

January 18, 2005

VIA FACSIMILE AND OVERNIGHT DELIVERY

Ms. Annette Taylor  
Legal Secretary  
Oregon Public Utility Commission  
550 Capitol Street NE, Suite 215  
PO Box 2148  
Salem, OR 97308-2148

Re: UM 1121 – Applicants' Response to Motion to Lift Protective Order

Dear Ms. Taylor:

Enclosed for filing in the above-referenced docket are the original and five copies of Applicants' Response to Motion to Lift Protective Order.

Please contact me with any questions.

Sincerely,



Sarah K. Wallace

Enclosure

cc: UM 1121 Service List

**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

**APPLICANTS' RESPONSE TO  
MOTION TO LIFT PROTECTIVE  
ORDER**

Oregon Electric Utility Company, LLC, *et al.* ("Applicants"), respectfully submit this response to the "Motion to Lift Protective Order" (the "Motion") filed by Portland Building Owners and Managers Association ("BOMA") on December 27, 2004. Applicants' response is supported by the Declaration of James M. Barrett ("Barrett Decl."), filed herewith.

**INTRODUCTION**

BOMA's Motion requests that the Commission: (1) lift the Protective Order in its entirety; or, in the alternative, (2) declassify CUB/100, 105-110, and 112. Both requests are inappropriate. BOMA's challenge to the entry of a protective order in UM 1121 is untimely by more than nine months. Until now, BOMA opposed neither Applicants' March 8, 2004 request for a protective order, nor the Administrative Law Judge's ("ALJ's") March 10, 2004 ruling that granted that request. By failing to object to the protective order at the appropriate time, BOMA ratified it and, as a result, its request to lift the order in its entirety must be denied.

With respect to BOMA's alternative request to declassify CUB/100, 105-110, and 112, Chief ALJ Grant already noted that Applicants appear to have satisfied the request by voluntarily declassifying confidential documents on January 10, 2005. Applicants agree with Judge Grant that BOMA's alternative request has been satisfied and is now moot.

1 **BACKGROUND FACTS**

2 Applicants filed a Motion for Protective Order on March 8, 2004, concurrently with their  
3 application to exercise influence over Portland General Electric. No party filed an opposition to  
4 Applicants' request. *See Barrett Decl. at ¶ 2.*

5 On March 10, 2004, the ALJ entered a Standard Protective Order. *See Order No. 04-139,*  
6 *UM 1121.* Any party could have appealed the Order pursuant to OAR 860-014-0091. *Id.* No  
7 party appealed the Order. *See Barrett Decl. at ¶ 3.*

8 Section 15 of the Standard Protective Order set out a procedure by which any party could  
9 have challenged the designation of particular information or documents as confidential. BOMA  
10 made no use of this procedure at any time with respect to any documents, including those  
11 specified in this Motion. *See Barrett Decl. at ¶ 4.*

12 The ALJ held an evidentiary hearing on October 20 and 21, 2004. The parties generally  
13 stipulated to the admission of each other's testimony and exhibits, and such stipulations at the  
14 very least implicitly included a waiver of objections regarding confidentiality designations. For  
15 example, ICNU and CUB objected to the confidentiality designation of certain information not at  
16 issue here before stipulating to its admission. *See Hearing Tr. at 192:7-197:23; Post-hearing*  
17 *Report, UM 1121 (Oct. 26, 2004).* The ALJ resolved those objections and closed the evidentiary  
18 record. *Id.* BOMA's counsel attended the evidentiary hearing and did not raise any objections to  
19 confidentiality designations. *See Barrett Decl. at ¶ 5.*

20 On January 5, 2005, the Willamette Week newspaper published excerpts of confidential  
21 documents that an intervenor improperly had disclosed. Applicants believe that the published  
22 excerpts were used in a misleading fashion. On January 10, 2005, Applicants declassified the  
23 confidential documents so that the public could evaluate them fairly and in context. The  
24 declassified documents include CUB/105 through CUB/110 and CUB/112, all of which are at  
25 issue here. *See Barrett Decl. at ¶ 6; Ex. A.*

1 **ARGUMENT**

2 The ALJ should reject BOMA’s request that the ALJ certify its Motion to the full  
3 commission. As demonstrated below, not only are some issues moot, the ALJ has all the  
4 authority it needs to consider and reject the Motion. *See* OAR 860-012-0035(g) (ALJ has  
5 authority to decide procedural matters).

6 **I. THE ALJ’S DECISION TO ENTER A STANDARD PROTECTIVE**  
7 **ORDER IN UM 1121 WAS PROPER, AND BOMA CANNOT**  
8 **CHALLENGE IT NOW.**

9 BOMA first attacks the legitimacy of the protective order entered in this docket, baldly  
10 asserting that “neither the Commission nor the ALJ considering the motion for a protective order  
11 required the Applicants to bring forth substantial evidence in support of the motion” and that the  
12 ALJ entered an order “without a factual analysis of the evidence and findings of fact.” *Motion*  
13 *at 2*. BOMA’s challenge lacks merit and is untimely.

14 The ALJ was authorized to enter a protective order in this docket, if only to facilitate  
15 discovery.<sup>1</sup> *See* OAR 860-012-0035(k). The Commission’s rules required BOMA to file a  
16 timely opposition to either the Applicants’ motion for a protective order or the ALJ’s ruling on  
17 that motion (if not both). *See* OAR 860-013-0050(2)(d) (allowing 15 days to respond to a  
18 motion); OAR 860-014-0091(2) (allowing 10 days to request certification of an ALJ ruling).  
19 BOMA chose to do nothing and cannot now, nine months later, attack the validity of an order  
20 that all parties have relied upon to protect their confidential information. *See Zenith Radio Corp.*  
21 *v. Matsushita Elec. Industrial Co.* (“*Zenith Radio*”), 529 F. Supp. 866, 875 (E.D. Pa. 1981)

22  
23  
24 <sup>1</sup> The Commission has explained that the primary by-product, if not a purpose, of the protective order is to  
25 facilitate discovery by avoiding document-by-document battles over protection, and “if a judge, magistrate, or  
26 special master had to rule upon countless invocations of [the civil rules protecting confidential information] the  
progress of complex cases would be severely impeded.” *See Re Investigation into the Cost of Providing*  
*Telecommunications Services*, UM 351, Order No. 91-500 (Apr. 21, 1991).

1 (party ratifies protective order by failing to challenge it and allowing other parties to designate  
2 voluminous documents as confidential without objection).<sup>2</sup>

3 Moreover, BOMA's eleventh-hour request for wholesale declassification is highly  
4 disruptive and would require the parties to engage in the time-consuming and expensive task of  
5 briefing each decision to protect a document. BOMA has the burden of justifying such an  
6 extraordinary undertaking. *See Zenith Radio*, 529 F. Supp. at 893 ("A party seeking wholesale  
7 declassification must first attempt to justify the investment of judicial and private resources  
8 demanded by such an exercise."). Far from meeting that burden, BOMA's counsel conceded  
9 that, prior to filing this Motion, she had "only read *some* of the documents" filed in this docket.  
10 *See Barrett Decl. at ¶ 7, Ex. B (emphasis added)*. In other words, BOMA apparently has never  
11 taken the time to review the evidentiary record to determine the accuracy of its claims regarding  
12 alleged "inconsistencies" between Applicants' public statements and confidential material, even  
13 though those claims are the basis for its Motion. *See Motion at 2*. The Commission must ignore  
14 a motion that, in blatant disregard of its rules, is not based on "the best of the knowledge,  
15 information, and belief of [BOMA's counsel], formed after reasonable inquiry." OAR 860-013-  
16 0065(b).

17 **II. BOMA'S CHALLENGE TO THE CONFIDENTIALITY DESIGNATIONS**  
18 **OF CUB/100, 105-110, AND 112 IS MOOT**

19 On January 11, 2005, Chief ALJ Grant issued a ruling allowing Applicants additional  
20 time to respond to this Motion in part because Applicants had appeared to satisfy BOMA's  
21 alternative request to declassify specific documents by voluntarily making those documents  
22 available to the public. *See Ruling*, UM 1121 (Jan. 11, 2005). Judge Grant further observed:  
23

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24 <sup>2</sup> *Zenith Radio* is not an Oregon case and was decided under federal law. However, the Oregon Court of  
25 Appeals cited it as providing guidance in "determining whether material that has become part of a judicial record  
26 should remain subject to a protective order." *Citizens' Utility Board of Oregon v. Oregon Public Utility  
Commission*, 128 Or. App. 650, 660 (1994).

1 The declassified documents include CUB 105-110 and 112. While CUB 100 was  
2 not listed, the confidential portions of that testimony generally discuss the now  
3 public exhibits.

4 *Id.*

5 Applicants agree with Judge Grant that their decision to voluntarily declassify CUB/105-  
6 110 and CUB/112 renders moot BOMA's alternative request to declassify those documents.  
7 Applicants also agree with Judge Grant that confidential portions of CUB/100 generally discuss  
8 now public exhibits CUB/104 through CUB/109. *See* CUB/100, Jenks-Brown/10-11; 14-15; 18-  
9 20. As a result, BOMA's alternative request must be dismissed.

### 10 CONCLUSION

11 For the foregoing reasons, Applicants respectfully request that the ALJ deny BOMA's  
12 Motion without certifying it to the Commission for consideration.

13 Respectfully submitted this 18th day of January, 2005.

14 ATER WYNNE LLP

15 By: 

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Of Attorneys for Applicants

1                                   **BEFORE THE PUBLIC UTILITY COMMISSION**  
2   **OF OREGON**  
3   **UM 1121**

4  
5   In the Matter of

6   OREGON ELECTRIC UTILITY COMPANY, LLC,  
7   et al.,

8   Application for Authorization to Acquire Portland  
9   General Electric Company

**DECLARATION OF JAMES M.  
BARRETT IN SUPPORT OF  
APPLICANTS' RESPONSE TO  
BOMA'S MOTION TO LIFT  
PROTECTIVE ORDER**

10           I, James M. Barrett, hereby declare that I have personal knowledge of the matters set  
11 forth in this Declaration and am competent to testify to them:

12           1.     I am an attorney at Ater Wynne LLP, and I represent Oregon Electric Utility  
13 Company LLC, *et al.* ("Applicants"), in the above-captioned proceeding.

14           2.     Applicants filed a Motion for Protective Order on March 8, 2004, concurrently  
15 with their application to exercise influence over Portland General Electric. No party filed an  
16 opposition to Applicants' request.

17           3.     On March 10, 2004, the Administrative Law Judge ("ALJ") entered a Standard  
18 Protective Order. *See* Order No. 04-139, UM 1121. Any party could have appealed the Order  
19 pursuant to OAR 860-014-0091. *Id.* No party appealed the Order.

20           4.     Section 15 of the Standard Protective Order set out a procedure by which any  
21 party could have challenged the designation of particular information or documents as  
22 confidential. BOMA made no use of this procedure at any time with respect to any documents,  
23 including those specified in its Motion.

24           5.     The ALJ held an evidentiary hearing on October 20 and 21, 2004. The parties  
25 generally stipulated to the admission of each other's testimony and exhibits, and such  
26

1 stipulations at the very least implicitly included a waiver of objections regarding confidentiality  
2 designations. For example, ICNU and CUB objected to the confidentiality designation of certain  
3 information before stipulating to its admission. *See* Hearing Tr. at 192:7-197:23; *Post-hearing*  
4 *Report*, UM 1121 (Oct. 26, 2004). The ALJ resolved those objections and closed the evidentiary  
5 record. *Id.* BOMA's counsel attended the evidentiary hearing and did not raise any objections to  
6 confidentiality designations.

7 6. On January 5, 2005, the Willamette Week newspaper published excerpts of  
8 confidential documents that an intervenor improperly had disclosed. Applicants believe that the  
9 published excerpts were used in a misleading fashion. On January 10, 2005, Applicants  
10 declassified the confidential documents so that the public could evaluate them fairly and in  
11 context. The declassified documents include CUB/105 through CUB/110 and CUB/112, all of  
12 which are at issue here. A true and correct copy of the January 10, 2005 letter from Lisa  
13 Rackner to ALJs Logan and Smith identifying the declassified documents is attached hereto as  
14 Exhibit A.

15 7. On January 6, 2005, BOMA's counsel wrote an e-mail in which she conceded  
16 that, prior to filing a motion to lift the protective order, she had "only read some of the  
17 documents" filed in this docket. A true and correct copy of that e-mail is attached hereto as  
18 Exhibit B.

19  
20 **I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO**  
21 **THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I**  
22 **UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND**  
23 **IS SUBJECT TO PENALTY FOR PERJURY.**

24 DATED this 18th day of January, 2005.

25   
26 James M. Barrett



January 10, 2005

VIA FACSIMILE AND OVERNIGHT MAIL

Honorable Kathryn A. Logan  
Honorable Christina M. Smith  
Administrative Law Judges  
Oregon Public Utility Commission  
550 Capitol Street NE, Suite 215  
Salem, OR 97308-2148

Re: UM 1121: Change of Confidentiality Designation for Certain Documents in the Record

Dear Judges Logan and Smith:

As you are aware, last Wednesday the Willamette Week newspaper published an article in which it announced that it had obtained Applicants' confidential documents filed in this case from one of the intervenors. In that article, Willamette Week selectively disclosed and discussed portions of those documents in what we believe to be a misleading fashion. We understand and appreciate the Commission's acknowledgment that such unauthorized disclosure does not waive Applicants' right to continue to claim confidential status for those documents. However, as a practical matter, Applicants have determined that, at this point, they and the public will be better served if interested persons can review the confidential documents in their entirety in order to evaluate them fairly and in context. For this reason, the Applicants have changed the confidentiality designation of the following documents from "confidential" to "public." All of these documents are part of the official record in this proceeding and are described using the appropriate exhibit number.

- Oregon Electric/101, Davis/1-2
- Oregon Electric/203, Wheeler/3, 11-13, 25, 28-29
- Staff/202, Morgan/25-165, 169-183, 188-189, 196-224, 226-462, 590-592, 597-608
- Staff/302, Durrenberger/1-230, 232-238
- Staff/800, Conway/12
- Staff/1000, Durrenberger/3
- CUB/104, Jenks-Brown/1-2

EXHIBIT A - Page 1 of 3

Honorable Kathryn A. Logan  
Honorable Christina M. Smith  
January 10, 2005  
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- CUB/105, Jenks-Brown/1-13
- CUB/106, Jenks-Brown/1
- CUB/107, Jenks-Brown/1-2
- CUB/108, Jenks-Brown/1
- CUB/109, Jenks-Brown/1
- CUB/110, Jenks-Brown/1-4
- CUB/112, Jenks-Brown/1-2
- CUB/205, Dittmer/1
- CUB/207, Dittmer/1
- CUB/301, Jenks-Brown/1
- CUB/302, Jenks-Brown/1-3
- ICNU/102, Schoenbeck/1-7
- ICNU/104, Schoenbeck/1-22
- ICNU/106, Schoenbeck/1-12
- ICNU/107, Schoenbeck/1-13
- ICNU/108, Schoenbeck/1-3
- ICNU/109, Schoenbeck/1
- ICNU/110, Schoenbeck/1
- ICNU/111, Schoenbeck/1-43
- ICNU/203, Antonuk-Vickroy/1-14
- ICNU/204, Antonuk-Vickroy/1-3
- ICNU/510, pages 1-4 (cross-examination exhibit)
- ICNU/802, pages 1-2 (cross-examination exhibit)
- ICNU/803, page 1 (cross-examination exhibit)
- ICNU/804, page 1 (cross-examination exhibit)
- ICNU/902, Transcript of the Deposition of Kelvin L. Davis, all confidential pages and exhibits
- ICNU/903, pages 1-24 (cross-examination exhibit)

# ATERWYNNE<sub>LLP</sub>

Honorable Kathryn A. Logan  
Honorable Christina M. Smith  
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- ICNU/904, pages 1-2 (cross-examination exhibit)
- ICNU/905, pages 1-24 (cross-examination exhibit)

With the removal of the confidential designations for the above documents, only the following five confidential exhibits remain in the official record. The Applicants do not have the unilateral authority to change the confidentiality designations of these exhibits.

- Exhibit Staff/202, Morgan/463-502, 575-589
- Exhibit CUB/203, Dittmer/1
- Exhibit CUB/204, Dittmer/1
- Exhibit ICNU/202, Antonuk-Vickroy/1
- ICNU/806, pages 18, 26-27, 35, 38, 42, 44, 47-49, 51-57, 81, 83, 94 (cross-examination exhibit)

Please contact me with any questions.

Sincerely,



Lisa F. Rackner

cc: UM 1121 Service List  
Bryan Conway

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**Date:** 1/6/05 4:53PM  
**Subject:** Re: UM 1121 OREGON ELECTRIC UTILITY ACQUISITION OF PGE - Public Disclosure o...

oh for Pete's sake. in response to a query by yet another reporter, I just now, for the first time opened staff's testimony, which does (as the reporter suggested) contain presumably confidential documents. but please be aware of the following.

1. the WW article referenced docs with water marks. the exhibits or docs attached to staff's testimony does not.
2. I resent the level of debate about what I did (filed the Motion) and didn't do (actually didn't have the docs, did no data requests, and got no data response) and for being apparently singled out for consideration. I am assuming that'd it will be ultimately verified and think the debate detracts from the important issue.

I think the issue is less who did "leak" and more what the documents say. I put forth BOMA's position on what the documents say and continue to believe that the public has a right to assess the truth and veracity of various public statements. If the documents are simply speculative or incidental as has been suggested in the press, there is no basis for the protective order. If they are not speculative and are germane, they ought to be available. However, I didn't leak them, did not get any except with pre filed testimony, and frankly have only read some of the documents. Let's talk about what's important - is this the right solution for the PGE situation?

\* ←

Ann Fisher

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**CERTIFICATE OF SERVICE  
UM 1121**

I hereby certify that a true and correct copy of **APPLICANTS' RESPONSE TO MOTION TO LIFT PROTECTIVE ORDER** was served via U.S. Mail on the following parties on January 18, 2005:

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