ISSUED: June 18, 2020

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 374

In the Matter of PACIFICORP, dba PACIFIC POWER Request for a General Rate Revision.	RULING

DISPOSITION: MOTION TO COMPEL DENIED

I. INTRODUCTION

On May 27, 2020, Sierra Club filed a motion to compel PacifiCorp, dba Pacific Power to respond to Sierra Club Data Request 2.3, seeking any legal assessments regarding the Participation Agreement between the co-owners of Craig Unit 2 and a challenge to the decision to install selective catalytic reduction (SCR) pollution controls at Craig Unit 2. On June 11, 2020, PacifiCorp filed a response and a proposed errata to its testimony. Sierra Club filed a reply on June 15, 2020. In this ruling, I find no explicit or implicit waiver of attorney-client privilege based on the errata to PacifiCorp's testimony, which clarifies that PacifiCorp is presenting its own reasoning and conclusions, rather than those of counsel. Accordingly, Sierra Club's motion is denied.

II. DATA REQUEST

Sierra Club's Data Request 2.3 is as follows:

> 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.
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> (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.
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> (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.

III. POSITIONS OF THE PARTIES

A. Sierra Club

Sierra Club asserts that PacifiCorp waived attorney client privilege with respect to any legal assessments under the following two theories: (1) by voluntarily disclosing a significant portion of the privileged communication in direct testimony, and (2) by placing the privileged information at issue in this proceeding.

First, Sierra Club contends under Oregon law, 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.[1] Sierra Club asserts that once a party has disclosed "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 subject with the same [and other] person[s]."[2] Sierra Club maintains that the level of detail in PacifiCorp's direct testimony disclosed the material substance of legal opinions regarding PacifiCorp's rights under the Participation Agreement relative to objection to the Craig Unit 2 SCR installation.

Sierra Club disputes PacifiCorp's characterization of the testimony as only acknowledging the consultation of counsel and argues that the direct testimony reveals the conclusions of the legal analysis. Sierra Club asserts that fairness requires that a 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."[3]

Sierra Club also contends that PacifiCorp waived attorney-client privilege by placing the privileged communication at issue in this proceeding. Sierra Club acknowledges that Oregon state courts have not adopted implied waiver, but asserts that the majority of jurisdictions across the country recognize waiver when a party relies upon facts to support a claim or defense while preventing discovery regarding those facts.[4] Sierra Club maintains that a privileged communication is placed at issue in a proceeding when a party

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[1] Sierra Club Motion at 5, *citing Elizabeth Retail Properties, LLC v. KeyBank National Association*, No. 3:13-CV-02045-SB, 2015 WL 6549616, 2015 U.S. Dist. LEXIS 146046 (D. Or. Oct 28, 2015).
[2] Sierra Club Motion at 5-6, *quoting* Legislative Commentary to Oregon Evidence Code 511.
[3] Sierra Club Motion at 7, *quoting Glenmede Trust Company v. Thompson*, 56 F.3d 476, 486 (3d Cir. May 23, 1995).
[4] Sierra Club Motion at 8 (citation omitted).

relies upon the contents of a privileged communication "as a basis for any claims or defenses."[5] Sierra Club argues that privilege is waived when the opposing party demonstrates a real need for the evidence, such as when the party asserting privilege relies solely on the privileged information in support of its position, because in those circumstances maintaining the privilege would be "manifestly unfair."[6]

Sierra Club asserts that PacifiCorp relied upon the legal assessment in direct testimony in this proceeding to support its position that PacifiCorp was unable to prevent the installation of SCRs at Craig Unit 2, and then claimed attorney-client privilege in objecting to Sierra Club's data request seeking the legal assessment. Sierra Club argues that the privileged communications are the sole basis for PacifiCorp's position that its actions regarding the SCR installation at Craig Unit 2 were prudent, and are thus squarely at issue in this proceeding. Further, Sierra Club argues that it has a real need for the privileged information because PacifiCorp's asserted justification for recovering the SCR costs was based solely on the legal assessment, and that as a result Sierra Club needs access to this information in order to demonstrate that the Craig Unit 2 SCR installation was imprudent. Sierra Club disputes PacifiCorp's assertion that Sierra Club could dispute the prudency of the SCR installation based on a review of the Participation Agreement, and contends that this issue rests on the advice PacifiCorp received regarding its ability to contest the SCR installation under the Participation Agreement or other legal avenues. Sierra Club argues that the prudency of PacifiCorp's decision not to dispute the SCR installation includes an examination of "the process used by the utility to make [the] decision."[7]

Sierra Club disputes PacifiCorp's position that the issue of whether PacifiCorp must provide a response to Data Request 2.3 is moot. Sierra Club contends that it was unable to assess the validity of a prudence challenge to Craig Unit 2 SCR in its opening testimony as a result of PacifiCorp's refusal to provide the requested information, and that as a result Sierra Club is not foreclosed from addressing this issue in rebuttal testimony. Additionally, Sierra Club asserts that the practice of parties raising or revising a position in rebuttal testimony is common practice before the Commission, as acknowledged by PacifiCorp. Sierra Club argues that because PacifiCorp will have the opportunity to file surrebuttal testimony under the procedural schedule, PacifiCorp will not be prejudiced as a result of any new issues raised in rebuttal testimony.

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[5] Sierra Club Motion at 10, *quoting Rich v. Bank of America*, 666 Fed. App'x 635, 641-42 (9th Cir. Nov 21, 2016).
[6] Sierra Club Motion at 10, *quoting Home Indemnity Company v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1326 (9th Cir. Jan 5, 1995), *United States v. Amlani*, 169 F.3d 1189, 1195-1196 (9th Cir. Mar 3, 1999).
[7] Sierra Club Reply at 3, *quoting In the Matter of PacifiCorp, Request for a General Rate Revision*, Docket No. UE 246, Order No. 12-493 (Dec 20, 2012).

Sierra Club responds to PacifiCorp's proposed errata, and contends that PacifiCorp must either withdraw its advice of counsel justification for why it should be permitted to recover costs for the Craig Unit 2 SCR installation, or disclose the advice of counsel upon which it relied.

B. PacifiCorp

PacifiCorp asserts that 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. Additionally, PacifiCorp proposes an errata to the Direct Testimony of Chad A. Teply to clarify that the testimony sought to present PacifiCorp's own reasoning and conclusions rather than those of counsel.

PacifiCorp contends that whether an issue is moot depends on "whether a decision will have practical effect" in a case. PacifiCorp contends that Sierra Club did not dispute the prudence of the Craig Unit 2 SCR installation in its opening testimony, and that as a result, any decision regarding Sierra Club's request for evidence related to that issue is moot. PacifiCorp contends that Sierra Club had access to sufficient information to evaluate and address the issue in opening testimony, in the form of PacifiCorp's testimony, economic analysis, and the Participation Agreement, but that Sierra Club did not do so. PacifiCorp disputes the fairness of raising new issues in rebuttal testimony, and asserts that the procedural schedule in this case depends upon parties fully stating their cases in opening testimony to provide other parties with the opportunity to respond.

PacifiCorp asserts that its direct testimony stated that legal counsel was consulted and identified the subject of this consultation, but contends that its testimony was not intended to communicate the conclusions and determinations of counsel. PacifiCorp asserts that the testimony was intended to address PacifiCorp's own conclusions, and as a result it did not waive attorney-client privilege. Specifically, PacifiCorp contends that these conclusions were ultimately based on PacifiCorp's assessment of the provisions of the Participation Agreement. PacifiCorp proposed errata to the testimony to clarify that the testimony only addressed the fact of PacifiCorp's communication with counsel and the general subject matter of that communication.

Additionally, PacifiCorp disputes that it waived attorney-client privilege via implied waiver. PacifiCorp contends that the Ninth Circuit found no waiver where the privileged communications were not "sufficiently vital" to the parties' dispute because, 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.[8] PacifiCorp asserts that here, because there is other highly relevant documentation (i.e., the Participation Agreement) available to support or refute PacifiCorp's position regarding prudence, and because PacifiCorp's decision not to challenge the Craig Unit 2 SCR installation was based on PacifiCorp's understanding and interpretation of the Participation Agreement, the details of PacifiCorp's consultation with counsel are not vital to Sierra Club's ability to dispute the prudence of PacifiCorp's actions.

IV. DISCUSSION

Under the Commission's rule, OAR 860-001-0500(3), privileged material is not discoverable except as provided under the Oregon Rules of Evidence. Under the Oregon Evidence Code Rule 511,[9] attorney-client privilege is waived if the party "voluntarily discloses or consents to disclosure of any significant part of the matter or communication." Mere disclosure of a subject that the party has discussed with an attorney does not effect a waiver, rather disclosure of part of the communication is required.[10] The burden of proving that the attorney-client privilege applies and was not waived rests with the party asserting the privilege.[11]

Here, the parties do not dispute whether the legal assessments are subject to attorney-client privilege, but whether PacifiCorp has waived the privilege. Regarding whether PacifiCorp waived attorney-client privilege via disclosure, the relevant consideration is whether PacifiCorp's testimony disclosed a "significant part of the matter or communication." Sierra Club contends that PacifiCorp's testimony reveals the material substance and conclusion of the legal assessments, rather than just acknowledging the existence of attorney-client communications on this topic. PacifiCorp asserts that its testimony was not intended to communicate the conclusions and determinations of its counsel, but instead PacifiCorp's own conclusions based on PacifiCorp's assessment of the Participation Agreement. Additionally, PacifiCorp proposes an errata to the testimony to clarify that point. Upon review, I find that the testimony, as clarified in the errata, does not disclose a significant part of the legal assessment provided to PacifiCorp, but rather identifies the subject matter of that communication. Accordingly, I find no waiver of attorney-client privilege on this basis.

Sierra Club also contends that PacifiCorp impliedly waived attorney-client privilege by placing the privileged information at issue in this proceeding. Specifically, Sierra Club

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[8] PacifiCorp Response at 7, *citing Home Indemnity Company,* 43 F.3d at 1326.
[9] Codified at ORS 40.280.
[10] *Elizabeth Retail Properties, LLC*, 2015 U.S. Dist. LEXIS 146046, at *10; State v Taylor, 247 Ore.App. 339, 345 (Dec 21, 2011) (quoting legislative history of OEC 511 "a person must disclose part of the communication itself in order to effect a waiver).
[11] *Goldsborough v. Eagle Crest Partners*, 105 Ore.App. 499, 503 (Feb 6, 1991).

contends that the prudency of PacifiCorp's decision not to dispute the SCR installation depends on the advice PacifiCorp received regarding its ability to contest the SCR installation, and includes an examination of the utility's decision making process.[12] Under the applicable test, as applied by the Ninth Circuit, implied waiver of 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."[13] Additionally, under this doctrine, "the holder of the privilege may preserve the confidentiality of the privileged communications by choosing to abandon the claim that gives rise to the waiver."[14]

Based on the errata to PacifiCorp's testimony, I find no implied waiver of attorney-client privilege. PacifiCorp has clarified its testimony to present PacifiCorp's own reasoning and conclusions rather than those of counsel, and as a result, PacifiCorp is not relying upon the legal assessment to support the prudence of its decision regarding the Craig Unit 2 SCR project. As a result, the legal assessment is not vital to Sierra Club's ability to rebut the Company's claim of prudence. As the party holding the privilege, PacifiCorp would need to produce the legal assessments if it wished to rely upon an advice of counsel argument to support the prudence of its decision regarding the Craig Unit 2 SCR project in this proceeding.[15]

PacifiCorp additionally opposed Sierra Club's motion, asserting that the issue was moot because Sierra Club did not address the prudence of the Craig Unit 2 SCR project in opening testimony. Had Sierra Club prevailed regarding the waiver issue, Sierra Club would not have been foreclosed from raising an issue in rebuttal testimony based on new evidence that was only made available to Sierra Club after the deadline to submit opening testimony. This is particularly true where PacifiCorp's refusal to provide the information would have been the cause for the delay in Sierra Club receiving the evidence.

Finally, in its response, PacifiCorp suggests that the Commission may be unable to order disclosure of confidential attorney-client communications, citing a 2004 Commission order.[16] In that decision, the Commission recognized a possible distinction between a Commission order and a court order in the context of Disciplinary Rule 4 101(DA), regarding an attorney's responsibility to not disclose communications with a client. In

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[12] Sierra Club Reply at 3, *citing* Order No. 12-493 (Dec 20, 2012).
[13] *Home Indemnity Company*, 43 F.3d at 1326, *citing Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. Sept 26, 1975).
[14] *Roberts v Legacy Meridian Park Hospital*, 97 F. Supp. 3d 1245, 1254 (D. Or. Jan 24, 2014).
[15] *See Roberts*, 97 F. Supp. 3d at 1254.
[16] Response at 9, *citing Central Lincoln People's Utility District v. Verizon Northwest. 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.")

that case, a party sought discovery regarding testimony of another party's counsel. The Commission found that discovery and cross-examination of the attorney must be permitted on matters related to the attorney's testimony in order for that testimony to be considered by the Commission.[17] As a result, the Commission determined that the party could withdraw the testimony from counsel and submit replacement testimony, or respond to discovery on the counsel's testimony.[18] Order No. 04-379, which addressed the attorney's duty to avoid disclosure of privileged information, would be inapplicable to the Commission's authority to direct disclosure of once-privileged information, in the possession of a client, once the client has effectively waived its privilege.

V. RULING

Sierra Club's Motion to Compel filed on May 27, 2020 is denied.

Dated this 18th day of June, 2020, at Salem, Oregon.

Alison Lackey
Administrative Law Judge

A party may request certification this ruling for the Commission's consideration. Under OAR 860-001-1100(1). A request for certification must be filed within 15 days of the date of service of this ruling.

[17] Order No. 04-379 at 10 (Jul 8, 2004).
[18] Order No. 04-379 at 11 (Jul 8, 2004).