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Suite 2460  
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July 23, 2004

*Via Facsimile, Electronically, and U.S. Mail*

Ms. Cheryl Walker  
Oregon Public Utility Commission  
P.O. Box 2148  
Salem OR 97308-2148

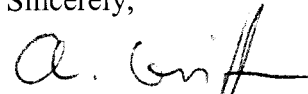
Re: In the Matter of Oregon Electric Utility Company, LLC, et al., Application for  
Authorization to Acquire Portland General Electric Company  
**Docket No. UM 1121**

Dear Ms. Walker:

Enclosed please find an original and six copies of the Application for Partial Reconsideration and Clarification of Commission Order No. 04-352 and ALJ Logan's Ruling Clarifying Order on behalf of the Industrial Customers of Northwest Utilities, Citizens' Utility Board, and Associated Oregon Industries in the above-captioned Docket.

Please return one file-stamped copy of the document in the self-addressed, stamped envelope provided. Thank you for your assistance.

Sincerely,



Christian W. Griffen

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Application for Partial Reconsideration and Clarification of Commission Order No. 04-352 and ALJ Logan's Ruling Clarifying Order on behalf of the Industrial Customers of Northwest Utilities, Citizens' Utility Board, and Associated Oregon Industries upon the parties, shown below, on the official service list for Docket No. UM 1121, by causing the same to be electronically served on all parties whom have an email address on the official service list, and by U.S. Mail, postage-prepaid, to those parties who do not have an email address on the official service list.

Dated at Portland, Oregon, this 23rd day of July, 2004.

  
 Christian W. Griffen

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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1121**

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| In the Matter of                         | ) |                                  |
|                                          | ) | APPLICATION FOR PARTIAL          |
| OREGON ELECTRIC UTILITY                  | ) | RECONSIDERATION AND              |
| COMPANY, LLC, et al.,                    | ) | CLARIFICATION OF COMMISSION      |
|                                          | ) | ORDER NO. 04-352 AND ALJ LOGAN’S |
| Application for Authorization to Acquire | ) | RULING CLARIFYING ORDER          |
| Portland General Electric Company        | ) |                                  |
|                                          | ) |                                  |
|                                          | ) |                                  |
| _____                                    | ) |                                  |

**INTRODUCTION**

Pursuant to ORS § 756.561 and OAR § 860-014-0095, the Industrial Customers of Northwest Utilities (“ICNU”), the Citizens’ Utility Board (“CUB”), and the Associated Oregon Industries (“AOI”) (collectively, “Joint Intervenors”) request partial reconsideration and clarification of Oregon Public Utility Commission (“OPUC” or the “Commission”) Order No. 04-352 and Administrative Law Judge (“ALJ”) Logan’s July 1 Ruling clarifying Order No. 04-352 (“Ruling) (collectively, the “Intervenor Funding Orders” or the “Orders”). In Order No. 04-352, the Commission approved the proposed budgets of each of the Joint Intervenors and required the Joint Intervenors to “submit detailed billings of monies expended on the first of July, September, and November 2004.” Re Oregon Elec. Util. Co., OPUC Docket No. UM 1121, Order No. 04-352 at 3 (June 23, 2004). Judge Logan subsequently issued the Ruling clarifying the format for the detailed billings. Ruling at 1-2.

Joint Intervenors request reconsideration of two aspects of the Orders: 1) the requirement in Order No. 04-352 to submit detailed billings prior to the submittal of any

Requests for Payment; and 2) ALJ Logan's Ruling clarifying that the billing format should include a detailed description of the monies spent. Joint Intervenors are not seeking reconsideration of the approval of the proposed budgets or Issue Fund Grants. Joint Intervenors request reconsideration of the Intervenor Funding Orders for the following reasons:

1. Reconsideration of the Intervenor Funding Orders is required to correct an error of law or fact. Allowing the Commission, ALJ, and other parties to view the detailed billings of Joint Intervenors at this point is not consistent with the Intervenor Funding Agreement ("IFA");
2. Good cause exists for further examination of the decision. Joint Intervenors will be unduly prejudiced if they are required to submit detailed billing information prior to a Request for Payment because such disclosure will reveal Joint Intervenors' litigation strategy during the course of the proceeding; and
3. The Intervenor Funding Orders require disclosure of detailed billing information that could reveal specific research areas, litigation strategies, and confidential communications that are protected under the attorney/client privilege or work product doctrine.

Joint Intervenors request that the Intervenor Funding Orders be reconsidered and amended to remove the requirement that Joint Intervenors submit detailed billings of monies expended on the first of July, September, and November 2004. In addition, Joint Intervenors request that the Commission clarify that the level of information provided to the Commission and to the UM 1121 service list in the July 9, 2004 Intervenor Fund Grants Report is sufficient to comply with the Intervenor Funding Orders until such time as any Joint Intervenor makes a Request for Payment. Joint Intervenors have no objection to a requirement to submit similar summaries on the first of September and November 2004 to aid the Commission in implementing the IFA.

## **BACKGROUND**

On June 23, 2004, in Order No. 04-352, the Commission granted the Issue Fund Grant requests of ICNU, CUB, and AOI, and required Joint Intervenors to submit “detailed billings,” showing the amounts expended on the case on the first of July, September, and November 2004. ICNU was granted an Issue Fund Grant in the amount of \$95,000, CUB was granted \$81,654, and AOI received a grant in the amount of \$55,000. On June 29, 2004, AOI filed a summary of its expenditures. On July 1, 2004, ALJ Logan issued the Ruling finding that AOI’s filing was insufficient and clarifying the format of the detailed billing information requested in Order No. 04-352. The Ruling required the Joint Intervenors to submit detailed billing reports with itemized time entries by July 9, 2004. On July 9, 2004, the Joint Intervenors filed a Motion for Partial Stay of the Intervenor Funding Orders. Joint Intervenors also submitted Intervenor Fund Grant Reports summarizing the “eligible expenses” spent to date in UM 1121, in partial compliance with the Intervenor Funding Orders. Joint Intervenors stated in their Motion for Partial Stay that they intended to file an Application for Reconsideration by July 23, 2004.

## **ARGUMENT**

Any party may file for reconsideration of a Commission order within 60 days of the date of service of that order. OAR § 860-014-0095(1); ORS § 756.561. The Commission may grant an application for reconsideration “if sufficient reason therefor is made to appear.” ORS § 756.561(1). Under the Commission rules, the OPUC may grant reconsideration if the applicant shows that there is: 1) new evidence which was unavailable and not reasonably discoverable before issuance of the order; 2) a change in the law or agency policy since the date



the order was issued; 3) an error of law or fact in the order; or 4) good cause for further examination. OAR § 860-014-0095(3). Any of the above grounds, if essential to the Commission's decision, constitutes a sufficient reason to grant reconsideration. Joint Intervenors request reconsideration of the Intervenor Funding Orders because the Orders contain an error of law or fact, and there is good cause for further examination.

**A. The Intervenor Funding Orders are Inconsistent with the Intervenor Funding Agreement**

The Intervenor Funding Orders are inconsistent with the IFA because they require Joint Intervenors to unnecessarily disclose highly sensitive detailed billing information prior to a Request for Payment or related Commission audit. The IFA prescribes the procedures for requesting and obtaining an Issue Fund Grant. These procedures provide protections to ensure that the Issue Fund is not overspent and intervenors are reimbursed only for “eligible expenses,” as defined by the IFA. Re Temporary Rules, OPUC Docket No. AR 462, Order No. 03-388 Attachment B, IFA at § 4.2.3 (Feb. 5, 2003). At the time an intervenor requests payment, the Commission may audit the unprivileged records of intervenors, as necessary, to verify the accuracy of the information provided in the intervenor's Request for Payment. Id. at § 7.10. Thus, submission of detailed billing information prior to a Request for Payment is unnecessary and inconsistent with the language and spirit of the IFA.

The 2003 legislature adopted Senate Bill 205, which authorized the Commission to approve IFAs. In Order No. 03-388, the OPUC adopted temporary rules governing intervenor funding<sup>1/</sup> and approved the IFA. Re Temporary Rules, OPUC Docket No. AR 462, Order No.

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<sup>1/</sup> These rules became permanent in January 2004. Re Adoption of Rules, OPUC Docket No. AR 465, Order No. 04-007 (Jan. 6, 2004).

03-388 (July 2, 2003). According to the intervenor funding rules adopted by the Commission, “the terms of an [intervenor funding] agreement will be binding on all organizations seeking a grant under that agreement and will be followed by the Commission in administering the agreement.” OAR § 860-012-0100(2). Thus, the Commission and Joint Intervenors have an obligation to follow the terms and procedures set forth in the IFA. See Belozer Poultry Farms, Inc. v. Portland Gen. Elec. Co., OPUC Docket No. UC 201, Order No. 92-825 at 10 (June 8, 1992) (finding that the Commission must follow its own rules). Likewise, the IFA provides that the granting of “an Issue Fund Grant shall constitute a binding obligation on the Commission to order reimbursement of Eligible Expenses . . . .” IFA at § 6.5.

The Intervenor Funding Orders are inconsistent with the procedures prescribed by the IFA. These procedures provide sufficient protections to ensure that Joint Intervenors will not be reimbursed for expenses that are not deemed “eligible”; thus, monitoring the expenses incurred by Joint Intervenors is unnecessary at this time. In order to receive payment from the Portland General Electric (“PGE”) Issue Fund Grant, Joint Intervenors must submit a Request for Payment. Id. at § 7.3. When a Request for Payment is made, Joint Intervenors are obligated to “[i]temize the expenses, payees, and hourly rates of amounts to be reimbursed” and “[d]emonstrate that the expenses are reasonable and are directly attributable to issues and positions pursued on behalf of a particular customer class and consistent with the intervenor’s proposed budget . . . .” Id. at § 7.3. Joint Intervenors may not request funds in excess of those incurred for “eligible expenses” and the Commission has the ability, through an audit of Joint Intervenors’ unprivileged records, to ensure that Joint Intervenors comply with this obligation

following a Request for Payment.<sup>2/</sup> Id. at § 7.10. The IFA does not require itemized expense reports or records to be submitted at this time because no party has submitted a Request for Payment and the Commission has not ordered an audit with regard to such a Request. The Commission will have ample opportunity to examine the itemized expenses and, if desired, the unprivileged billing records of Joint Intervenors once a Request for Payment is made to determine if those expenses are “eligible” in accordance with the IFA. Thus, there is no need to require Joint Intervenors to disclose this sensitive information at this time.

Requiring detailed billings to monitor the Issue Fund and ensure that it will not be overspent is unnecessary because: 1) the Commission has already approved Joint Intervenors’ Issue Fund Grants; 2) the Commission has a binding obligation to reimburse Joint Intervenors for eligible expenses in these amounts after a Request for Payment is made; and 3) Joint Intervenors may not request reimbursement for more than approved in Order 04-352, without seeking Commission approval for a proposed budget amendment.

Pursuant to the IFA, the Commission may not approve Issue Fund Grants in excess of the Issue Fund. IFA at § 4.2.3. In Order No. 04-352, the Commission granted the three Issue Fund Grants, noting that the issuance of the Grants in this docket left \$9,000 in the PGE Issue Fund, with the possibility of additional money being added to the Fund from other dockets. Order No. 04-352 at 2. Thus, the Commission has already determined that the Issue Fund is sufficient to satisfy all three Issue Fund Grants. In addition, the Commission has an obligation to reimburse Joint Intervenors for eligible expenses incurred in this docket, in

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<sup>2/</sup> Pursuant to § 7.10 of the Intervenor Funding Agreement, “[t]he Commission may audit the relevant, not privileged, records of any intervenor submitting a Request for Payment . . . as necessary to verify the accuracy of the information provided in the Request for Payment . . . .”

accordance with their proposed budgets. IFA at § 6.5. Thus, this money is already fully committed for the purpose of determining whether funds will be available from the PGE Issue Fund to assist intervenors in other eligible proceedings. Finally, Joint Intervenors may not request reimbursement for a greater amount of money than the Commission approved in Order No. 04-352, and the Commission may not grant reimbursement in excess of the approved Issue Fund Grants, unless Joint Intervenors request an amendment to their proposed budgets. *Id.* at §§ 6.7, 7.6. The Commission may only grant such an amendment if it is not in excess of the Issue Fund. *Id.* at § 7.6. Therefore, there is no danger that the PGE Issue Fund will be overspent due to the Issue Fund Grants approved in this proceeding, and thus no reason to monitor the expenses incurred by Joint Intervenors to ensure the Issue Fund is not overspent.

**B. Good Cause Exists to Reconsider the Intervenor Funding Orders**

Good cause exists for prohibiting disclosure of the detailed billings during this proceeding, because the premature release of such information could create an unfair advantage for opposing parties. In this case, the billing records disclose sensitive information that detail Joint Intervenors' strategies in this proceeding, including: 1) the expert witnesses retained by Joint Intervenors; 2) the work being performed by expert witnesses; 3) the legal research being conducted by counsel for Joint Intervenors; 4) the allocation of resources; 5) the contacts with third parties; and 6) the general strategy of Joint Intervenors. Disclosure of this type of information during the proceeding would harm Joint Intervenors' ability to effectively participate in this Docket. It is improper to prejudice a party in this manner simply because a party received an Intervenor Funding Grant.

This proceeding involves the potential transfer of ownership of the largest utility in Oregon, which only may be approved if the Commission finds that it serves PGE’s “customers in the public interest.” ORS § 757.511(3). Joint Intervenors, as representatives of PGE’s customer classes, have an overwhelming interest in making sure this transaction serves their constituents in the public interest. To do so, Joint Intervenors must be able to prepare their arguments without divulging their strategy and case preparation to other parties. The information that would be disclosed under the Intervenor Funding Orders includes detailed descriptions of research performed and time spent on different aspects of the case by both outside counsel and expert witnesses. This information, if divulged to other parties or even the ALJ hearing the case, could impair Joint Intervenors’ ability to adequately prepare their case to determine whether the transaction is in the public interest.

Joint Intervenors are the only parties, out of over 40 parties, that have been required to disclose detailed billings. No other party has been ordered to disclose any billings, and Joint Intervenors will not be privy to the legal strategies of any other parties. Allowing all parties to have access to only some parties’ billings unduly prejudices those parties who are required to make such disclosures. Thus, the Commission should abandon the requirement that detailed billings be disclosed at this point in the proceeding.

**C. Descriptions of Legal Services Provided on the Billing Statements Are Protected by the Attorney/Client Privilege and Work Product Doctrine**

Pursuant to Oregon Evidence Code (“OEC”) 503(2), “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . .” The Ninth Circuit has recognized that “correspondence, bills, ledgers, statements, and time

records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the [attorney/client] privilege.” Clarke v. Am. Commerce Nat’l Bank, 974 F.2d 127, 129 (9th Cir. 1992). Similarly, the work product doctrine protects from disclosure those documents prepared in anticipation of litigation, unless the requesting party can show an express need for the information and no other means of obtaining it. ORCP 36 B(3).

The detailed billings directed to be disclosed include some information protected by the attorney/client privilege and/or work product doctrine. The billing statements provided by legal counsel and retained experts include: 1) the date the service was performed; 2) the attorney or expert who performed the service; 3) a detailed description of the services performed; 4) the amount of time spent performing the service; and 5) the dollar amount billed. Some aspects of the billing statements are protected by attorney/client privilege because they reveal the “specific nature of the services provided,” including the areas of law researched and Joint Intervenors’ litigation strategy. These statements are also protected by the work product doctrine because they were prepared in anticipation of litigation by the attorneys and experts of Joint Intervenors. In addition, pursuant to the IFA, the Commission may not review privileged material, even if it is relevant to the Issue Fund Grant, when performing an audit of a party’s Request for Payment and expenses incurred. IFA at § 7.10. Similarly, the Commission should not require an intervenor to disclose privileged material at any time.

Joint Intervenors recognize that ALJ Logan’s Ruling sought to allow the production of billing information in a manner that would not reveal attorney/client or work product material. However, it would be extremely difficult to produce the information in a

manner consistent with the Ruling. Creating the data necessary to comply with the level of detail requested by the Ruling would be very time consuming and unduly burdensome because Joint Intervenors would be required to either redact their detailed bills, or create entirely new bills, to protect from disclosing the attorney/client or work product material. This burden would significantly detract from Joint Intervenors' time and the financial resources necessary to fully participate in the ongoing proceeding for which the Intervenor Funding Grant was awarded, and be counter-productive to the purpose of the intervenor funding program. Furthermore, some information, such as the allocation of resources in the case, would be virtually impossible to protect through redaction. Finally, unlike attorneys, expert witnesses on electric utility matters traditionally have not submitted billings with detailed time entries like those sought in the Ruling.

### **CONCLUSION**

Joint Intervenors, in partial compliance with Order No. 04-352, submitted Intervenor Funding Grant Reports, summarizing the expenses incurred in this proceeding. Joint Intervenors do not object to submitting summaries with this same level of detail on the first of September and November 2004 to aid the Commission in implementing the IFA. However, Joint Intervenors object to disclosing detailed billing information that could jeopardize their ability to effectively participate in this proceeding.

The Commission should grant reconsideration and clarification of the provisions in the Intervenor Funding Orders directing Joint Intervenors to submit detailed billings. The Orders contain errors of law and fact that are inconsistent with the procedures agreed upon and approved in the IFA. Furthermore, good cause exists to reconsider the Order because disclosure

of the information in the detailed billings could result in undue prejudice to the Joint Intervenors, creating an unfair advantage to other parties who become aware of Joint Intervenors' litigation strategy. The Commission will have the full opportunity to request and review detailed information regarding the eligible expenses of Joint Intervenors after a Request for Payment has been made. Because no party has requested payment, disclosure of this information at this time is improper. Thus, the Commission should reconsider the Orders, and clarify that detailed billings are not required at this time.



WHEREFORE, ICNU, CUB and AOI request that the Commission grant Joint  
Intervenors' Application for Partial Reconsideration and Clarification.

Dated this 23rd day of July, 2004.

Respectfully submitted,

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