BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 374

In the Matter of PACIFICORP d/b/a PACIFIC POWER, Request for a General Rate Revision	SIERRA CLUB'S MOTION TO COMPEL DISCOVERY RESPONSES

Sierra Club hereby moves the Oregon Public Utility Commission ("Commission") Administrative Law Judge Alison Lackey, to order PacifiCorp to provide the documents requested in Sierra Club Data Request 2.3.[1] The documents are two legal opinions on which PacifiCorp expressly relied upon in its request to recover in rates certain pollution control expenditures on Craig Unit 2, a coal-fired generating unit that PacifiCorp co-owns.

On April 21, 2020, Sierra Club met with PacifiCorp to attempt to resolve various disputes over a larger set of duly-requested documents, including the requests here. While PacifiCorp and Sierra Club were able to come to agreement on a number of data requests, Sierra Club was unable to convince PacifiCorp to produce the information requested in SC Data Request 2.3. As explained below, this information is central to the full resolution of this general rate docket and is within the set of information to which a party to this case is entitled. Specifically, PacifiCorp has waived any asserted privilege by partially disclosing the material substance of the legal opinions and by putting the information in the opinions directly at issue in this case.

I. Background

PacifiCorp seeks authorization to recover costs associated with installing "selective catalytic reduction" ("SCR") pollution controls at Craig Unit 2. Because PacifiCorp is seeking

[1] OAR 860-001-0500(7).

to charge customers for this cost, whether the expenditure was prudently incurred is directly at issue in this case.

Craig Units 1 and 2 are jointly owned amongst PacifiCorp, Tri-State Generation and Transmission Association, Inc., Salt River Project, Platte River Power Authority, and Public Service Company of Colorado. PacifiCorp is a minority owner, owning approximately 19.28 percent of both units. Co-ownership of Units 1 and 2 operates pursuant to a "participation agreement," under which capital investments must be approved by a majority (i.e., over 50 percent) of the co-owners. In 2013, the Craig Unit 2 SCR project was presented to the co-owners for approval.

According to Mr. Teply's direct testimony, in July 2013, PacifiCorp "independently assessed the benefits associated with the Craig Unit 2 SCR project against a hypothetical wherein PacifiCorp would unilaterally effectuate an accelerated shutdown of the unit . . . PacifiCorp's hypothetical did not support the installation of SCRs."[2] As a result, PacifiCorp voted against installing the SCRs.[3] Nevertheless, the project was approved by a majority of the co-owners.

Because PacifiCorp's nay vote, standing alone, "would not change the outcome with the other joint-owners voting yes,"[4] PacifiCorp "engaged internal and external counsel to independently assess PacifiCorp's rights under the Participation Agreement"[5] and PacifiCorp's ability to challenge installation of the SCRs. "The ultimate determination of the 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

[2] PAC/800 at Teply/46:3-5; 7-8.
[3] *Id.* at 46:11.
[4] *Id.* at Teply/46:12-13.
[5] *Id.* at 36:18-21.

the project through arbitration or litigation."[6] Relying upon the legal advice it received, PacifiCorp did not pursue either arbitration or litigation to challenge the Craig Unit 2 SCR project.[7]

Despite PacifiCorp's acknowledgment that its assessment concluded that the SCR installation was not an economic investment, PacifiCorp seeks to recover associated costs solely based on the fact that, according to its legal advice, the company would not have prevailed in a legal challenge to the project. In essence, PacifiCorp raised an "advice of counsel" justification for why it should be permitted to recover costs for an uneconomic capital expenditure. Accordingly, Sierra Club properly sought discovery on the legal advice pertaining to PacifiCorp's choice not to challenge the project. PacifiCorp objected based on the attorney-client privilege. Specifically, Sierra Club submitted the following data request and PacifiCorp stated the following objection:

Sierra Club Data Request 2.3[8]

Refer to the Direct Testimony of Chad Teply, page 46 at 18 through page 47 at 2 with respect to the legal reviews of the Participation Agreement and challenging the decision to install SCR at Craig Unit 2.

(a) Identify each review generated on behalf of, provided to, or made available to PacifiCorp with respect to the Participation Agreement and challenging the decision to install SCR at Craig Unit 2.

(b) Provide each review generated on behalf of, provided to, or made available to PacifiCorp with respect to the Participation Agreement and challenging the decision to install SCR at Craig Unit 2.

PacifiCorp's Objections

(a) PacifiCorp objects to this request to the extent it requests information that is subject to the attorney-client privilege. Without waiving this objection, the company responds as follows: The

[6] *Id.* at Teply/46:21-47:2.
[7] *Id.* at Teply/47:8-11.
[8] A true and correct copy of Sierra Club Data Request 2.3 and PacifiCorp's Objection is attached here as Exhibit A.

legal assessment was completed under attorney-client privilege at the request of legal counsel and will be retained as such.

(b) PacifiCorp objects to this request to the extent it requests information that is subject to the attorney-client privilege. Without waiving this objection, the company responds as follows: The legal assessment was completed under attorney-client privilege at the request of legal counsel and will be retained as such.

PacifiCorp's objection based on the attorney-client privilege was improper and must be rejected because, as explained below, PacifiCorp has waived this privilege by:

(1) Voluntarily disclosing a significant portion of the privileged communication through Mr. Teply's direct testimony; and,

(2) Selectively relying upon the protected communications to prove a point, but then invoking the attorney client privilege to prevent Sierra Club and other parties from testing its assertion. Because PacifiCorp has not raised any other objection to SC Data Request 2.3, all other objections are waived.[9]

II. Standard of Review

"Whether a party has waived the attorney-client privilege is a question of fact . . . [f]actors the court may consider include 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."[10] The burden of proving that the attorney-client privilege applies and was not waived rests with the party asserting the privilege.[11]

III. PacifiCorp has Waived the Attorney-Client Privilege by Voluntarily Disclosing a Significant Part of Privileged Communications

While the attorney-client privilege typically shields from discovery "confidential communications made for the purpose of facilitating the rendition of professional legal

[9] O.R.C.P. 43(B)(3).
[10] *GPL Treatment, Ltd. v. Louisiana-Pac. Corp.*, 133 Or. App. 633, 639 (1995), *aff'd*, 323 Or. 116 (1996).
[11] *Goldsborough v. Eagle Crest Partners, Ltd.*, 105 Or. App. 499, 503 (1991).

services[,]"[12] the privilege is not absolute.[13] The privilege is waived "if the person . . . voluntarily discloses or consents to disclosure any significant part of the [privileged] matter or communication."[14] The Oregon Court of Appeals has recognized that "waiver [of the attorney-client privilege] does not require a *subjectively* intended act. It may be recognized by implication."[15]

A party voluntarily waives the attorney-client privilege by revealing the material substance of the privileged communication at issue, even when the communication itself has not been disclosed.[16] In *Elizabeth Retail Properties*, the court held that although an email between the plaintiffs and their former counsel had not been disclosed, plaintiffs had waived the attorney-client privilege by providing a summary of the email exchange in order to support their cause of action.[17] The court concluded that the attorney-client privilege had been voluntarily waived because plaintiffs "disclose[d] more than just the existence of the [email] – [p]laintiffs . . . revealed the material substance of that email."[18]

Once the attorney-client privilege has been waived, "the widely applied standard for determining the scope of [the] waiver . . . is that the waiver applies to all other communications relating to the same subject matter."[19] "If the holder has voluntarily disclosed or consented to the disclosure of any significant part of a privileged communication, then the entire communication may be inquired into [and] the privilege [is] waived as to other communications on the same

---

[12] Or. Stat. § 40.225(2).
[13] *Longo v. Premo*, 355 Or. 525, 533 (2014) ("[T]he attorney-client privilege is not absolute." (internal citations omitted)).
[14] Or. Stat. § 40.280.
[15] *Goldsborough v. Eagle Crest Partners, Ltd.*, 105 Or. App. 499 (1991), *aff'd* 314 Or. 336 (1992) (emphasis in original).
[16] *Elizabeth Retail Properties, LLC v. KeyBank Nat'l Ass'n*, No. 3:13-CV-02045-SB, 2015 WL 6549616, at *4 (D. Or. Oct. 28, 2015).
[17] *Id.* at *2.
[18] *Id.* at *4.
[19] *In re Premera Blue Cross Customer Data Security Breach Litigation*, 296 F. Supp. 3d 1230, 1249 (D. Or. 2017) (internal citations omitted).

subject with the same [and other] person[s]."[20] A party may not "[selectively] define the subject matter of the advice of counsel on which it relied in order to limit the scope of the waiver of the attorney-client privilege and therefore the scope of discovery. To do so would undermine the very purpose" of waiver – fairness.[21]

Here, PacifiCorp voluntarily waived the attorney-client privilege by disclosing, through Mr. Teply's testimony, the material substance of the "internal and external" legal opinions provided to the company regarding PacifiCorp's rights under the participation agreement regarding objection to the Craig Unit 2 SCR project. More than simply acknowledging the existence of attorney-client communications, Mr. Teply's direct testimony divulges the conclusions of the legal opinions provided. Specifically, Mr. Teply testified:

> The ultimate determination of the 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 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.[22]

As in *Elizabeth Retail Properties, LLC*, this level of information goes far beyond merely acknowledging that PacifiCorp received legal advice concerning the SCR project. Rather, Mr. Teply's testimony disclosed the material substance of the legal advice received in order to support its claim that despite the uneconomical nature of the SCR project, the Commission should authorize cost-recovery from captive ratepayers. Because PacifiCorp selectively disclosed portions of counsel's advice for self-serving purposes, PacifiCorp waived the privilege as to the

[20] Legislative Commentary to OEC 511.
[21] *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3d Cir. 1995); *see also U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) ("A defendant may not use the [attorney client] privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.").
[22] PAC/800 at Teply/46:18-47:7 (emphasis added).

entirety of the internal and external opinions received, as well as other privileged communications with Mr. Teply or others on the same subject matter.[23] In fairness, "[t]he party opposing the defense of reliance on advice of counsel must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice – whether counsel was provided with all material facts in rendering their advice, whether counsel gave a well-informed opinion and whether that advice was heeded by the client."[24]

IV. PacifiCorp Waived the Attorney-Client Privilege By Placing Privileged Information Directly At Issue in this Proceeding

In addition to voluntarily disclosing a significant portion of the privileged communications at issue, PacifiCorp further waived the attorney-client privilege by placing the privileged communications at issue in the current proceeding. Courts have found "at-issue waiver" of the attorney-client privilege when the privilege has been used "as both a sword and shield by selectively using the protected documents to prove a point but then invoking the protection to prevent an opponent from challenging the assertion."[25] "When the client makes the communications with counsel a substantive issue in the litigation, courts have consistently held that the attorney-client privilege protecting those communications is waived . . . [a] client will be required to disclose privileged attorney client communications whenever she is perceived as placing, directly or indirectly, those communications 'at issue' in the cause of action. The principle upon which this implied waiver concept is based is simple 'fairness.'"[26]

[23] Legislative Commentary to OEC 511.
[24] *Glenmede Trust Co.*, 56 F.3d at 486.
[25] Eric Surette, *Waiver or Loss of Protection of State Attorney "Work Product" Protection*, 45 A.L.R.7th Art. 2 (2019).
[26] 2 Rice, ATTORNEY-CLIENT PRIVILEGE § 9:24 at 89.

a. The Majority of Jurisdictions, including the Ninth Circuit,[27] have found Waiver of the Attorney Client Privilege when Privileged Communications are placed "At Issue" in the Proceeding

Although Oregon state courts have not yet directly ruled upon "at issue" waiver, the Commission should follow the vast majority of jurisdictions across the country that have recognized and applied the waiver when a party attempts to rely upon facts to support a claim or defense while at the same time preventing discovery into those facts.[28]

In *Chevron Corp. v. Pennzoil Co.*, the Ninth Circuit concluded that the attorney-client privilege is waived when a party places privileged communications at issue because the privilege "may not be used both as a sword and a shield."[29] *Chevron* arose from a previous three-billion-dollar settlement between Pennzoil and Texaco.[30] Following the settlement, Pennzoil began acquiring Chevron stock with the settlement proceeds in order to defer taxes owed on the settlement proceedings by making a similar reinvestment. Chevron filed suit to enjoin the stock acquisition based on the allegation that Pennzoil's tax documents were materially misleading.[31] Although Pennzoil had stated in its tax filings that it had no intention of attaining management control over Chevron, Chevron alleged that, in order to obtain the tax deferral that Pennzoil sought, it would be required to seek management control of the company.[32] In response, Pennzoil submitted affidavits from its directors stating that Pennzoil did not intend to exert

---

[27] Although federal law is not binding upon Oregon state forums, because Or. St. § 40.225 (Oregon Evidence Rule 503) "was modeled after proposed Rule 503 of the Federal Rules of Evidence[,]" *Longo v. Premo*, 355 Or. 525, 532 (2015), federal case law is highly persuasive authority.

[28] *See Rich v. Bank of Am., N.A.*, 666 Fed. App'x 635 (9th Cir. 2016); *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999); *Home Indem. Co. v Lane Powell Moss and Miller*, 43 F.3d 1322 (9th Cir. 1995); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992); *A.M. by & Through Nay v. Physicians' Med. Ctr., P.C.*, No. 3:17-CV-1833-SI, 2018 WL 6305661 (D. Or. Dec. 3, 2018); *Triangle Park, LLC v. Indian Harbor Ins. Co.*, No. 08-CV-1256-BR, 2010 WL 11579376 (D. Or. May 3, 2010); *Interstellar Starship Services, Ltd. v. Epix, Inc.*, 190 F.R.D. 667 (D. Or. 2000); *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975); *Pendleton Firefighters Union, IAFF Local 2296, Complainant; City of Pendleton, Respondent*, 2019 WL 6877513 (Or. Employment Relations Bd., Sept. 4, 2019).

[29] *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992).

[30] *Id.* at 1157.

[31] *Id.*

[32] *Id.*

control over Chevron management and that its tax position was reasonable because the company had relied in good faith on its counsel's advice that management control was not necessary to obtain the tax deferral allowed under the federal tax code.[33] Accordingly, Chevron sought discovery into the legal advice concerning Pennzoil's tax position, to which Pennzoil objected under the attorney client privilege.[34]

The Ninth Circuit rejected Pennzoil's privilege claim, concluding that because Pennzoil had claimed "that its tax position [was] reasonable because it was based on advice of counsel," the company had placed the tax advice "at issue" in the litigation.[35] The court found that "Pennzoil cannot invoke the attorney-client privilege to deny Chevron access to the very information that Chevron must refute in order to demonstrate that" Pennzoil's tax documentation was materially misleading.[36]

Three years later, the Ninth Circuit endorsed a three-prong test for determining whether a party has implicitly waived the attorney-client privilege by placing privileged communications at issue:

> [A]n implied waiver of the attorney-client privilege occurs when (1) the party asserts the privilege as a result of some affirmative act, such as filing suit; (2) through this affirmative act, the asserting party puts the privileged information at issue; and (3) allowing the privilege would deny the opposing party access to information vital to its defense.[37]

[33] *Id.*
[34] *Id.* at 1162.
[35] *Id.*
[36] *Id.* at 1163.
[37] *Home Indem. Co. v Lane Powell Moss and Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995) (endorsing test first established in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)); *see also Pendleton Firefighters Union, IAFF Local 2296, Complainant; City of Pendleton, Respondent*, 2019 WL 6877513, at *3-4 (Or. Employment Relations Bd., Sept. 4, 2019) (applying the three-prong test adopted in *Home Indemnification* to find that waiver had not occurred).

The assertion of the privilege through an affirmative act must occur within the legal proceeding in which waiver is alleged,[38] but an affirmative act is not limited to filing suit.[39] Privileged communications have been placed "at issue" in the litigation when a party relies upon the communications' contents "as a basis for any claims or defenses."[40] The otherwise privileged information must be "actually required for resolution of [an] issue."[41] Finally, privilege is waived when maintaining the privilege would be "manifestly unfair,"[42] because the opposing party has demonstrated "a real need for the evidence," such as when the party asserting privilege solely relies upon privileged information to support its claim.[43]

b. PacifiCorp has Implicitly Waived the Attorney-Client Privilege by Invoking its Legal Opinions to Support its Request for Rate Recovery for Craig Unit 2 Expenditures

PacifiCorp's actions in this proceeding satisfy all three prongs of the test for implied waiver of the attorney client privilege articulated in *Home Indemnification.* First, PacifiCorp has taken affirmative action to raise privileged communications relevant to this proceeding by discussing and relying upon those communications in Mr. Teply's direct testimony.[44] As discussed above, Mr. Teply's direct testimony invoked "internal and external" legal opinions to support an assertion that it was unable to halt installation of SCRs at Craig Unit 2 and, thus, is entitled to recover associated costs. PacifiCorp then affirmatively claimed the attorney-client privilege by objecting to Sierra Club's data request for these legal opinions and refusing to

[38] *A.M. by & Through Nay v. Physicians' Med. Ctr., P.C.*, No. 3:17-CV-1833-SI, 2018 WL 6305661, at *4 (D. Or. Dec. 3, 2018)
[39] *See, e.g., United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999) (finding attorney-client communications raised in motion had placed privileged information at issue in case); *Interstellar Starship Services, Ltd. v. Epix, Inc.*, 190 F.R.D. 667 (D. Or. 2000) (finding attorney-client communications discussed in declaration had placed privileged information at issue).
[40] *Rich v. Bank of Am., N.A.*, 666 Fed. App'x 635, 641-42 (9th Cir. 2016).
[41] *Triangle Park, LLC v. Indian Harbor Ins. Co.*, No. 08-CV-1256-BR, 2010 WL 11579376, at *4 (D. Or. May 3, 2010).
[42] *Home Indem. Co.*, 43 F.3d at 1326.
[43] *Amlani*, 169 F.3d at 1195-96 (noting that the federal government had demonstrated that privileged information was vital to its case because "alternative sources of evidence would be of little, if any, value").
[44] PAC/800 at Teply/46-47.

provide the information requested.[45] In sum, PacifiCorp has attempted to use the attorney client privilege as both a sword, by selectively using protected documents in its testimony to prove a point, and a shield, by invoking the privilege to block parties from challenging the validity of its testimony.

Second, the privileged communications are squarely at issue in this proceeding, as they are the sole basis for PacifiCorp's defense that although it voted against installation of SCRs at Craig Unit 2, the Commission should nevertheless approve rate recovery. By voting against the SCR project, PacifiCorp tacitly acknowledged that the project was imprudent and not in the best interests of PacifiCorp's customers. The Company provided no other justification for why it should nonetheless recover costs for this project other than the fact that it received "internal and external" legal advice that there "was little to no opportunity to successfully challenge the project through arbitration or litigation."

In order to assess whether PacifiCorp should be granted rate recovery for the Craig Unit 2 SCR project, the Commission must evaluate the prudency of the utility's decision to move forward with expenditures for the project – despite previously determining it was not economic. The Commission has recognized that the prudence of a utility's action is "based on all that it knew or should have known at the time . . . in light of the circumstances which then existed."[46] Not only is the utility's ultimate decision relevant to a prudency review, but also "the process used by the utility to make [the] decision."[47] Accordingly, the information that PacifiCorp received regarding its legal options to oppose the project are central to the prudency review here.

[45] *See* Exhibit A.
[46] *In the Matter of Pacificorp, DBA Pac. Power Request for a Gen. Rate Revision*, No. 12 493, 2012 WL 6644237 (Dec. 20, 2012).
[47] *Id.*

Finally, Sierra Club has a "real need" for the privileged communications and it would be "manifestly unfair" to maintain the attorney-client privilege. Parties to this proceeding are entitled to review for themselves the full legal, factual and economic rationale for the company ultimately deciding to expend its customers' money on a recognized uneconomic project. Where a party relies upon advice of counsel to establish a central issue in a proceeding, opposing parties "must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice[;]"[48] yet, PacifiCorp hopes to prevent that review. Because PacifiCorp only asserted one justification for recovering the costs associated with the SCR project, its legal opinions, any other evidence aside from these opinions "would be of little, if any, value."[49] As in *Chevron*, PacifiCorp should not be permitted to invoke the attorney client privilege to deny Sierra Club access to the very information that Sierra Club must refute in order to demonstrate that PacifiCorp's decision to move forward with the Craig Unit 2 SCR project was imprudent.[50]

V. Conclusion

For the foregoing reasons, PacifiCorp has waived the attorney-client privilege pertaining to internal and external legal opinions on the Craig Unit 2 SCR project. Sierra Club respectfully requests that the Commission grant this motion to compel, order PacifiCorp to furnish a full response to SC Data Request 2.3, and grant such further relief to which Sierra Club may be entitled.

Dated: May 27, 2020

Respectfully submitted,

/s/ Gloria D. Smith

Gloria D. Smith (*pro hac vice*)
Managing Attorney

[48] *Glenmede Trust Co.*, 56 F.3d at 486.
[49] *Amlani*, 169 F.3d at 1195-96.
[50] *Chevron*, 974 F.2d at 1163.

Joshua Smith
Senior Attorney
Sierra Club Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5560
gloria.smith@sierraclub.org
joshua.smith@sierraclub.org

Christopher Bzdok (*pro hac vice*)
Olson, Bzdok and Howard, P.C.
420 East Front Street
Traverse City, Michigan 49686
231-946-0044
chris@envlaw.com

Exhibit A

Sierra Club Data Request 2.3

Refer to the Direct Testimony of Chad Teply, page 46 at 18 through page 47 at 2 with respect to the legal reviews of the Participation Agreement and challenging the decision to install SCR at Craig Unit 2.

(a) Identify each review generated on behalf of, provided to, or made available to PacifiCorp with respect to the Participation Agreement and challenging the decision to install SCR at Craig Unit 2.

(b) Provide each review generated on behalf of, provided to, or made available to PacifiCorp with respect to the Participation Agreement and challenging the decision to install SCR at Craig Unit 2.

Response to Sierra Club Data Request 2.3

(a) PacifiCorp objects to this request to the extent it requests information that is subject to the attorney-client privilege. Without waiving this objection, the company responds as follows:

The legal assessment was completed under attorney-client privilege at the request of legal counsel and will be retained as such.

(b) PacifiCorp objects to this request to the extent it requests information that is subject to the attorney-client privilege. Without waiving this objection, the company responds as follows:

The legal assessment was completed under attorney-client privilege at the request of legal counsel and will be retained as such.