

1 **BEFORE THE PUBLIC UTILITY COMMISSION**  
2 **OF OREGON**

3 UM 1121

4 In the Matter of OREGON ELECTRIC  
5 UTILITY COMPANY, LLC, et al.,  
6 Application for Authorization to Acquire  
Portland General Electric Company

STAFF’S MOTION TO COMPEL  
PRODUCTION

7 Comes now the staff of the Public Utility Commission of Oregon (staff) and moves the  
8 administrative law judges (ALJs) for an order requiring applicant Oregon Electric Utility  
9 Company, LLC (OEUC) to provide unredacted versions of the following data request responses:  
10 OE 104297, OE 104312, OE 104318, OE 105466, OE 105747, OE 105751, OE 105569, and  
11 OE 113873.

12 OEUC redacted all or parts of each of these documents, with the notation “Attorney  
13 Work Product Port Westward.” Staff’s motion is based upon (1) a challenge to the claim that  
14 any of these documents are “attorney work product,” and if so (2) staff’s substantial need for and  
15 its inability to obtain similar documents supercedes OEUC’s work product privilege.

16 Staff further asserts and certifies, as required by OAR 860-014-0070(2), that it has  
17 discussed this matter with OEUC’s attorney and has not been able to resolve this dispute. Staff  
18 understands from a conversation with OEUC’s attorney Lisa Rackner that OEUC’s response to  
19 staff’s motion will include unredacted copies of the challenged documents for an *in camera*  
20 review by the ALJs.

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Staff's motion is supported by the attached memorandum.

DATED this \_\_\_\_\_ day of July 2004.

Respectfully submitted,

HARDY MYERS  
Attorney General

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Michael T. Weirich, #82425  
Assistant Attorney General  
Of Attorneys for the Public Utility Commission  
of Oregon



1 Staff requests the ALJs review the unredacted Responses to first determine whether  
2 OEUC appropriately applied the attorney work product limited privilege as justification to redact  
3 the Responses. If OEUC is able to make the required showing, staff asks the ALJs to  
4 nonetheless order OEUC to provide the unredacted material because staff’s substantial need for  
5 the information and its inability to obtain similar information supercedes the limited work  
6 product privilege.

7 **Argument**

8 **1. OEUC has so far failed to show circumstances justifying the application of the**  
9 **attorney work product doctrine**

10 OEUC has not provided sufficient information to determine whether it has properly  
11 applied the attorney work product doctrine to withhold the information it redacted. OEUC’s  
12 only justification for its redactions is the simple statement: “Attorney Work Product Port  
13 Westward.” The ALJs, in reviewing the documents *in camera*, should apply the following legal  
14 and factual analysis.

15 Pursuant to ORCP 36B, any party may seek discovery about any matter that is relevant to  
16 its position or a defense.<sup>3</sup> The Oregon Rules of Evidence (OEC) define relevant evidence as  
17 “evidence having any tendency to make the existence of any fact that is of consequence to the  
18 determination of the action more probable or less probable than it would be without the  
19 evidence.” OEC 401. The information sought need not be admissible evidence so long as the  
20 request is reasonably calculated to lead the discovery of admissible evidence.

21 Staff sought information related to OECU’s plans concerning Portland General Electric  
22 Company’s (PGE) announced plan to build a gas-fired generation resource known as “Port  
23 Westward.” *See generally* PUC Docket LC 33. Generally stated, staff’s data requests at issue  
24 are intended to explore OECU’s commitment to build Port Westward (or a gas-fired resource  
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26 <sup>3</sup> The Commission has stated that the Oregon Rules of Civil Procedure (ORCP) govern in all  
Commission cases except as modified by the Commission. *See* OAR 860-011-0000(3).

1 like Port Westward).<sup>4</sup> It is possible that OEUC or its investors may decide it is in OEUC’s, or its  
2 TPG investors’, financial best interests not to build Port Westward, to the detriment of PGE’s  
3 ratepayers. Or, conversely, OEUC or its TPG investors may determine it is in their financial best  
4 interests to build Port Westward to the detriment of PGE’s customers.

5 OEUC has provided, through its financial models, some information concerning its long-  
6 range planning, including analyses of whether to build Port Westward. Staff’s data requests  
7 follow-up on this information and are thus reasonably calculated to lead to the discovery of  
8 admissible evidence. In light of these circumstances, OEUC clearly may not, as a general  
9 position, redact additional information about Port Westward. However, despite the fact that Port  
10 Westward is a relevant area of inquiry, OEUC withheld information when responding to staff’s  
11 data requests at issue with nothing more than the cryptic notation “Attorney Work Product Port  
12 Westward.”

13 The attorney work product doctrine was first announced in *Hickman v. Taylor*, 329 US  
14 495 (1947). It is now part of ORCP 36B, which provides in relevant part that a party may  
15 “obtain discovery of documents and tangible things...prepared in anticipation of litigation...only  
16 upon a showing that the party seeking discovery has substantial need of the material in the  
17 preparation of such party’s case and is unable without undue hardship to obtain the substantial  
18 equivalent of the materials by other means.” Unlike the more familiar attorney-client privilege,  
19 the work product doctrine provides only a limited or qualified protection from discovery.

20 OEUC has not shown that the redacted material meets the criteria for the work product  
21 doctrine to apply to protect the Port Westward information from disclosure. Its simple  
22 declaration “attorney work product Port Westward” is a mere conclusion made without substance  
23 or support. OEUC’s overly simple declaration does not state that the documents were prepared  
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25 <sup>4</sup> Staff is aware that PGE has modified its least cost plan submitted in LC 33 from an exploration  
26 of building Port Westward to a consideration whether to build a generic gas-fired plant like Port  
Westward. For ease in reading this memorandum, staff will use the term “Port Westward” to  
include both the specific facility and a generic gas-fired plant similar to Port Westward.

1 in anticipation of any litigation. In its response to this motion, OEUC should provide all details  
2 surrounding its claim of “anticipated litigation,” including the event, date or timeframe, and  
3 general circumstances of when the potential for anticipated litigation became reasonably certain.

4 **2. If OEUC is able to show the work product doctrine applies, staff’s substantial**  
5 **need for the information, and its inability to obtain similar information,**  
6 **supercedes the limited privilege afforded by the doctrine**

7 Even if the documents staff seeks were prepared in anticipation of litigation, staff has a  
8 substantial need for the information requested. The extent of OEUC’s commitment to build Port  
9 Westward consistent with PGE’s current least cost plan is of keen interest to staff. Staff  
10 recognizes and understands that future events may result in a reasoned decision that building Port  
11 Westward is no longer the least cost option for PGE and its customers. However, staff is  
12 concerned that a decision to build (or not build) Port Westward be made consistent with the best  
13 interests of PGE’s customers. Stated differently, it would not necessarily be in PGE’s  
14 customers’ best interests if OEUC decided to not build Port Westward solely because not  
15 building the plant was in OEUC’s investors’ best interests. Staff desires to obtain any  
16 information that is related to this serious issue. Further, staff is not able to obtain the information  
17 that has been redacted from the data request responses by other means. For these reasons, the  
18 ALJs should conclude that staff’s need to review the redacted Port Westward information  
19 supercedes OEUC’s claim of attorney work product, to the extent it exists.

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**Conclusion**

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For the reasons stated, staff asks the ALJs grant staff's motion to compel.

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DATED this \_\_\_\_\_ day of July 2004.

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Respectfully submitted,

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HARDY MYERS

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Attorney General

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Michael T. Weirich, #82425

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Assistant Attorney General

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Of Attorneys for the Public Utility Commission  
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## CERTIFICATE OF SERVICE

I certify that on July 19, 2004, I served the foregoing upon the parties hereto by sending a true, exact and full copy by electronic mail only and hardcopy to those parties who do have an email address:

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