the actions were reasonable in light of the clear implications of the Participation Agreement.

[34] Mr. Teply is no longer with the Company, and his testimony will be adopted by another Company witness or witnesses at a later date.

~~internal and external legal reviews of the Participation Agreement~~ was that PacifiCorp had the right to challenge the majority's decision, but there was little to no opportunity to successfully challenge the project through arbitration or litigation. ~~This~~ PacifiCorp reached this determination ~~was~~ primarily because the project met the requirements under the Participation Agreements, specifically: (i) the project is required by applicable law (the Colorado Regional Haze SIP); (ii) Craig Unit 2 is required to be operated in accordance with applicable law under the Participation Agreement; and (iii) the majority of the Craig Unit 2 joint-owners (in fact all other than PacifiCorp) voted in support of the project.[35]

PacifiCorp believes that the above correction makes clear that the Company was testifying only to the fact of its communication with counsel and the general subject matter—and did *not* disclose "any significant part of the matter or communication."[36]

The Commission has previously supported amending testimony as a means of avoiding any underlying privilege concerns, in part because the Commission may be unable to order disclosure of confidential attorney-client communications.[37] In Order No. 04-379, the Commission found that a party had clearly made privileged communications "an issue" by having the party's lawyer submit testimony on the record.[38] To remedy the issue, the Commission directed the party to either disclose the requested information, or to submit substitute testimony from a non-lawyer witness.[39]

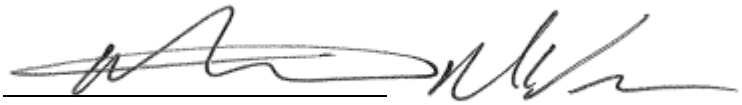
Here, to the extent that the Commission believes that there were any potential disclosure concerns with respect to PacifiCorp's testimony as originally submitted, PacifiCorp believes that the proposed errata will avoid any privilege concerns.

[35] PAC/800, Teply/46-47 (revisions added).
[36] OEC 511.
[37] *Central Lincoln People's Util. Dist. v. Verizon Nw. Inc.*, Docket UM 1087, Order No. 04-379 at 6 (Jul. 8, 2004) ("One exception [to the duty to maintain confidentiality] allows production if compelled by a court order, and this admittedly is not a court order.").
[38] Order No. 04-379 at 5 ("These concerns arise, however, only because CLPUD chose to submit testimony sponsored by its attorney.").
[39] Order No. 04-379 at 6.

IV. CONCLUSION

PacifiCorp prudently decided not to contest the joint owners' majority decision to invest in the Craig Unit 2 SCR project. While PacifiCorp appropriately consulted with legal counsel about this issue, the Company's decision was based on the terms of the joint owners' Participation Agreement. Sierra Club does not challenge the prudence of the Company's decision, nor is the underlying legal analysis necessary to support PacifiCorp's claim of prudence. PacifiCorp's testimony describing this decision did not waive the Company's privilege with respect to the underlying legal discussions. The Commission should deny Sierra Club's Motion to Compel and accept PacifiCorp's clarifying errata as resolving any possible privilege-related concerns.

Respectfully submitted this 11st day of June 2020.



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