



Portland General Electric Company

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J. Jeffrey Dudley
Associate General Counsel

July 2, 2004

Via Facsimile and U.S. Mail

Ms. Cheryl Walker
Oregon Public Utility Commission
PO 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 for filing in the above-captioned docket are an original and five (5) copies of Portland General Electric's Brief on *In Camera* Review of Disputed Materials in the above-captioned docket.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Jeffrey Dudley", with a long horizontal flourish extending to the right.

JJD:am

cc: UM 1121 Service List

Enclosure



BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1121

In the Matter of the Application of)	
)	
OREGON ELECTRIC UTILITY)	BRIEF OF PORTLAND GENERAL
COMPANY, LLC, et al.,)	ELECTRIC COMPANY ON <i>IN</i>
)	<i>CAMERA</i> REVIEW OF DISPUTED
)	MATERIALS
For Authorization to Acquire Portland)	
General Electric Company)	

Portland General Electric Company ("PGE") and the Industrial Customers of Northwest Utilities ("ICNU") (collectively, "Parties") have entered into a Stipulation ("Stipulation") to facilitate the expedited review by the Administrative Law Judge ("ALT") of certain disputed materials produced by PGE. A copy of the Stipulation is attached hereto as Exhibit A.

The review requested is for materials produced in connection with the scheduled deposition of PGE's Chief Executive Officer and President, Peggy Y. Fowler, which has been set by the Parties on July 12, 2004. The Parties respectfully request the ALT to review these materials *in camera* and to issue a ruling on the disputed materials by noon on Friday, July 9.¹

The materials at issue were produced by PGE pursuant to ICNU Data Request No. 5.1. This request read,

Please provide copies of all e-mail and other communications regarding the proposed transaction that was sent to or from Peggy Fowler since July 1, 2002.

PGE responded to this data request with a submission on Friday, June 25, and a supplemental submission on Sunday, June 27. The Parties have been in discussion regarding the production by

¹ If the ALJ cannot meet this schedule, the Stipulation provides that ICNU may request a second deposition session with Ms. Fowler with respect to new material that may be made available to ICNU as a result of the ALJ's ruling.

PGE, and have agreed to a procedure for the resolution of the disputed issues via the Stipulation attached as Exhibit A.

The Parties respectfully request the ALJ to review three separate issues relating to the produced materials: First, whether information redacted by PGE on the materials produced was properly redacted due to the non-responsive nature of the material. Second, whether documents selected by ICNU from PGE's Privilege Log are properly protected by Attorney-Client, Attorney Work Product, or Joint Defense privileges. Third, whether material designated by PGE as Confidential under Protective Order No. 04-139 in this docket is properly confidential.

The three binders included with the submission to the ALJ correspond to these three issues. Binder 1 contains the documents that were redacted by PGE because certain portions of the documents were non-responsive, as well as unredacted versions of those documents. Binder 2 contains full unredacted copies of documents PGE has designated as privileged and the designation of which ICNU challenges. Binder 3 contains a complete set of the confidential documents that PGE produced in response to Data Request 5.1, except for those documents that ICNU grants should be treated as confidential. (Binder 1 and Binder 3 contain some documents in common.)

I. REDACTIONS FOR **NONRESPONSIVE** MATERIALS

In Binder 1, PGE has redacted selected portions of the produced materials. A list of the Bates numbers and the reasons for each redaction appears in the table below. The most frequent reason for redaction is for non-responsive materials; that is, materials that are in an e-mail or other communication that are on a subject other than "regarding the proposed transaction." For example, Ms. Fowler frequently sent and received e-mails regarding several subjects, only one of which was related to the transaction with TPG. The other subjects frequently discuss sensitive and confidential matters, and should not be produced in connection with discovery in this docket.

	Bates Number(s)	Reason for Redaction
1.	PGE 202914	Non-Responsive Material
2.	PGE 2029 15-916	Non-Responsive Material
3.	PGE 2029 17	Non-Responsive Material
4.	PGE 202945	Non-Responsive Material
5.	PGE 202946	Non-Responsive Material
6.	PGE 203067	Attorney-Client Privilege
7.	PGE 203070	Non-Responsive Material
8.	PGE 203 163	Non-Responsive Material
9.	PGE 203 164	First Redaction - Oversight. This is the same message as included in PGE 203163. Balance of the Redactions: Non-Responsive Material
10.	PGE 203 165	First Redaction: Non-Responsive Material Second Redaction - Oversight. The full text appears at PGE 203 163.
11.	PGE 206166	Non-Responsive Material
12.	PGE 203 167	Non-Responsive Material
13.	PGE 203181	Non-Responsive Material
14.	PGE 203 182	Non-Responsive Material
15.	PGE 203 186	Attorney Work Product
16.	PGE 203 187	Non-Responsive Material
17.	PGE 203 188	Non-Responsive Material
18.	PGE 203 189	Personal Information: Cell Phone Number
19.	PGE 203 190	Personal Information: Cell Phone Number
20.	PGE 203 191	Personal Information: Cell Phone Number
21.	PGE 203 192	Personal Information: Cell Phone Number
22.	PGE 203 193	Non-Responsive Material
23.	PGE 203 194	Non-Responsive Material
24.	PGE 203211	Non-Responsive Material
25.	PGE 203214	Non-Responsive Material
26.	PGE 203217-218	Non-Responsive Material
27.	PGE 203220	Non-Responsive Material
28.	PGE 203221	Non-Responsive Material
29.	PGE 203223	Non-Responsive Material
30.	PGE 203225	Non-Responsive Material
31.	PGE 203226	Non-Responsive Material
32.	PGE 203227	Non-Responsive Material

	Bates Number(s)	Reason for Redaction
33.	PGE 203229	Non-Responsive Material
34.	PGE 203230	First Redaction: Attorney-Client Privilege Second Redaction: Non-Responsive Material
35.	PGE 203234	Non-Responsive Material
36.	PGE 203253	Non-Responsive Material
37.	PGE 203268	Non-Responsive Material
38.	PGE 203269	Non-Responsive Material
39.	PGE 203271	Non-Responsive Material
40.	PGE 203272	Non-Responsive Material
41.	PGE 203284-285	Non-Responsive Material
42.	PGE 203286	Non-Responsive Material

II. PRIVILEGED DOCUMENTS

Binder Two contains documents for which PGE claims privileged treatment.

PGE claims three distinct, yet overlapping, privileges for the documents in the second binder. They are: Attorney-Client Privilege, Work Product Privilege, and Joint Defense/Common Interest Privilege.

A. Attorney-Client Privilege. The Oregon law of Attorney-Client Privilege is governed by Oregon Evidence Code (“OEC”) 503, which provides:

Lawyer-client privilege. (1) As used in this section, unless the context requires otherwise:

(a) "Client" means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(d) "Representative of the client" means a principal, an employee, an officer or a director of the client:

(A) Who provides the client's lawyer with information that was acquired during the course of, or as a result of, such person's relationship with the client as

principal, employee, officer or director, and is provided to the lawyer for the purpose of obtaining for the client the legal advice or other legal services of the lawyer; or

(B) Who, as part of such person's relationship with the client as principal, employee, officer or director, seeks, receives or applies legal advice from the client's lawyer.

(e) "Representative of the lawyer" means one employed to assist the lawyer in the rendition of professional legal services, but does not include a physician making a physical or mental examination under ORCP 44.

(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:

(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;

(b) Between the client's lawyer and the lawyer's representative;

(c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;

(d) Between representatives of the client or between the client and a representative of the client; or

(e) Between lawyers representing the client.

In addition, OEC 503 permits privileged communications with any corporate employee, and not just with members of what is sometimes called the "control group," as long as the communication is in aid of giving legal advice to the corporation. *See* OEC 503(1)(d) (defining client representatives); Oregon State Bar Legal Ethics Opinion No. 1991-80 (noting that attorney-client privilege is potentially applicable to communications with all employees); State ex. rel. OHSU v. Haas. 325 Or. 492, 502-03, 942 P.2d 261 (1997) (stating that decision by entity-client to share privileged communications with others within the entity who need to know was not a waiver of privilege). Accordingly, communications between employees of PGE and its attorneys are protected by Attorney-Client Privilege. As a subsidiary of Enron Corp., communications between PGE and Enron Corp. are considered to be within the same entity.

To aid the Commission in its review, attorneys representing PGE are:

Douglas Nichols, Jay Dudley, Barbara Halle, Michael Morgan, David White, Loretta Mabinton, and Steve McCarrel. David Koogler is a lawyer for Enron Corp. also involved in

communications with PGE. Mr. Morgan and Mr. White also serve as counsel for Enron Corp. Jay Tabor and Michael Farnell are lawyers with the law firm of Weil, Gotshal & Manges, outside counsel for Enron Corp.

B. Work Product Privilege. Communications can be, and often are, subject to both Attorney-Client and Work Product privilege. On the other hand, the two privileges are legally distinct. Either one can exist in the absence of the other.

The Oregon law of Work Product Privilege is governed by Oregon Rules of Civil Procedures (“ORCP”) 36(B)(3), which provides:

Trial preparation materials. Subject to the provisions of Rule 44, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B(1) of this rule and 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) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party’s case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

By common understanding, "litigation" for Work Product purposes includes administrative proceedings as well as court actions. Oregon permits a Work Product claim for documents prepared in anticipation of litigation, even if no attorney is immediately involved in the communication. *See, e.g., Laird C. Kirkpatrick, Oregon Evidence, Section 503.14 at Article V-36 (Exhibit B) (“[t]he work product doctrine protects from discovery documents and other tangible things prepared by a party, a party’s attorney, or other representatives of a party in anticipation of litigation”).* Thus, e-mails that are purely between representatives of PGE, even though no attorney is in the chain of the e-mail, are protected by Work Product privilege if the communication is regarding a matter in anticipation of an administrative proceeding.

Many of the documents requested for review by ICNU fall in this category. They contain impressions and subjective judgments and communications regarding the anticipated administrative proceeding of the TPG transaction docket, UM 1121. The communications also

apply to other matters relating to the prosecution of application of approval for the purchase of PGE, such as formation of an affiliate for wholesale power trading. This affiliate will need FERC, OPUC and SEC approval.

C. Joint Defense/Common Interest Privilege. Oregon protects sharing of privileged information on matters "of common interest." OEC 503(2)(c). As a result, if there are communications between PGE and representatives of TPG regarding approval of the Application in UM 1121 or other matters surrounding the Application, the Joint Defense Privilege will apply. Joint Defense also applies to work product privileges. Cf Restatement (3rd), "The Law Governing Lawyers," Section 76 (2000), attached as Exhibit C. Some of the communications included in Binder 2 are between representatives of PGE and TPG, and thus covered by Joint Defense Privilege, as well as other privileges.

	Privileged Bates Numbers	Basis for Privilege	Explanation of Privilege
1.	12-13	A-C, WP	Initial e-mail seeks legal advice on tariff proposal ("Jay" is Jay Dudley). Subsequent e-mail discussion involves Doug Nichols, General Counsel of PGE
2.	21	A-C	
3.	22	A-C	Communication with Steve McCarrel, Attorney for PGE
4.	24	A-C	Communication from Doug Nichols, PGE General Counsel
5.	26	A-C	Communication with Cheryl Chevis, PGE Counsel
6.	31	A-C	Communication from Doug Nichols, PGE General Counsel
7.	33-34	A-C, JD	Initial e-mail seeks legal advice on tariff proposal ("Jay" is Jay Dudley). Subsequent e-mail discussion involves Doug Nichols, General Counsel of PGE
8.	35-36	A-C, JD	Initial e-mail seeks legal advice on tariff proposal ("Jay" is Jay Dudley). Subsequent e-mail discussion involves Doug Nichols, General Counsel of PGE
9.	47	A-C, WP	Communications with Doug Nichols, PGE General Counsel
10.	116	A-C	Communications from Doug Nichols, PGE General Counsel
11.	117	A-C, WP	Communications with Doug Nichols, PGE General Counsel
12.	118-173	A-C	Product produced by Weil, Gotshal & Manges attorneys for Enron Plan of Reorganization
13.	509-514	A-C	Communication from Doug Nichols, PGE General Counsel

	Privileged Bates Numbers	Basis for Privilege	Explanation of Privilege
14.	523-525	A-C	Communication from Doug Nichols, PGE General Counsel
15.	545	A-C	Communication from Jay Dudley, attorney for PGE
16.	546	A-C	Communication from Jay Dudley, attorney for PGE
17.	547-548	A-C	Communications with Jay Dudley and Doug Nichols, attorneys for PGE
18.	561-564	A-C	Communications from Doug Nichols, PGE General Counsel
19.	593-597	A-C	Communication between PGE client representatives regarding potential discovery in the UM 1121 docket
20.	598-604	A-C	Communication between PGE client representatives regarding potential discovery in the UM 1121 docket
21.	605-616	A-C, WP	Communication between PGE client representatives regarding potential discovery in the UM 1121 docket
22.	617	A-C, WP, JD	Communication between PGE client representatives, including PGE General Counsel Doug Nichols, and Enron client representatives regarding transaction approval matters
23.	618-620	A-C, JD	Communication between PGE client representatives and Enron client representatives regarding transaction approval matters
24.	621-622	A-C, WP	Communication between PGE client representatives regarding strategy in the UM 1121 docket
25.	623-625	A-C, WP	Communication between PGE client representatives regarding transaction approval matters
26.	626	A-C, WP	Communication between PGE client representatives regarding communications in advance of OPUC filing
27.	627	A-C, WP, JD	Communication with Doug Nichols, PGE General Counsel, and client representatives regarding strategy for transaction approval
28.	628-642	WP, A-C, JD	Communication from Doug Nichols, PGE General Counsel, and other client representatives regarding strategy for transaction approval
29.	645	A-C, JD	Communication between PGE client representatives and Enron client representatives regarding transaction approval matters
30.	646	WP, JD	Communication between PGE client representatives regarding legal interpretation
31.	647-649	WP, JD	Communication between PGE client representatives and Enron client representatives regarding transaction approval matters
32.	650	WP, JD	Communication between PGE client representatives, TPG client representatives and Enron client representatives regarding transaction approval matters
33.	655-656	WP	Communication between PGE client representatives regarding legal interpretation

	Privileged Bates Numbers	Basis for Privilege	Explanation of Privilege
34.	657-658	WP, JD	Communication among PGE client representatives and TPG regarding transaction approval
35.	659	WP, JD	Communication between PGE client representative and TPG regarding transaction approval
36.	660	WP, JD	Communication between PGE client representative and TPG regarding transaction approval
37.	661-662	WP, JD	Communication between PGE client representatives and TPG regarding legal interpretation and transaction approval
38.	664	JD, A-C, WP	Communication between PGE client representatives and strategy for transaction approval and legal matters
39.	665-666	WP, JD	Communication between PGE client representatives and Enron client representatives regarding litigation and legal matters status. Contains information provided by counsel from PGE.
40.	667	WP, JD	Communication between PGE client representatives and TPG regarding transaction approval matters
41.	668	WP, JD	Communication between PGE client representatives and TPG regarding transaction approval matters
42.	671	WP, JD	Communication between PGE client representatives and TPG regarding issues for transaction approval. Contains material provided by legal counsel
43.	672	WP, JD	Communication from PGE client representatives to General Counsel of PGE regarding transaction approval filing at FERC
44.	673	WP, JD	Communication between PGE client representative to Enron client representative copying communication with TPG client representative regarding information on transaction approval. Communication contains input from PGE attorneys
45.	675-676	WP, A-C	Communication from PGE client representatives to Enron regarding status of litigation and other legal matters. Contains input from PGE attorneys.
46.	679	WP, A-C	Communication to Doug Nichols, PGE General Counsel, regarding OPUC Transaction Approval
47.	687	WP	Communication between PGE client representatives regarding transaction approval
48.	699	WP, A-C	Communication to Doug Nichols, PGE General Counsel, regarding information on transaction approval
49.	700-701	WP, JD	Communication between PGE client representatives regarding transaction approval
50.	702-702	WP, A-C, JD	Communication with Jay Dudley, attorney for PGE, regarding comments on draft Application to OPUC
51.	703-704	WP, JD	Communication between PGE client representatives and TPG regarding draft communication on approval
52.	705-706	WP, JD	Communication between PGE client representatives and TPG regarding draft communication on approval

	Privileged Bates Numbers	Basis for Privilege	Explanation of Privilege
53.	707	WP, A-C	Communication with Doug Nichols, PGE General Counsel, regarding actions for transaction approval
54.	708	WP, JD	Communication among PGE client representatives regarding transaction approval issues
55.	709	WP	Communication among PGE client representatives regarding transaction approval issues
56.	710	WP	Communication among PGE client representatives regarding transaction approval issues
57.	711-712	WP, A-C, JD	Communication between PGE client representatives and Enron client representatives regarding transaction approval issues and status of legal matters. Includes material from PGE lawyers.
58.	713	WP, AC	Communication to Jay Dudley, attorney for PGE, regarding TPG application to OPUC
59.	714	WP, JD	Communication among PGE client representatives regarding TPG draft application to OPUC
60.	715-716	JD, WP, AC	Communication among PGE client representatives regarding transaction approval and other non-responsive matters. Includes discussion of actions of PGE General Counsel, Doug Nichols
61.	717-721	WP, AC	Communication between PGE client representatives and Enron representatives, including discussion of legal matters and litigation. Contains information supplied by PGE counsel
62.	722-726	WP, AC	Communication between PGE client representatives and Enron representatives, including discussion of legal matters and litigation. Contains information supplied by PGE counsel
63.	727-731	WP, AC	Communication between PGE client representatives and Enron representatives, including discussion of legal matters and litigation. Contains information supplied by PGE counsel
64.	757	WP	Communication between PGE client representatives regarding transaction approval
65.	779	WP	Communication among PGE client representatives regarding transaction approval
66.	877-880	A-C, WP, JD	Communication between PGE client representatives and TPG regarding status of legal matters and litigation. Contains information supplied by PGE counsel
67.	882-886	WP, JD	Communication among PGE client representatives regarding transaction approval
68.	899-905	WP, JD	Communication among PGE client representatives and Enron representatives regarding litigation and other legal matters. Contains information supplied by PGE counsel
69.	908-911	A-C, WP	Communications among PGE client representatives regarding litigation and other legal matters. Includes information supplied by PGE counsel

	Privileged Bates Numbers	Basis for Privilege	Explanation of Privilege
70.	912-915	A-C, WP	Communications among PGE client representatives regarding litigation and other legal matters. Includes information supplied by PGE counsel
71.	919	WP, JD	Communication among PGE client representatives regarding transaction approval
72.	924	A-C, JD	Communication to Jay Dudley, attorney for PGE, regarding draft TPG filing to OPUC
73.	928-930	A-C, JD, WP	Communication to Jay Dudley, attorney for PGE, regarding draft TPG Application
74.	940	A-C	Communication from Jay Dudley, attorney for PGE, and between PGE client representatives on draft TPG application
75.	1126	WP, AC	Communication from Jay Dudley, attorney for PGE, regarding draft TPG application at OPUC
76.	1134-1136	WP, JD	Communication between PGE client representatives, Enron client representatives, and TPG client representatives regarding transaction approval issues
77.	1137-1138	WP, JD	Communication between PGE client representatives and TPG client representatives regarding transaction approval issues
78.	1139-1140	WP, A-C, JD	Communication between Enron client representatives and Enron lawyers (Koogler and Biggerstaff) and PGE client representatives regarding legal issues in connection with the Stock Purchase Agreement
79.	1141	WP, JD	Communication between PGE client representatives and TPG client representatives regarding transaction approval issues
80.	1142	WP, JD	Communication between PGE client representatives and TPG client representatives regarding transaction approval issues
81.	1143-1144	WP, JD	Communication between PGE client representatives and Enron client representatives regarding transaction approval issues and legal interpretations of the Stock Purchase Agreement
82.	1174	WP, JD	Communication between PGE client representatives and TPG client representatives regarding transaction approval issues
83.	1175-1176	WP	Communication between PGE client representatives regarding transaction approval communications
84.	1177	WP, JD	Communication between PGE client representatives and TPG client representatives regarding transaction approval issues
85.	1178-1179	A-C, WP	Communication between PGE client representatives regarding communication from PGE attorney on hydro deferral result and transaction approval issues

	Privileged Bates Numbers	Basis for Privilege	Explanation of Privilege
86.	1180-1185	WP, A-C	Communication between PGE client representatives and Enron client representatives regarding litigation and other legal matters. Contains input from PGE attorneys
87.	1186-1192	WP, A-C	Communication between PGE client representatives and Enron client representatives regarding litigation and other legal matters. Contains input from PGE attorneys
88.	1193-1199	WP, JD, A-C *	Communication between PGE client representatives and Enron client representatives regarding litigation and other legal matters. Contains input from PGE attorneys
89.	1258-1264	A-C, WP, JD	Communication between PGE client representatives and TPG client representatives regarding draft testimony for TPG transaction
90.	1265	WP, JD	Communication between PGE client representatives regarding transaction approval communications
91.	1267	WP, JD	Communication among PGE client representatives, Enron client representatives and TPG client representatives regarding transaction approval issues
92.	1268	WP, JD	Communication between PGE client representatives and TPG client representatives regarding transaction approval issues
93.	1269	WP, JD	Communication among PGE client representatives and TPG client representatives regarding application approval issues
94.	1270	WP, JD	Communication among PGE client representatives regarding draft supplemental testimony for OPUC transaction approval
95.	1271-1295	WP, JD	Communications among PGE client representatives regarding transaction approval issues
96.	1356-1360	A-C, WP	Communication between PGE client representatives and Enron client representatives regarding litigation and legal matters. Contains input from PGE attorneys
97.	1361-1362	WP	Communication among PGE client representatives, including attorneys Jay Dudley and Doug Nichols, regarding transaction approval communications
98.	1425	WP	Communications among PGE client representatives regarding transaction approval issues
99.	1426	WP, JD, A-C	Communication among PGE client representatives and Enron client representatives regarding transaction approval
100.	1427-1428	WP, JD, A-C	Communication among PGE client representatives and Enron client representatives regarding legal and litigation matters. Contains information supplied by PGE counsel

	Privileged Bates Numbers	Basis for Privilege	Explanation of Privilege
101.	1429-1431	WP, JD	Communication among PGE client representatives and TPG client representatives regarding transaction approval communications
102.	1432-1433	WP, JD	Communications among PGE client representatives, including PGE lawyers Doug Nichols, regarding transaction approval communications
103.	1434	WP, JD	Communication among PGE client representatives regarding transaction approval issues
104.	1435	WP	Communication among PGE client representatives regarding TPG filing
105.	1436-1437	WP, JD, A-C	Communications among PGE client representatives and Enron client representatives regarding litigation and legal matters. Contains information supplied by PGE counsel
106.	1438	WP, JD	Communication among PGE client representatives regarding transaction approval issues
107.	1439	WP	Communication among PGE client representatives regarding transaction approval issues
108.	1440-1441	WP	Communication among PGE client representatives and Enron client representatives regarding legal matters and transaction approval issues
109.	1442-1444	WP, JD	Communication among PGE client representatives and Enron client representatives regarding TPG transaction approval
110.	1445-1454	WP, A-C	Communication from Karen Lewis, assistant to JDoug Nichols, General Counsel of PGE, regarding transaction approval issues
111.	1455	WP	Communication between PGE client representatives and Enron client representatives regarding legal matters and TPG transaction approval issues
112.	1457	WP	Communication between PGE client representatives regarding transaction approval issues
113.	1460-1533	WP, JD	Communication between TPG client representatives and PGE client representatives regarding draft filing for TPG OPUC approval
114.	1534-1548	WP, JD	Communication between PGE client representatives and TPG client representatives regarding transaction approval issues
115.	1549	WP, JD	Communication between PGE client representatives and TPG client representatives regarding transaction approval issues
116.	1550-1551	JD, WP	Communication between PGE client representatives and TPG client representatives regarding transaction approval issues
117.	1552-1579	WP, JD	Communication between PGE client representatives, Enron client representatives and TPG client representatives, regarding transaction approval issues

refer to drafts and proposals containing numbers and concepts, which is confidential commercial information. PGE urges the Commission to uphold its confidential designations on all the yellow paper documents in this binder.

DATED this 2nd day of July, 2004.

PORTLAND GENERAL ELECTRIC COMPANY

By 

J. Jeffrey Dudley, OSB # 89042 V
Associate General Counsel
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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1121

In the Matter of the Application of)
OREGON ELECTRIC UTILITY) **STIPULATION REGARDING**
COMPANY, LLC, et al.,) **DEPOSITION**
For Authorization to Acquire Portland)
General Electric Company)

This Stipulation ("Stipulation") is entered into by and among Portland General Electric Co. ("PGE") and Industrial Customers of Northwest Utilities ("ICNU") (collectively referred to as the "Parties" and individually as "Party").

The Parties enter into this Stipulation in order to resolve discovery issues in connection with PGE's response to ICNU DR No. 5.1 to enable the deposition of Peggy Fowler, Chief Executive Officer and President of PGE.

The terms and conditions of this Stipulation are set forth herein:

1. PGE will submit disputed materials to the Administrative Law Judge ("ALJ") for in camera review July 2, 2004. At the time of submission, PGE will provide a brief to the ALJ regarding the standards the ALJ should apply for review of the disputed materials. On July 6, 2004, ICNU will provide its responsive brief.

2. The ALJ will review the materials to determine:

a) whether information redacted by PGE is properly non-responsive to ICNU Data Request 5.1;

b) whether material (including some redacted material) is properly protected by Attorney Client, Attorney Work Product or Joint Defense privileges; and

EXHIBIT A
PAGE 1 OF 3

c) whether material designated confidential by PGE is properly confidential under the Protective Order, Order 04-139.

3. The parties respectfully request the ALJ to make a ruling on the disputed materials by Friday, July 9, 2004, at noon. If the ruling is issued before that time, PGE will comply with the ALJ's ruling by 5:00 p.m. Friday, July 9, 2004 by delivering the appropriate materials to the offices of Davison Van Cleve, P.C. If the ALJ rules later than July 9, 2004, at noon, PGE will comply as soon as practicable thereafter, but in advance of the July 12, 2004, deposition (assuming a ruling issues later in the day on July 9).

4. Notwithstanding when the ALJ issues the ruling on disputed materials requested in paragraph 3, Ms. Fowler's deposition will be conducted on Monday, July 12, 2004, at 8:30 a.m., provided that if the ALJ does not issue a ruling on all the disputed materials by July 9, 2004, at noon, or if PGE does not comply with the ruling by 5:00 p.m. on July 9, 2004, the parties agree that ICNU may set a second deposition with Ms. Fowler at a mutually agreeable time based on the materials ordered produced by the ALJ in paragraph 3.

5. Nothing in this stipulation is intended to alter the provisions of ALJ's ruling of June 25, 2004 regarding Ms. Fowler's deposition except that ICNU shall have such additional time as is needed in a second deposition for examination based on the materials ordered produced by the ALJ.

6. The parties agree to accept the ALJ's ruling in paragraph 3, as if it were in response to motions on the disputed materials regularly presented to the ALJ. This does not preclude any party from raising issues to the Commission regarding the ALJ's ruling.


EXHIBIT A
PAGE 2 OF 3


7. This Stipulation may be executed in counterparts and each signed counterpart shall constitute an original document.

DATED this 2nd day of July.

PORTLAND GENERAL ELECTRIC CO.

INDUSTRIAL CUSTOMERS OF
NORTHWEST UTILITIES


By: JAY DULEY, Assoc. Gen Counsel


By: Attorney for ICNU

§ 503.14 Work Product Doctrine

[1] Qualified Immunity from Discovery

Although not within the scope of Rule 503, the work product doctrine should be considered in relation to the attorney-client privilege. The work product doctrine protects from discovery documents and other tangible things prepared by a party, a party's attorney, or other representatives of a party in anticipation of litigation. The immunity is qualified because, unlike the attorney-client privilege, it can be overcome and production required upon a showing of substantial need and hardship. ORCP 36B(3) provides:

Subject to the provisions of Rule 44 . . . , a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B(1) of this rule and 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) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The above rule is merely a partial codification of the work product doctrine; because it protects only "documents and tangible things" whereas the doctrine itself also protects opinions and impressions of a lawyer or a representative of a lawyer that have not been reduced to writing. Cf. *State v. Bockorny*, 125 Or App 479, 486, 866 P2d 1230, 1235 (1993), rev denied 319 Or 150, 877 P2d 87 (1994) (defendant argued that his work product protection was violated because the prosecutor was allowed to elicit an opinion from a defense expert that the "Christmas tree stain method" was an effective scientific method of detecting the presence of sperm; because defense had hired the expert to testify about a different matter, there was no invasion of work product; but court appeared to recognize that work product claim could be made for nonwritten impressions of an expert); *State v. Cartwright*, 173 Or App 59, 20 P3d 223 (2001) (in criminal prosecution for harassment, taped interviews of employees made by their employer who was not a party to case were not subject to discovery or subpoena, even though those employees later became prosecution witnesses; tapes were privileged under work product doctrine and defendant made no showing that they were material or favorable to the defense, only a claim that witness's prior statements might be useful for impeachment).

For Oregon cases discussing the work product doctrine, see *State v. Riddle*, 330 Or 471, 8 P3d 980 (2000) (fact that expert was hired by one party does

not render expert per se incompetent to testify on behalf of another party about segregated information or opinions that expert formed without regard to confidential communication; ORS 135.855(1)(a) which protects work product during discovery process is interpreted to govern only pretrial matters). *Brink v. Multnomah County*, 224 Or 507, 356 P2d 536 (1960); *Nielsen v. Brown*, 232 Or 426, 374 P2d 896 (1962); *Pacific NW Bell Tel Co. v. Century Home Components, Inc.*, 261 Or 333, 491 P2d 1023 (1971), modified on other grounds 494 P2d 884 (1972).

There is no work product immunity for a document prepared in the regular course of business without reference to an existing or threatened lawsuit. *City of Portland v. Nudelman*, 45 Or App 425, 608 P2d 1190 (1980). The work product doctrine applies in criminal cases as well as civil cases. See ORS 135.855(1)(a) (exempting work product from criminal discovery process); *United States v. Nobles*, 422 US 225, 95 SCt 2160, 45 LEd2d 141 (1975) (recognizing work product doctrine in criminal case).

See generally Waits, *Opinion Work Product: A Critical Analysis of Current Law and a New Analytical Framework*, 73 Or L Rev 385 (1994); Floyd, A "Delicate and Difficult Task": *Balancing the Competing Interests of Federal Rule of Evidence 612, the Work Product Doctrine, and the Attorney-Client Privilege*, 44 Buff L Rev 101 (1996).

[2] Witness Interview Notes

In *Upjohn Co. v. United States*, 449 US 383, 399, 101 SCt 677, 66 LEd2d 584 (1981), the court commented that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." The Court held that more than the usual showing of "substantial need" and inability to obtain such information by other means "without undue hardship" would be required to obtain an attorney's interview notes and memoranda.

Some courts have held that no showing of necessity is sufficient to compel disclosure "of an attorney's notes based on oral statements from witnesses. See, e.g., *In re Grand Jury Proceedings*, 473 F2d 840, 848 (8th Cir 1973). Another court has held that "special considerations must shape any ruling on the discoverability of interview memoranda . . .; such documents will be discoverable only in a 'rare situation.'" *In re Grand Jury Investigation*, 599 F2d 1224, 1231 (3rd Cir 1979).

However, in *State v. Gallup*, 108 Or App 508, 511, 816 P2d 669, 670 (1991), the court held that interview notes of a district attorney were not work product exempt from discovery under ORS 135.855(1)(a). The court held that the interview notes "contain no opinions, theories or conclusions that could be characterized as work product."

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EXHIBIT

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[3] Using Writings to Refresh Memory

If a writing protected by the work product doctrine is shown to a witness to refresh his or her recollection for purposes of testifying, the work product immunity may be waived. *Pac NW Bell Tel Co. v. Century Home Components, Inc.*, 261 Or 333, 491 P2d 1023, modified on other grounds 494 P2d 884 (1972) (right to see prior statement referred to by witness overrides work product immunity). See further discussion under Rule 612.

[4] Other Authorities

See generally Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 Wis L Rev 305; Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 7 Geo L J 917 (1983); ANNOT., *Development, Since Hickman v. Taylor, of Attorney's "Work Product" Doctrine*, 35 ALR3d 412 (1971); Annot., *Work Product Privilege as Applying to Material Prepared for Terminated Litigation or For Claim Which Did Not Result in Litigation*, 27 ALR 4th 568 (1984).

Rule 504. ORS 40.230. Psychotherapist-Patient Privilege

- § 504.01 Text of Rule 504
- § 504.02 Legislative Commentary
- § 504.03 Psychotherapist-Patient Privilege
- § 504.04 Court-Ordered Examinations
- § 504.05 Other Statutes

§ 504.01 Text of Rule 504

Rule 504. ORS 40.230. Psychotherapist-Patient Privilege

- (1) [Definitions.] As used in this section, unless the context requires otherwise:
 - (a) "Confidential communication" means a communication not intended to be disclosed to third persons except:
 - (A) Persons present to further the interest of the patient in the consultation, examination or interview;

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lawyer hired by insurer to defend insured, insured could not waive privilege with respect to communications between insurer and lawyer); *State v. Maxwell*, 691 P.2d 1316, 1320 (Kan. Ct.App.1984) (dicta) (no waiver even if majority of co-clients wish to waive). *Contra*, *Tunick v. Day, Berry & Howard*, 486 A.2d 1147, 1149 (Conn.Super.Ct.1984) (former co-client suing common lawyer for malpractice can waive privilege invoked by common lawyer on behalf of non-party co-clients who had neither waived privilege nor been involved in malpractice litigation). It might be thought there is an inconsistency between the rule requiring, in effect, collaborative waiver by co-clients and the well-recognized ability of lawyers and other agents to waive a client's privilege, even in instances in which that is not in the interest of the client. See § 78 and § 79, Comment c; cf. § 79, Comment c (manifestly wrongful disclosure by agent). However, the co-clients, by that fact alone, are not agents of each other. Their common lawyer, of course, is the agent of each and can waive for both or either.

Dean Wigmore's often-quoted but ambiguous statement of the waiver

rule in co-client cases has caused confusion. See 8 J. Wigmore, *Evidence* § 2328, at 639 (J. McNaughton rev. 1961) ("Where the consultation was had by *several clients jointly*, the waiver should be joint for joint statements, and neither could waive for the disclosure of the other's statements; yet neither should be able to obstruct the other in the disclosure of the latter's own statements") (emphasis in original). Dean Wigmore plainly is asserting as a rule that each co-client can waive the privilege as to that co-client's own communications. The reference to "joint statements," however, might on hasty reading be thought to contradict it. What Dean Wigmore had in mind by such an ensemble recital by co-clients to a lawyer is not clear, but he probably did not mean individual communications. Perhaps he meant to refer to a lawyer's single letter to co-clients or a single co-client's letter to the common lawyer that mixes in communications from two or more of the co-clients. As indicated in the Comment, that problem can be dealt with in some instances by redacting from the document references to communications by others than the waiving client.

§ 76. The Privilege in Common-Interest Arrangements

(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as

between clients described in Subsection (1) in a subsequent adverse proceeding between them.

Comment:

a. Scope and cross-references. This Section states the common-interest attorney-client privilege. The rule differs from the co-client rule of § 75 in that the clients are represented by separate lawyers. Subsection (1) applies only if the other conditions of §§ 68–72 are satisfied, except it qualifies the requirement of § 71 that the communication be in confidence. Subsection (2) modifies the normal rules of waiver (see §§ 78–85) with respect to subsequent adverse proceedings between the clients.

b. Rationale. The rule in this Section permits persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers. For example, where conflict of interest disqualifies a lawyer from representing two co-defendants in a criminal case (see § 129), the separate lawyers representing them may exchange confidential communications to prepare their defense without loss of the privilege. Clients thus can elect separate representation while maintaining the privilege in cooperating on common elements of interest.

c. Confidentiality and common-interest rules. The common-interest privilege somewhat relaxes the requirement of confidentiality (see § 71) by defining a widened circle of persons to whom clients may disclose privileged communications. As a corollary, the rule also limits what would otherwise be instances of waiver by disclosing a communication (compare § 79). Communications of several commonly interested clients remain confidential against the rest of the world, no matter how many clients are involved. However, the known presence of a stranger negates the privilege for communications made in the stranger's presence.

Exchanging communications may be predicated on an express agreement, but formality is not required. It may pertain to litigation or to other matters. Separately represented clients do not, by the mere fact of cooperation under this Section, impliedly undertake to exchange all information concerning the matter of common interest.

d. The permissible extent of common-interest disclosures. Under the privilege, any member of a client set—a client, the client's agent for communication, the client's lawyer, and the lawyer's agent (see § 70)—can exchange communications with members of a similar client set. However, a communication directly among the clients is not privileged unless made for the purpose of communicating with a privileged person as defined in § 70. A person who is not represented

by a lawyer and who is not himself or herself a lawyer cannot participate in a common-interest arrangement within this Section.

e. Extent of common interests. The communication must relate to the common interest, which may be either legal, factual, or strategic in character. The interests of the separately represented clients need not be entirely congruent.

Illustration:

1. Lawyer One separately represents Corporation A and Lawyer Two represents Corporation B in defending a products-liability action brought by a common adversary, Plaintiff X. The two lawyers agree to exchange otherwise privileged communications of their respective clients concerning settlement strategies. Plaintiff Y later sues Corporation A and Corporation B for damages for alleged defects involving the same products and attempts to obtain discovery of the communications between Lawyer One and Lawyer Two. The communications exchanged between the lawyers for Corporation A and Corporation B are privileged and cannot be discovered.

Unlike the relationship between co-clients, the common-interest relationship does not imply an undertaking to disclose all relevant information (compare § 75, Comment *d*). Confidential communications disclosed to only some members of the arrangement remain privileged against other members as well as against the rest of the world.

f. Subsequent adverse proceedings. Disclosing privileged communications to members of a common-interest arrangement waives the privilege as against other members in subsequent adverse proceedings between them, unless they have agreed otherwise. In that respect, the common-interest exception operates in the same way as the exception for subsequent adverse proceedings as between co-clients (see § 75, Comment *d*). Disclosing information does not waive the privilege with respect to other communications that might also be germane to the matter of common interest but that were not in fact disclosed.

There is no waiver between the members exchanging a communication if they have agreed that it will remain privileged as against each other in subsequent adverse proceedings.

g. Standing to assert the privilege; waiver. Any member of a common-interest arrangement may invoke the privilege against third persons, even if the communication in question was not originally made by or addressed to the objecting member.

In the absence of an agreement to the contrary, any member may waive the privilege with respect to that person's own communications. Correlatively, a member is not authorized to waive the privilege for another member's communication. If a document or other recording embodies communications from two or more members, a waiver is effective only if concurred in by all members whose communications are involved, unless an objecting member's communication can be redacted.

REPORTER'S NOTE

See generally C. Mueller & L. Kirkpatrick, *Modern Evidence* § 5.15 (1995); P. Rice, *Attorney-Client Privilege in the United States* §§ 4.35-4.38 (1994); 2 J. Weinstein & M. Berger, *Evidence* f 503(b)(6) (1986); C. Wolfram, *Modern Legal Ethics* § 6.4.8 (1986). See, e.g., Revised Uniform Rules of Evidence, Rule 502(b)(3) (1974) (privilege applies to a communication by a client "or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein . . . "); Proposed Federal Rules of Evidence, Rule 503(b)(3) (1973) (privilege applies to communication by client "or his lawyer to a lawyer representing another in a matter of common interest"). For criticism of extensive application of the privilege to representatives of lawyers and clients, see 24 C. Wright & K. Graham, *Federal Practice & Procedure* §§ 5482-83 (1986).

The Proposed Federal Rule and the Revised Uniform Rule differ significantly; this Section departs somewhat from each. The Proposed Federal Rule apparently would not extend the common-interest rule to communications by a lawyer's or client's agent assisting in communication between the parties, but it

was not limited to pending litigation. The Revised Uniform Rule apparently did contain the latter limitation but not the former. This Section contains neither limitation.

Comment b. Rationale. Terms such as "joint defense"—less frequently, "common defense"—are sometimes applied to the principle in the Section. Either term can be misleading, perhaps connoting that disclosure can occur only between co-defendants, and perhaps then only if they are actually involved in pending litigation. Although joint defense of a pending lawsuit is a common situation in which courts have applied the doctrine, its rationale and the Section apply equally to two or more separately represented persons whatever their denomination in pleadings and whether or not involved in litigation (Reporter's Note to Comment *d*, *infra*). A preferable term is "common interest" because it includes, as do the decisions, both claiming as well as defending parties and nonlitigating as well as litigating persons. E.g., *Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co.*, 654 F.Supp. 1334, 1365 (D.D.C.1986). The term also distinguishes this Section from the somewhat different rules that apply to co-clients under § 75. On situations in which common-interest arrangements are commonly employed,

see ABA Formal Opin. 95-395 (1995) (citing Restatement).

Comment c. Confidentiality and common-interest rules. On the general principle that protects exchanged communications when third persons attempt to gain access or introduce them in evidence, see, e.g., *United States v. Melvin*, 650 F.2d 641, 645-46 (5th Cir.1981) (recognizing general rule, but finding it inapplicable because undercover government agent who was not member of common-interest arrangement was permitted to attend multi-defendant meeting with their lawyers); *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965) (lawyer for one prospective tax-evasion indictee informed lawyer for another that client was guilty; latter cannot testify to admission); *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir.1964) (privilege extends to summaries of parties' testimony before grand jury that were exchanged between lawyers for parties); *In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F.Supp. 381, 388-89 (S.D.N.Y.1975) (memoranda exchanged between lawyers for several individuals implicated in fraud schemes involved in Securities Exchange Commission investigation and civil actions). The common-interest doctrine stands in contrast to the rule that, in the absence of an agreement based on such an interest, communications between a person and a lawyer for another person are not privileged. E.g., *Government of the Virgin Islands v. Joseph*, 685 F.2d 857, 862 (3d Cir.1982) (no privilege for admission of guilt by unrepresented person to lawyer for person accused of crime).

Comment d. The permissible extent of common-interest disclosures. On

coverage of agents, compare, e.g., Revised Uniform Rules of Evidence, Rule 502(b)(3) (1974), with, e.g., Proposed Federal Rules of Evidence, Rule 503(b)(3) (1973), both quoted in Reporter's Note, *supra*. On applying the doctrine to co-plaintiffs, see, e.g., *Sedlacek v. Morgan Whitney Trading Group, Inc.*, 795 F.Supp. 329, 331 (C.D.Cal.1992). On applying the doctrine to nonlitigation situations, see, e.g., *Schachar v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 191-92 (N.D.Ill.1985) (*dicta*), and authorities cited.

The exchanged communication must itself be privileged. The doctrine does not create new kinds of privileged communications aside from client-lawyer and similar types of communications that are privileged under §§ 68-72. E.g., *In re Grand Jury Testimony of Attorney X*, 621 F.Supp. 590, 592-93 (E.D.N.Y.1985) (common-interest privilege inapplicable when first lawyer communicates to lawyer for another member information that first lawyer obtained in nonprivileged way). On the applicability of the work-product immunity to disclosure of common-interest materials, see § 91, *Comment b*.

Comment e. Extent of common interests. On the general requirement of the presence of common interests, see, e.g., *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C.Cir.1980); *Loustalet v. Refco, Inc.*, 154 F.R.D. 243, 247-48 (C.D.Cal. 1993). The fact that clients with common interests also have interests that conflict, perhaps sharply, does not mean that communications on matters of common interest are nonprivileged. E.g., *Eisenberg v. Gagnon*, 766 F.2d 770, 787-88 (3d Cir.), cert. denied, 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290 (1985), and authorities

cited (correspondence between lawyers for insurer of law firm, law firm, and member of firm in attempt to develop common position privileged despite conflicts). Illustration 1 is based on *Lemelson v. Bendix Corp.*, 104 F.R.D. 13 (D.Del.1984) (manufacturers' exchange of privileged settlement information cannot be discovered by patent holder in latter's action against manufacturers for conspiracy to violate antitrust laws by unified opposition to holder's licensing claims). The fact that information is exchanged about parallel lawsuits, rather than about the same litigation, does not remove the privilege. E.g., *United States v. A.T. & T. Co.*, 642 F.2d 1285 (D.C.Cir.1980). Interests may converge on nonlitigated issues as well. E.g., *United States v. United Technologies Corp.*, 979 F.Supp. 108 (D.Conn.1997) (exchanges among 5 aerospace companies that formed consortium to break General Electric's dominance in the small-engine market).

Conversely, of course, the fact that clients have common interests does not provide a basis for forced disclosure of information in the absence of an agreement to do so. E.g., *Vermont Gas Systems, Inc. v. United States Fidelity & Guar. Co.*, 151 F.R.D. 268, 277 (D.Vt.1993) (common interest of insured and insurer in defeating EPA superfund claims no basis for forced disclosure of privileged communications of insured with separately retained lawyer in suit by insured for declaratory judgment that claims are within policy coverage in light of uncertainty over coverage and adversity of interest on question).

Comment f. Subsequent adverse proceedings. E.g., *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29, 32-33 (N.D.Ill.1980) (dicta)

(waiver with respect to communications actually exchanged in later litigation between parties to common-interest arrangement); In re Grand Jury Subpoena Dated November 16, 1974, 406 F.Supp. 381, 393-94 (S.D.N.Y.1975). The court in *Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co.*, 654 F.Supp. 1334, 1365-66 (D.D.C.1986), erroneously held that a party who exchanges some privileged communications with another member waives the privilege with respect to all privileged communications relevant to the matter. The court, in effect, applied the co-client rule (§ 75(2)) to a common-interest situation. That is not the law under the privilege, but the court may have been correct that waiver of the privilege was an implied term of the insurer-insured relationship that existed between the parties, perhaps stemming from the cooperation clause of the policy. Several insurance cases have reached a result consistent with *Independent Petrochemical*, but based on the cooperation obligation of the insured. E.g., *Truck Ins. Exchange v. St. Paul Fire & Mar. Ins. Co.*, 66 F.R.D. 129, 134-36 (E.D.Pa. 1975), and authorities cited.

As with the corresponding point under the co-client privilege, see § 75, Reporter's Note to Comment *d*, no authority has been found for dealing with the enforceability of agreements among members of a common-interest arrangement that the privilege shall be preserved, even in subsequent adverse proceedings between them. The approach taken in Subsection (2) and in Comment *f* is consistent with the theory of the privilege for such arrangements and with the basis for removing the privilege in subsequent litigation.

Comment g. Standing to assert the privilege; waiver. E.g., *Interfaith Housing Delaware, Inc. v. Town of Georgetown*, 841 F.Supp. 1393, 1400-02 (D.Del.1994) (reviewing decisions); *Western Fuels Ass'n v. Burlington No. R.R.*, 102 F.R.D. 201, 203 (D.Wyo.1984), and authorities cited (waiver by the member who initiated privileged communication, even if other members neither waived nor concurred in client's waiver); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1191 (D.S.C.1974) (no waiver by one member, without concurrence of other members, of privileged communications originally made by another member); *Ohio-Sea-ly Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D.Ill.1980) (no waiver by one member with respect to own communications if contained in document reflecting communications of other, nonwaiving members).

See generally § 75, *Comment e*, and Reporter's Note thereto,

TITLE C. DURATION OF THE ATTORNEY-CLIENT PRIVILEGE; WAIVERS AND EXCEPTIONS

Introductory Note

Section

77. Duration of the Privilege
78. Agreement, Disclaimer, or Failure to Object
79. Subsequent Disclosure
80. Putting Assistance or a Communication in Issue
81. A Dispute Concerning a Decedent's Disposition of Property
82. Client Crime or Fraud
83. Lawyer Self-Protection
84. Fiduciary-Lawyer Communications
85. Communications Involving a Fiduciary Within an Organization

Introductory Note: The attorney-client privilege must be asserted to maintain its protection. The privileged status of the communication can be waived in several ways (see §§ 78-80). Waivers are sometimes classified as "express" or "implied." Most instances result from inaction that the law treats as inconsistent with maintaining the privilege. The term "implied" waiver suggests advertent client purpose, but this is not required. Indeed, the client may waive the privilege even though entirely ignorant of its application. In this respect, the law's attitude toward the privilege is unsympathetic. Moreover, in certain limited instances the law recognizes exceptions to the privilege (see §§ 81-85).


Although the privilege for a client communication may be waived or lost, the information may remain confidential for other purposes. Application of waiver or exception to a communication does not relieve

CERTIFICATE OF SERVICE

I certify that I have caused to be served the foregoing BRIEF OF PORTLAND GENERAL ELECTRIC COMPANY ON *IN CAMERA* REVIEW OF DISPUTED MATERIALS in OPUC Docket No. UM 1121 by First Class U.S. Mail, postage prepaid and properly addressed, to the persons below, and by electronic mail to those persons on the electronic service list maintained by the OPUC.

Dated this 2nd day of July, 2004.

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By 

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J. Jeffrey Dudley
Associate General Counsel

July 6, 2004

Via Facsimile and U.S. Mail

Ms. Cheryl Walker
Oregon Public Utility Commission
PO 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:

On Friday, July 2, 2004, Portland General Electric filed its Brief on *In Camera* Review of Disputed Materials in the above-captioned docket.

The version of this document that was filed with the Commission and served on the parties via U.S. mail and e-mail was missing page 14. Attached please find an original and five copies of the missing page. The other pages of the brief are not affected.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Dudley", with a long horizontal flourish extending to the right.

JJD:am

cc: UM 1121 Service List

Enclosure



	Privileged Bates Numbers	Basis for Privilege	Explanation of Privilege
118.	1580-1610	A-C	Communication between Enron client representatives and PGE client representatives transmitting draft term sheets generated by Weil, Gotshal attorneys regarding TPG purchase transaction
119.	1611-1619	WP, JD	Communication between PGE client representatives and TPG attorney (tmiller6 is Thad Miller, General Counsel of Oregon Electric) regarding transaction approval issues
120.	1620	WP	Communication between PGE client representatives regarding transaction approval issues
121.	1621-1651	A-C	Communication between Enron client representatives and PGE client representatives transmitting draft term sheets generated by Weil, Gotshal attorneys regarding TPG purchase transaction

In consideration of PGE's claim for privilege, the ALJ should recognize that many of the documents have non-responsive information. Should the ALJ order production of any of these documents, care must be taken to redact material that is not responsive to ICNU's Data Request No. 5.1. Furthermore, PGE requests that if the ALJ has doubts regarding the privileged nature of any document, the ALJ should err on the side of finding privilege. If further discussion with PGE would assist the judge, PGE is willing to provide additional information.

III. PGE'S CONFIDENTIAL DESIGNATIONS

Under the Protective Order in this docket, Order No. 04-139, Paragraph 15, a party requesting confidential treatment of information when challenged has the burden of showing that the challenged information falls within ORCP 36(c)(7). Binder 3 contains produced materials, on yellow paper, for which PGE claims confidential protection.² The protection is available for material that is a "trade secret or other confidential research, development or commercial information____" ORCP 36(c)(7).

By their very nature, most e-mails with PGE's CEO and President are confidential. E-mails are private correspondence and are not publicly available. Many of the communications

² Binder 3 does not contain those few documents which ICNU agrees are confidential.