

June 7, 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

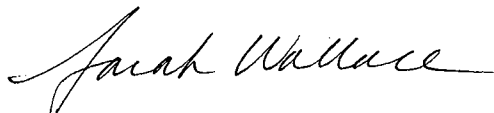
Dear Sir or Madam:

Enclosed for filing in the above-referenced docket are the original and five copies of the following documents:

- Applicants' Motion Requesting Certification of Judge Smith's Ruling Denying Motion for Additional Protection
- Declaration of Carrie Wheeler in Support of Applicants' Motion Requesting Certification of Judge Smith's Ruling

Please contact me with any questions.

Very truly yours,



Sarah Wallace

Enclosures

cc: UM 1121 Service List

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

**APPLICANTS' MOTION
REQUESTING CERTIFICATION
OF JUDGE SMITH'S RULING
DENYING MOTION FOR
ADDITIONAL PROTECTION**

10 **INTRODUCTION**

11 On May 28, 2004, Administrative Law Judge ("ALJ") Christina Smith issued a Ruling
12 denying Applicants' motion for additional protection of the following four categories of highly
13 sensitive and proprietary information: (1) The TPG¹ electronic financial model; (2) TPG
14 prospectuses; (3) Information presented to TPG's Investment Review Committee ("IRC") and
15 the underlying due diligence; and (4) A list of TPG's Limited Partners (*i.e.*, TPG's investors or
16 "customer list").
17

18 Applicants request that Judge Smith's Ruling be certified to the Commission, because
19 they believe it was wrongly decided and failed to apply the appropriate standard for determining
20 whether additional protection of the above information was justified. Importantly, Applicants
21 remain hopeful that they will be able to reach a compromise regarding disclosure of the
22 documents in the first three categories of information described above under the terms of the
23 Ruling. Specifically, Applicants are working with CUB, ICNU, and the City of Portland to
24 decide on a satisfactory way to produce the TPG electronic financial model, TPG prospectuses,
25 and the information presented to the IRC. However, it is possible that they will not reach a
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¹ The term "TPG" refers to TPG Partners III, L.P., TPG Partners IV, L.P., and Tarrant Partners, L.P.

1 resolution of their dispute regarding that information and so, as a precautionary matter,
2 Applicants seek certification of the ALJ's Ruling in its entirety.

3 In addition, Applicants do not believe that any compromise is possible with respect to
4 disclosure of the fourth category of information, which consists of a list identifying TPG's
5 Limited Partners. Applicants interpret the Ruling to require the parties to work together to find a
6 way to disclose the identities of any Oregon investors in TPG funds. Other parties may contend,
7 however, that the Ruling requires disclosure of investors outside of Oregon as well. Regardless
8 of which interpretation is correct, Applicants should not be required to disclose the identities of
9 TPG's Limited Partners to anyone other than Commission Staff. As a result, the arguments in
10 this Motion are directed to that issue in particular, although, as noted above, Applicants request
11 certification of the entire Ruling.

12 In support of their motion, Applicants incorporate by reference the arguments stated in
13 their Motion for Additional Protection filed with the Commission on April 20, 2004 and their
14 Reply and affidavits in support of that motion, filed on May 13, 2004.

15 SUMMARY OF ARGUMENT

16 The Ruling is wrongly decided with respect to each category of information because it
17 failed to apply the appropriate standard for determining whether additional protection is
18 warranted. Under that standard, the Commission must consider whether the risk of harm to TPG
19 from inadvertent public disclosure of its most sensitive and proprietary information outweighs
20 any benefit that might accrue from allowing the parties to review that information. This
21 balancing of interests is the required test for determining whether additional protection is
22 appropriate. *See, e.g., Re PacifiCorp*, UE 116, Order No. 01-219 (Mar. 9, 2001). With respect
23 to the identities of TPG's Limited Partners, the Ruling also is wrongly decided because those
24 identities are not relevant to the Commission's investigation of the public interest under
25 ORS 757.511 or likely to lead to admissible evidence.

1 The TPG Applicants are entitled to the protections afforded by Oregon's discovery rules
2 and should not be forced to reveal their most competitively sensitive information to the 106
3 Qualified Persons in this docket, many of whom do not have a known track record of
4 maintaining confidentiality. A proper weighing of the risks to Applicants justifies additional
5 protection. Based upon those grounds, Applicants respectfully bring this motion to request
6 certification of Judge Smith's May 28, 2004 Ruling to the Commission.

7 NATURE OF INFORMATION AT ISSUE

8 All categories of information are described in detail in Applicants' Motion for Additional
9 Protection filed on April 20, 2004 and those descriptions will not be fully restated here. Instead
10 this motion will focus on one category of information – the identities of TPG's Limited Partners
11 or "customer list" – which is among TPG's most highly sensitive proprietary information. The
12 customer list is nine pages and identifies the Limited Partners in TPG's private equity funds.
13 Limited Partners are individuals and organizations that have invested in TPG's funds, and they
14 can be accurately characterized as TPG's customers. *See Declaration of Carrie Wheeler in*
15 *Support of Motion for Certification* ¶ 2 ("*Wheeler Declaration*"). The Limited Partners have
16 absolutely no control of this or any other investment made by the TPG funds. *Id.* ¶ 3. Further,
17 they have no voting rights and no opportunity or right to control any of the companies in which
18 TPG funds invest. *Id.* They are, in other words, completely passive and rely on TPG to manage
19 their investments. *Id.* As with the other categories of information at issue in this motion,
20 Applicants already have produced the list of Limited Partners to Staff in the spirit of cooperation
21 and full disclosure without waiving their right to object to its relevance or seek additional
22 protection. The question is whether Applicants should be required to share that information with
23 intervening parties under the Standard Protective Order.

24 The identities of TPG's Limited Partners constitute some of TPG's most valuable
25 commercial assets, and disclosure of those identities to the public, whether inadvertent or
26

1 intentional, would cause TPG substantial competitive harm for two reasons. First, the private
2 equity market is intensely competitive. *Wheeler Declaration* ¶ 2. If the identities of TPG's
3 Limited Partners are leaked to the public, competing private equity firms might attempt to solicit
4 TPG's investors for their own funds. Second, Limited Partners expect a high degree of privacy
5 regarding their financial affairs and might be hesitant to invest with TPG funds in the future, if
6 TPG is forced to disclose their identities in this docket.²

7 QUESTIONS FOR CERTIFICATION

8 (1) When making a determination whether additional protection was justified in this
9 case, did the ALJ fail to apply the proper balancing test to determine whether the risk of harm
10 from inadvertent public disclosure outweighed any benefit of access under the Standard
11 Protective Order?

12 (2) Are the identities of TPG's Limited Partners, who are passive and have no voting
13 rights or opportunity to influence the TPG Applicants, relevant to the Commission's
14 investigation under ORS 757.511(3) of whether Applicants' proposed acquisition of PGE would
15 serve PGE's customers in the public interest?

16 (3) If the Commission finds that the identities of TPG's Limited Partners are relevant,
17 in light of the high degree of risk of inadvertent public disclosure of confidential information in
18 this docket, is additional protection warranted under the Standard Protective Order such that TPG
19 should be allowed to disclose the Limited Partners' identities only to Commission Staff?

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22 _____
23 ² The Limited Partners' expectation of privacy is not unjustified. Indeed, TPG contractually promised that it
24 would not reveal the identity of its investors except as required by law. The confidentiality provision states:
25 "Except as otherwise required by law, the General Partner may not disclose the identities of the Limited Partners, to
26 prospective limited partners in the Partnership or a Subsequent Fund, prospective lenders to, or other creditors of,
professional consultants upon notification to such Affiliate, officer employee agent or consultant that such disclosure
is made in confidence and shall be kept in confidence." *See Affidavit of James Barrett in Support of Motion for
Additional Protection Under Protective Order* ¶ 2. Applicants disclosed OPERS as a TPG investor only after
receiving permission.

1 **CERTIFICATION STANDARD**

2 Oregon Administrative Rule (“OAR”) 860-014-0035(1)(i) specifically authorizes ALJs to
3 “certify a question to the Commission for consideration and disposition.” A ruling of an ALJ
4 may be appealed by certification, upon a finding that the challenged ruling “may result in
5 substantial detriment to the public interest or undue prejudice to any party.” OAR 860-014-
6 0091. As discussed below, the Ruling is contrary to law and will cause the TPG Applicants to
7 suffer substantial prejudice. Therefore the ALJ should certify the questions to the Commission.

8 **ARGUMENT**

9 Applicants incorporate the arguments in their Motion for Additional Protection and Reply
10 brief in support of that motion filed with the Commission, which describe each category of
11 information and why additional protection is warranted. The Ruling denied Applicants’ Motion
12 for Additional Protection without weighing the risk of potential harm to TPG from inadvertent
13 public disclosure as required by the Commission’s prior decisions. *Re PacifiCorp*, UE 116,
14 Order No. 01-219 (Mar. 9, 2001). The entire ruling should be certified to the Commission on
15 that ground. This motion reiterates and expands upon Applicants’ previously filed arguments
16 only with respect to the customer list, because Applicants do not believe that, pursuant to the
17 Ruling’s directive, they will be able to reach a compromise on disclosure of that information to
18 the parties.

19 **A. The Identities of TPG’s Customers Are Not Relevant to This Proceeding**

20 In this proceeding, the Commission is charged with investigating whether approval of
21 Applicants’ proposed acquisition of PGE “will serve the public utility’s customers in the public
22 interest.” ORS 757.511(3). To that end, the Commission must inquire about those persons who
23 “shall acquire the power to exercise any substantial influence over the policies and actions of
24 [PGE],” including “affiliated interests” as defined by certain subsections of ORS 757.015.³

25 ³ An “affiliated interest” for purposes of ORS 757.511 includes: (1) Every corporation and person owning or
26 holding directly or indirectly five percent or more of the voting securities of such public utility; (2) Every

1 ORS 757.511(1). Here, only Applicants will exercise substantial influence over PGE or meet the
2 definition of “affiliated interests.” By contrast, TPG’s customers will have no right or
3 opportunity to exercise any control of PGE, and the Commission has no reason to investigate
4 them. Their identities are, therefore, irrelevant and not likely to lead to admissible evidence with
5 regard to the Commission’s investigation of the public interest.

6 Judge Smith concluded otherwise. She reasoned that “Applicants raised the issue of the
7 identity of its investors in its application” (1) by citing the participation of OPERS, and (2) by
8 including a pie chart indicating “the broad background of investors” as an exhibit. *See* Ruling
9 at 3 (citing Application at 9-10; Oregon Electric/Exhibit 12). Accordingly, Judge Smith ruled
10 that “to the extent that Applicants have raised the issue of the identity of its investors and
11 whether they are from Oregon, the information is discoverable[.]” *Id.*

12 Applicants disagree with Judge Smith’s ruling if it implies that, by identifying a single
13 TPG investor or the general background of TPG’s customers, Applicants placed the identity of
14 all TPG’s customers at issue, particularly those who have no Oregon connection. A proper
15 analysis of the relevance of TPG’s customers should occur in the context of an inquiry into the
16 scope of the Commission’s task under ORS 757.511 and the limits on discovery imposed by
17 ORCP 36 B. Specifically, the Commission should inquire whether the identities of passive
18 investors who have no right or opportunity to control PGE are relevant to its investigation of
19 persons who “shall acquire the power to exercise any substantial influence over the policies and
20 actions of [PGE].” The proper response to that inquiry is “no.”

21 Imagine, for example, that a publicly traded company such as IBM was one of the
22 Applicants proposing to acquire and exercise substantial influence over PGE. Would

23
24 corporation and person in any chain of successive ownership of five percent or more of voting securities of such
25 public utility; and (3) Every corporation five percent or more of whose voting securities are owned by any person or
26 corporation owning five percent or more of the voting securities of such public utility or by any person or
corporation in any chain of successive ownership of five percent or more of voting securities of such public utility.
ORS 757.015(1), (2), and (3).

1 ORS 757.511 require the Commission to investigate the identity of the vast number of individual
2 shareholders? Moreover, large institutional investors who own many IBM shares, such as
3 mutual funds, are themselves made up of thousands of individual investors. Would
4 ORS 757.511 require IBM to produce the identity of those investors? ORS 757.511 requires
5 only that the Commission investigate those persons who “shall acquire the power to exercise any
6 substantial influence over the policies and actions of [PGE],” including “affiliated interests” as
7 defined by certain subsections of ORS 757.015. The identities of persons who do not meet those
8 criteria, such as TPG’s investors (or, in the above hypothetical, IBM’s shareholders), have no
9 possible relevance and would not lead to the discovery of admissible evidence. Indeed, unlike
10 investors in a public company like IBM who can exercise voting rights, TPG’s Limited Partners
11 have no voting rights whatsoever. They simply cannot be considered relevant to the scope of the
12 Commission’s inquiry under ORS 757.511.

13 **B. The Risk of Harm to TPG from Inadvertent Disclosure of Its Customers’**
14 **Identities Outweighs the Benefit of Allowing Parties to Review Them.**

15 Even if the Commission concludes that the identities of TPG’s customers are
16 discoverable, it should determine, following application of the appropriate standard, that
17 additional protection beyond that provided under the Standard Protective Order is warranted.

18 The appropriate standard is an analysis of whether the harm to TPG from inadvertent
19 public disclosure of its customers’ identities outweighs the benefit of allowing the other parties
20 to review a customer list, and application of that standard is required by the Commission’s recent
21 prior decisions. *See, e.g., Re PacifiCorp*, UE 116, Order No. 01-219 (Mar. 9, 2001); *In re Matter*
22 *of the Revised Tariff Schedules*, UE 111, Order No. 00-305 (Jun. 9, 2000).

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1 The context of a proper balancing of interests is crucial and the Commission should take
2 into consideration at least the following three factors:

- 3 1. The current competitive market for private equity, which requires greater
4 attention on the need to provide heightened protection for confidential
5 information in this proceeding;
- 6 2. The unusually large number of persons who have signed the Standard
7 Protective Order to become Qualified Persons, which substantially
8 increases the risk of inadvertent disclosure of confidential information to
9 the public; and
- 10 3. Applicants' willingness to answer questions regarding TPG's Limited
11 Partners, apart from their specific identities.

12 When the foregoing considerations are weighed against the marginal benefit, if any, of
13 allowing access to TPG's customer list, additional protection to prevent the risk of harm is
14 clearly warranted.

15 ***1. The current competitive market weighs in favor of granting additional
16 protection to TPG's customer list.***

17 When balancing the competing interests of parties regarding access to highly sensitive
18 information, the Commission recently granted additional protection under the Standard
19 Protective Order in part because highly sensitive information is "made even more so by the
20 current competitive market" in the electric industry. *Re PacifiCorp, supra*, Order No. 01-219.
21 Just as in the electric industry, the private equity market has become intensely competitive, *see*
22 *Wheeler Declaration* ¶ 2, and the same heightened sensitivity to requiring disclosure of
23 confidential information should apply to the balancing of interests in this proceeding.

24 Notably, the Commission has recognized the sensitivity of customer lists in prior dockets.
25 *See In the Matter of the Application of PGE Company for Approval of Customer Choice Plan*,
26 UE 102, Order No. 98-294 (Jul. 16, 1998) (stating that concern about the sensitive nature of
certain information, including customer identities, "is understandable"). That sensitive

1 information is “made even more so” in light of the current competitive private equity market,
2 which weighs heavily in favor of granting additional protection.

3 **2. *The risk of inadvertent disclosure is substantial and weighs in favor of***
4 ***additional protection.***

5 The number of persons in this docket qualified to review information designated as
6 “confidential” under the Standard Protective Order (“Qualified Persons”) is unusually large.
7 Currently, there are 45 intervenors and 106 Qualified Persons. In previous merger proceedings
8 the numbers were substantially fewer.⁴ Large numbers of Qualified Persons, alone, substantially
9 increase the risk of inadvertent public disclosure and weigh in favor of additional protection.

10 More disturbingly, the representative of one intervenor, Friends of Clackamas River,
11 stated his *intention* to broadcast confidential information to the public that other Qualified
12 Persons leak to him. *See Affidavit of Sandee Harris in Support of Applicants’ Motion for*
13 *Additional Protection Under Protective Order, Exhibit 1.* Applicants became aware of Friends
14 of Clackamas River’s intentions *purely by chance*. There is no practical way to know whether
15 any of the 106 Qualified Persons intend to help Friends of Clackamas River (or others)
16 circumvent the Standard Protective Order and no practical way for the Commission or
17 Applicants to police Qualified Persons in this docket.

18 Even if all Qualified Persons intend to adhere scrupulously to the Standard Protective
19 Order, anyone who regularly has attended Commission proceedings knows that, occasionally,
20 Qualified Persons reveal confidential information inadvertently when non-Qualified Persons are
21 in the same room. Indeed, the Commission recently has granted motions for additional
22 protection due, in part, to the fact that “[t]he disclosure of sensitive material may be inadvertent
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24 ⁴ Based on public filings on the Commission’s Web site, ScottishPower’s 1998 acquisition of PacifiCorp
25 (UM 918) involved 31 intervenors and only 11 Qualified Persons. Yet even in that proceeding the Commission
26 determined that additional protection of confidential information was warranted. *See In the Matter of the*
Application of ScottishPower plc and PacifiCorp, UM 918, Order Nos. 99-106 (Feb. 19, 1999) and 99-293 (Apr. 27,
1999).

1 and may be undetectable, especially over long periods.” UE 111, Order No. 00-305. Parties
2 then are faced with “the difficulty in ‘unringing the bell’” and risk serious competitive harm.
3 *Re PacifiCorp*, UE 116, Order No. 01-219 (Mar. 9, 2001).

4 Lastly, some intervenors employ consultants who advise competitors of TPG or may
5 advise them in the future. Even with the best intentions, “[i]t is humanly impossible to control
6 the inadvertent disclosure of some [confidential] information in any prolonged working
7 relationship.” *Intel Corp. v. VIA Tech., Inc.*, 198 F.R.D. 525, 530 (N. D. Cal. 2000) (quoting
8 *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1467 (Fed. Cir. 1984)). See also *Re*
9 *PacifiCorp*, UE 116, Order No. 01-219 (granting additional protection where consultants’
10 understanding of certain strategies “might be used by other persons who retain these same
11 consultants to gain a competitive advantage”).

12 In light of the foregoing, the risk of inadvertent disclosure is far larger than it has ever
13 been in recent comparable proceedings and weighs heavily in favor of additional protection. See
14 *Re PacifiCorp*, UE 116, Order No. 01-219 (Mar. 9, 2001).

15 **3. Applicants are willing to answer general questions about TPG’s Limited**
16 **Partners.**

17 Applicants have offered to answer questions about TPG’s Limited Partners that do not
18 reveal their identities. Accordingly, the parties to this proceeding already are able to discover a
19 great deal of information about the Limited Partners, and there is no additional benefit to
20 revealing their actual identities when the scope of this proceeding is limited to an investigation of
21 persons who “shall acquire the power to exercise any substantial influence over the policies and
22 actions of [PGE].” ORS 757.511. Again, the Limited Partners have no voting rights and no
23 right or opportunity to influence or control any company in which TPG invests. *Wheeler*
24 *Declaration* ¶ 3. Whatever benefit remains in identifying the Limited Partners (and Applicants
25 contend that there is none) must be weighed against both the heightened sensitivity of
26

1 confidential information in the current competitive environment and the abnormally high risk of
2 inadvertent disclosure in this particular docket. A proper balancing justifies additional protection
3 of TPG's customer list.

4 **CONCLUSION**

5 For the foregoing reasons, Applicants request certification of ALJ Smith's ruling denying
6 Applicant's Motion for Additional Protection Under Protective Order.

7 Respectfully submitted this 7th day of June, 2004.

8 ATER WYNNE LLP

9
10 By: 

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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


DECLARATION OF CARRIE
WHEELER IN SUPPORT OF
APPLICANTS' MOTION FOR
CERTIFICATION OF JUDGE
SMITH'S RULING

I, Carrie Wheeler, hereby declare that I have personal knowledge of the matters set forth in this Declaration and am competent to testify to them:

1. I am a principal of the Texas Pacific Group ("TPG").

2. Limited Partners that invest in TPG funds, including TPG Partners III, L.P., and TPG Partners IV, L.P., are individuals and organizations who can be accurately characterized as TPG's customers. The private equity market is intensely competitive and TPG considers its customer list to be commercially valuable and competitively sensitive information.

3. The Limited Partners have absolutely no control over TPG funds' investment in Portland General Electric or in any other investment made by the TPG funds. Further, the Limited Partners have no voting rights and no opportunity or right to control any of the companies in which TPG funds invest. They are, in other words, completely passive and rely on TPG to manage their investments.


Carrie Wheeler

PAGE 1- DECLARATION OF CARRIE WHEELER IN SUPPORT
OF APPLICANTS' MOTION FOR CERTIFICATION OF JUDGE
SMITH'S RULING
UM 1121

Motion to Certify_Wheeler Declaration1

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**CERTIFICATE OF SERVICE
UM 1121**

I hereby certify that true and correct copies of **APPLICANTS' MOTION REQUESTING CERTIFICATION OF JUDGE SMITH'S RULING DENYING MOTION FOR ADDITIONAL PROTECTION and DECLARATION OF CARRIE WHEELER IN SUPPORT OF APPLICANTS' MOTION REQUESTING CERTIFICATION OF JUDGE SMITH'S RULING** were served via U.S. Mail on the following parties on June 7, 2004.

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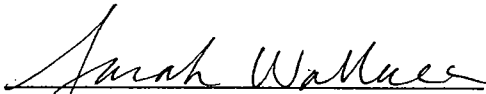
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