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July 8, 2004

VIA FACSIMILE AND UPS OVERNIGHT

Administrative Hearings Division
Oregon Public Utility Commission
550 Capitol Street NE, Suite 215
PO Box 2148
Salem, OR 97308-2148

Re: UM 1121

Dear Sir or Madam:

Enclosed for filing in the above-referenced docket are the original and five copies of the Joint Reply of PGE, Enron, and Applicants to INCU's Brief on *In Camera* Review of Disputed Materials. Please contact me with any questions.

Very truly yours,

Sarah Wallace

Sarah Wallace

Enclosures
cc: UM 1121 Service List

CERTIFICATE OF SERVICE
UM 1121

I hereby certify that a true and correct copy of **JOINT REPLY OF PGE, ENRON, AND APPLICANTS TO ICNU'S BRIEF ON IN CAMERA REVIEW OF DISPUTED MATERIALS** was served via U.S. Mail on the following parties on this 8th day of July, 2004:

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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	JOINT REPLY OF PGE, ENRON, AND APPLICANTS TO ICNU'S BRIEF ON *IN CAMERA* REVIEW OF DISPUTED MATERIALS

Oregon Electric Utility Company, LLC, TPG Partners III, L.P., TPG Partners IV, L.P., Managing Member LLC, Gerald Grinstein, and Tom Walsh (collectively "Applicants"), along with Portland General Electric ("PGE") and Enron Corp. ("Enron"), submit the following Joint Reply to ICNU's Brief on *In Camera* Review of Disputed Materials.

The foregoing parties respectfully request that the Administrative Law Judge ("ALJ") consider this Reply, notwithstanding that additional submissions were not contemplated by the "Stipulation Regarding Deposition" between PGE and ICNU. The parties would not object if ICNU chooses to file a reply brief of its own.

This Reply addresses only PGE's ability to claim that certain communications between itself, Enron, and Applicants are protected from disclosure under Oregon law because they relate to a matter of common interest or are subject to a joint defense agreement.[1]

[1] Applicants have standing to join PGE and Enron in defending claims of privilege and work product based on matters of common interest or joint defense, because, under Oregon law, Applicants' have a right to protect their own claims of privilege and/or work product with regard to the same information. *See* 1981 Conference Committee Commentary to OEC 503(2)(c) ("In a case in which lawyers represent different clients who have a common interest, Rule 503 allows each client a privilege as to the client's own statements."); *cf. Marriage of Boon*, 100 Or. App. 354, 357 (1990) (third party claiming personal right or privilege relating to documents in possession of another has standing to quash a subpoena requesting disclosure of those documents).

PGE's stipulation to *in camera* review of protected communications does not waive or terminate any privilege held by Applicants. *Frease v. Glazer*, 330 Or. 364, 372 (2000). Further, if ICNU seeks *in camera* review

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A. ENRON, PGE, AND APPLICANTS SHARE A MATTER OF COMMON INTEREST SUFFICIENT TO PROTECT THEIR COMMUNICATIONS

Enron, its wholly owned subsidiary, PGE, and Applicants share matters of common interest, namely: (1) to obtain approval of Applicants' proposed purchase of PGE from Enron at the Oregon Public Utility Commission ("OPUC") and the Federal Energy Regulatory Commission ("FERC"); and (2) information related to PGE's potential legal liabilities that Applicants may assume as the prospective purchaser. As explained below, these common interests provide sufficient basis to extend the protections provided by both the attorney-client privilege and the work product doctrine to communications shared between the parties that relate to the transaction and the approval process.

Courts routinely have applied the common interest privilege to protect communications between corporations that, as here, are engaged in a purchase/sale transaction. *See, e.g., Cavallaro v. United States*, 153 F. Supp. 2d 52, 62 (D. Mass. 2001), *aff'd*, 284 F.3d 236 (1st Cir. 2002) ("The weight of the case law suggests that, as a general matter, privileged information disclosed during a merger between two unaffiliated businesses would fall within the common-interest privilege."); *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308, 311 (N.D. Cal. 1987) (upholding claim of privilege for communication between two corporations engaged in sale of corporate division).

Similarly, courts commonly have used the presence of a common interest to extend work product protections to communications shared among corporations engaged in the sale of a business. *See, e.g., United States v. Adlman*, 134 F.3d 1194, 1199-1200 (2d Cir. 1998) (concluding that work product protection should apply to communications shared by a company that "is engaged in, or contemplates, some kind of partnership, merger, joint

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of communications in Applicants' possession, Applicants do not waive their right to demand that ICNU first meet its burden of presenting "sufficient evidence" that the communications do not, in the first instance, fall within the scope of a privilege or the work product doctrine. *Kahn v. Pony Express Courier Corp.*, 173 Or. App. 127, 132-33 (2001).

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undertaking, or business association with another company"); *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (T.E.C.A. 1985) (applying work product protections to communications between two companies "in the initial stages of becoming parent and subsidiary").

In the context of a corporate transaction, acknowledging the protections afforded by a common interest advances important policy goals:

> Unless it serves some significant interest courts should not create procedural doctrine that restricts communication between buyers and sellers, erects barriers to business deals, and increases the risk that prospective buyers will not have access to important information that could play key roles in assessing the value of the business or product they are considering buying. Legal doctrine that impedes frank communication between buyers and sellers also sets the stage for more lawsuits, as buyers are more likely to be unpleasantly surprised by what they receive. By refusing to find waiver in these settings, courts create an environment in which businesses can share more freely information that is relevant to their transactions. This policy lubricates business deals and encourages more openness in transactions of this nature.

Hewlett-Packard Co., 115 F.R.D. at 311.

A claim that communications are protected by a common interest is further strengthened when there is evidence that the communications were revealed both in confidence and in anticipation of litigation. *See, e.g., Gulf Oil Corp.*, 760 F.2d at 296 (finding stronger case for common interest when information was exchanged between merging corporations with "strong common interests in sharing the fruit of trial preparation efforts" and concurrently with a guarantee of confidentiality). Both elements are present here. First, because the parties knew that any purchase agreement ultimately would be contested in proceedings before the OPUC and (potentially) FERC, they entered into a common interest agreement in anticipation of that litigation. In this docket, the OPUC has adopted a contested case proceeding that qualifies as

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"litigation" for the purpose of the work product doctrine.[2] Second, the parties entered into a confidentiality agreement that applied to information disclosed during the transaction.[3] These indicia of common interest require that the ALJ protect communications between them.

B. ENRON, PGE, AND APPLICANTS DO NOT HAVE TO SHARE COMMON INTERESTS ON EVERY ISSUE

ICNU incorrectly suggests that the common interest or joint defense privilege does not apply because "PGE and TPG do not share the same party status in this Docket," and "PGE has not demonstrated that TPG, PGE, and Enron share common interests on all issues." *ICNU's Brief at 11.*

In fact, complete commonality of interests is not required. Oregon law recognizes waiver of the common interest privilege only "where there is *no* common interest to be promoted by a joint consultation, and the parties, therefore, meet on a *purely* adversary basis." 1981 Conference Committee Commentary to OEC 503(2) (emphasis added). *See also United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979) ("the joint-interest privilege is not limited to situations in which the positions of the parties are compatible in all respects"); *In re Circle K Corp.*, 1997 WL 31197 * 11 (S.D.N.Y. 1997) ("parties need not have identical interests to have a common interest").

Because PGE, Enron, and Applicants need not share common interests on every issue, the fact that they do not share the same party status in this docket is irrelevant. *See, e.g., United States v. AT&T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) ("'common interest' should not be construed as narrowly limited to co-parties"); *SCM Corp. v. Xerox Corp.* 70 F.R.D. 508, 512 (D. Conn. 1976) ("the shared interest necessary to justify extending the privilege to encompass

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[2] "Litigation" is defined "to include all proceedings in which there is a right of cross-examination" such as "all trial-type hearings . . . rule-making on the record, and any other proceedings in which by law or established practice the right of cross-examination exits." *United States v. AT&T*, 86 F.R.D. 603, 627-28 (D.D.C. 1979).

[3] Applicants have produced drafts of this confidentiality agreement to ICNU under the Standard Protective Order. *See* Exhibit 371 to ICNU's Fifth Set of Data Requests.

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intercorporate communications appears most clearly in cases of co-defendants and impending litigations but is not necessarily limited to those situations.").

C. THE PARTIES' COMMON INTEREST EXTENDS THE PROTECTION OF BOTH THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

ICNU asserts that to claim joint defense or common interest protection for communications that PGE shared with Applicants (or vice versa), those communications "must be subject to the attorney-client privilege." *ICNU's Brief at 10.* However, a common interest claim also affects communications subject to the *work product doctrine.* The work product doctrine and the attorney-client privilege are distinct and should be addressed separately. A shared communication may qualify as protected work product, whether or not it qualifies as an attorney-client privileged communication. Further, parties with a common interest may share work product without waiving the work product protection. *See, e.g., Key v. U.S. Bancorp Disability Income Plan*, 1988 WL 114929 * 3 (D. Or. 1988).

The work product doctrine is far broader than the attorney-client privilege in that (1) it protects more than just communications between the attorney and the client, and (2) it is more difficult to waive the protection afforded work product by mere disclosure to a third party. The work product doctrine applies to any document "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) . . . ." ORCP 36 B(3). Importantly, even communications between non-lawyers are protected by the work product doctrine if they are prepared in anticipation of litigation. *Id.*

The protection afforded by the doctrine is not waived "unless the disclosure is inconsistent with maintaining secrecy from possible adversaries." *Key*, 1988 WL 114929 at * 3. Corporations that share a common interest in closing a business transaction therefore are able to

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share work product freely without losing those protections. *See, e.g., Gulf Oil Corp.*, 760 F.2d at 295-96 ("A transfer made to a party with 'strong common interests in sharing the fruit of trial preparation efforts,' or such a transfer made concurrently with a guarantee of confidentiality, does not necessarily constitute a waiver of the work product privilege.").

The strong commonality of interest shared between PGE, Enron, and Applicants, as described above, provides sufficient ground to extend work product protection to communications shared between them.

D. THE WORK PRODUCT DOCTRINE APPLIES TO COMMUNICATIONS PRIOR TO EXECUTION OF THE STOCK PURCHASE AGREEMENT

The work product doctrine applies to any document prepared "in anticipation of litigation." ICNU claims that "in anticipation of litigation" means that there must be more than "a mere potential for litigation." *ICNU's Brief at 9.* ICNU also suggests that, "for the purposes of this proceeding, it appears that the OPUC and FERC litigation regarding the proposed transaction was reasonably certain at the time that TPG and Enron executed the Stock Purchase Agreement." *Id. at 9-10.* ICNU is incorrect on both counts.

A "growing number" of courts – most recently the Ninth Circuit – are adopting a broad "because of" standard to determine whether documents are prepared "in anticipation of litigation." *See In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 907 (9th Cir. 2004). Applying this standard, "a document should be deemed prepared 'in anticipation of litigation' and thus eligible for work product protection . . . if 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.* (citing Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 *Federal Practice & Procedure* § 2024 (2d ed. 1994)).

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The "because of" standard "does not consider whether litigation was a primary or secondary motive behind the creation of a document. Rather, it considers the totality of the circumstances and affords protection when it can fairly be said that the 'document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation.'" *In re Grand Jury Subpoena*, 357 F.3d at 908 (quoting *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998)). Importantly, the work product doctrine does *not* require that a document be prepared "primarily to assist in" litigation, and "there is no rule that bars application of work-product protection to documents created prior to the event giving rise to litigation." *Adlman*, 134 F.3d at 1198, 1200.

For example, in *Adlman*, the court analyzed a memorandum prepared by an accountant and lawyer to evaluate the tax implications of a proposed merger. The memorandum was drafted to assist the client in making a business decision, but also was prepared "because of" the almost certain prospect that the proposed merger would result in litigation with the Internal Revenue Service. Under those circumstances, the court concluded that the work product doctrine may apply. *See Adlman*, 134 F.3d at 1204.

Similar to the merging corporations in *Adlman*, in this case each party knew that any agreement to purchase PGE, although a business decision, would also require regulatory approval and would be contested in proceedings at the OPUC and potentially at FERC. Many communications between Applicants, Enron, and PGE were made "because of" this certainty. Some of those communications reasonably would have occurred before Enron and TPG signed the Stock Purchase Agreement, because each party had an interest in laying the groundwork for a common strategy at the Commission in advance of signing. The ALJ should not order disclosure of these communications.

Lastly, Enron, PGE, and Applicants shared information generated by their attorneys relating to potential and actual legal liabilities. These communications clearly involved a matter

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of common interest and are afforded work product protection. *See, e.g., Adlman*, 134 F.3d at 1199-1200 (work product protection should extend to attorneys' candid assessment of litigation prospects that are shared between two companies engaged in or contemplating a merger or other business association); *Gulf Oil Co.*, 760 F.2d at 296 (purchasing company had legitimate, nonadversarial, interest in reviewing work product related to litigation involving company it sought to purchase). Accordingly, the ALJ should not order that these communications be disclosed.

E. COMMUNICATIONS IN DRAFT FORM ARE ENTITLED TO WORK PRODUCT PROTECTION

ICNU claims that a prior Commission order permits disclosure of draft documents over the claim of attorney-work product privilege. The cited case, *Re US West Communications, Inc.*, Docket No. UM 823, Order No 97-248 (sic., s/b Order No. 97-428), does not support this broad claim. In that case, US West was ordered to produce a working draft of an application it was required to file with *another* agency, the FCC. The Commission needed the information from this application in order to make its own recommendation to the FCC. Order 97-428 at 2. The Commission's decision clearly does not address work product privilege available to drafts prepared in connection with proceedings before the OPUC.

CONCLUSION

Applicants continue to have a common interest with PGE and Enron in obtaining approval of its proposed purchase of PGE. Communications between PGE, Enron, and

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Applicants relating to that purchase and the approval process are protected by the common interest privilege and the work product doctrine, and should remain so.

RESPECTFULLY SUBMITTED this 8th day of July, 2004.

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