ISSUED: September 3, 2004

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1121

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

DISPOSITION: DOCUMENTS TO BE DISCLOSED

This ruling addresses the documents submitted by Portland General Electric Company (PGE) for *in camera* review before disclosure to Industrial Customers of Northwest Utilities (ICNU).

Procedural Background

This dispute arose from data request 5.1 by ICNU to PGE, which stated, "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." On July 2, 2004, ICNU and PGE entered into a stipulation agreeing to submit the responsive e-mails to the Administrative Law Judges (ALJs) to be reviewed *in camera* for a ruling.

PGE sorted the contested e-mails into three binders, according to the following issues: 1) e-mails that were irrelevant; 2) e-mails that were shielded from disclosure under the attorney-client privilege, work product doctrine, and joint defense privilege; and 3) e-mails that should be marked confidential under the protective order. ICNU argued that e-mails in the first two binders should be disclosed pursuant to the protective order and e-mails in the third binder should not be marked confidential and should be widely available.

Along with the binders, PGE submitted a brief on July 2, 2004, arguing why the e-mails in each binder should be protected as designated by PGE. ICNU submitted a reply brief on July 6, 2004, in accordance with the stipulation. Then, Enron, Oregon Electric Utility Company, LLC, et al. (Applicants), and PGE submitted a joint

reply on July 9, 2004,[1] conveying arguments on the attorney-client privilege, work product, and joint defense e-mails. ICNU challenged the joint reply as outside the stipulation, burdensome on the process, and providing new arguments that ICNU did not have time to rebut.

***In Camera* Procedure**

As to Binder 1, ALJ Logan reviewed the binder and made a chart with her initial ruling as to which documents were to be disclosed, which documents were not to be disclosed, and which documents were to be disclosed as redacted because of their relevance to the data request. On July 8, 2004, ALJ Logan sent the chart to PGE to determine whether it had further objections to her ruling. It did not, and on July 8, 2004, ALJ Logan sent the chart for disclosure to ICNU.

As to Binder 2, ALJ Smith reviewed the binder and made a chart with her initial ruling as to which documents were to be disclosed, not disclosed, and redacted. On July 28, 2004, ALJ Smith sent the chart to PGE to discuss which portions were to be redacted and determine whether there were further objections. On July 30, 2004, PGE responded that it wanted to have a conference call with Applicants, Enron, and ALJ Smith to discuss the ruling as to Binder 2. Conference calls were held on August 3 and 4, 2004. During the course of those calls, Applicants, Enron, and PGE voiced objections to disclosure of some of the documents.[2] ICNU joined the conference on August 4, 2004, and a schedule was set for supplemental briefings on the ongoing objections. Pursuant to that schedule, Applicants, Enron, and PGE submitted a brief on their objections to the Binder 2 ruling on August 13, 2004, and ICNU filed its brief on August 24, 2004.

As to Binder 3, law clerk Jodi Skeel reviewed the binder with supervision from ALJs Logan and Smith and constructed a similar chart. On August 12, 2004, ALJ Smith sent the chart to PGE for further comment. On August 26, 2004, PGE responded that it did not contest the preliminary ruling on Binder 3, but that two rulings on identical material, Bates No. 202950 and 202960, conflicted. PGE's filing misstated the identification numbers of the identical material. The correctly identified materials do have conflicting rulings. Upon review, the material should remain confidential.

[1] Even though Applicants and Enron joined in the briefs, the arguments are still made on behalf of PGE. Procedurally, ICNU requested e-mails by Peggy Fowler and PGE objected. PGE is the party involved in this proceeding, though Applicants and Enron have an interest in the outcome and have joined PGE in some of the briefs.

[2] PGE also expressed the concern that, even if PGE allowed disclosure of some documents that it contended were protected by attorney-client privilege or work product doctrine, it wanted to reserve the right to object to future disclosure of documents related to the same subject as those documents that were disclosed. That objection is speculative and will be dealt with when it arises.

Analysis

This ruling resolves the remaining disputes over the documents in Binder 2, which PGE asserts are protected by the attorney-client privilege, work product doctrine, and joint defense privilege.[3] At the outset, we address ICNU's argument that this second round of briefing and ruling should be treated as reconsideration of the initial ruling, with no change in the ruling unless there is new evidence, a change in law or policy, good cause, or an error of law or fact. *See* OAR 860-014-0095(3). ICNU correctly notes that Applicants' brief fleshes out legal arguments that could have, and probably should have, been made in the initial round of briefing, which instead only set out the statutes and rules and provided little other guidance. However, those filings were made in haste, and ALJ Logan requested a modified procedure to issue a first ruling without a formal explanation so that ICNU would receive documents more quickly to be better able to depose Ms. Fowler. The parties agreed to the modified procedure and should not now be penalized for their accommodation. Therefore, we consider all of the parties' arguments as if the issue was under initial consideration.

We also address ICNU's letter of July 12, 2004, encouraging us to "disregard the improper Joint Reply Brief" which was filed July 9, 2004. We agree with ICNU that it was inappropriate for the entities to submit a brief after a schedule had been agreed to by the parties without consulting ICNU or us. However, the brief was incorporated into PGE's subsequent brief on the attorney-client privilege and work product doctrine, providing ICNU with an opportunity to respond. Therefore, we consider the Applicants' Joint Brief submitted July 9 in our analysis below. We analyze each privilege in turn.

Attorney-Client Privilege

The attorney-client privilege stems from OEC 503, which provides,

> 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;

[3] Because PGE did not object to the initial rulings for Binders 1 and 3, PGE's arguments regarding those e-mails are moot and need not be addressed. Portions of three documents in Binder 1 were redacted due to assertions of attorney-client privilege. The initial ruling was provided by telephone call on September 1, 2004, and agreed to by PGE as set out below.

(d) Between representatives of the client or between the client and a representative of the client; or
(e) Between lawyers representing the client.

PGE argues that communications between any PGE employee and its lawyers, for the purpose of facilitating legal advice, are protected under the attorney-client privilege. PGE further asserts that any legal advice passed on among employees is still protected by the privilege. In addition, PGE contends that communication between Enron and PGE employees and counsel are protected by the privilege because Enron owns PGE and they constitute a single entity for attorney-client privilege purposes. ICNU emphasizes that the communication must relate to legal advice, and that the receipt of an e-mail that otherwise relates to business matters does not necessarily constitute a privileged communication. If there is any question whether the document relates to legal advice or business advice, or if the document was created for a dual purpose, ICNU argues the document should be disclosed.

State ex rel OHSU v. Haas, 325 Or 492, 505-510 (1997) supports the proposition that any legal advice communicated to any employee of the company-client is protected under the attorney-client privilege. Oregon law takes a much broader view than federal law as to the definition of "representative of the client," and the Oregon Supreme Court found that the rules in other states or on the federal level are not instructive.[4] 325 Or at 507. The court then made its own interpretation and found that even communications between rank and file employees and the company's attorney are protected. 325 Or at 509.

We conclude that, under *Haas*, communications between attorneys and employees at all levels, as long as reasonably protected so as not to be disclosed outside the company, should be protected under the attorney-client privilege. The communication must constitute legal advice, not solely business advice, though that is not a clear line. ICNU is also correct that, just because an attorney is sent a copy of an e-mail, it does not necessarily constitute a privileged communication. We balance all of these considerations in making the rulings set out below.

Work Product Doctrine

The work product doctrine is grounded in Oregon Rule of Civil Procedure 36 B(3), which states:

> 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

[4] Where Oregon statutory language mirrors the language of the rule in other jurisdictions, we will use related case law from those jurisdictions as guidance.

> 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.
>
> A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. * * * For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

PGE argues that any material prepared or e-mails of conversations between Applicants, PGE, and Enron, regarding any part of the transaction are work product. The relevant scope of litigation includes attempts to persuade the public, because any member of the public can comment on the proceedings or file a petition to intervene in the case. PGE further asserts employees, as well as attorneys, can create protected work product. As to when a protected work product document was created, PGE contends that the doctrine can apply to documents created before "the event giving rise to litigation." *U.S. v. Adlman*, 68 F3d 1495, 1501 (2d Cir 1995). As long as the prospect of litigation was identifiable, and the document was created because of the prospect of litigation, the document should be protected, in PGE's view.

ICNU contends that the work product doctrine is designed to protect an attorney's "zone of privacy" so that an opponent cannot take advantage of an attorney's research. ICNU argues that PGE seeks to protect documents produced in the normal course of business. We should not adopt PGE's broad standard, argues ICNU, because this case is so far-reaching. As a regulated entity, much of PGE's activity is subject to disclosure. Any material related to those activities could be said to be prepared "in anticipation of litigation" because PGE is subject to ongoing regulatory proceedings. ICNU contends that we should adapt the work product doctrine to suit the peculiarities of the administrative hearing process.

Materials prepared for litigation are clearly work product. These materials include drafts of sworn testimony, preparation for hearing, briefs, and other similar items. We also find that materials prepared in anticipation of litigation may also be protected work product.[5] These materials include strategy for filing with the Commission and working with intervenors.

PGE contends that material produced for public relations and media releases should also be protected, citing *In re. Copper Market Antitrust Litigation*, 200 FRD 213 (SDNY 2001), for the proposition that a public relations firm hired by the defendant produced materials covered by the work product doctrine because, "it is clear that [defendant] retained [the public relations firm] to make sure that its public statements would not result in further exposure in the litigation which grew out of the copper trading scandal." 200 FRD at 221. In that case, the public relations firm was hired to make certain that persons involved in the copper trading scandal did not make admissions against interest. The present case does not involve liability of a company, but whether it is in the public interest for Applicants to acquire PGE. Viewed in this light, material involving media efforts are not protected, as long as they don't overlap with the strategy of the case presented to the Commission. The line is not always clear, but it attempts to preserve legitimate work product while facilitating necessary discovery.

ICNU also seeks to distinguish between e-mails created by attorneys in the ordinary course of business and in the course of litigation. While that distinction may be appropriate in other contexts, in this instance, it is not. ICNU's data request is for e-mails that relate to this transaction, which is in litigation. PGE does not have ordinary business with Applicants, nor are there related communications, that would be relevant under the data request. After acknowledging that any relevant communication would be prepared for the litigation, we next sort by whether the communication relates directly to the approval process before the Commission or is aimed at external processes. Communications related to the approval process are protected; those related to other processes are not protected.

The parties also dispute who may create protected work product. This process is very different from a typical court case in that the client has a prominent role in preparing for and participating in the litigation before the Commission. For instance, non-attorneys have met with intervenors as other parties in the case to discuss matters. That is directly related to the litigation and is protected work product. PGE argues that principle should reach broadly to cover any employee. In practical application, the principle is likely more narrow and covers those employees who have the capacity to represent the company in the transaction.

[5] As to the timing of the creation of the document, even ICNU proposes a standard that "there must be a reasonable anticipation of litigation." Any proposed acquisition of PGE would result in this litigation, the Commission approval process, by Oregon statute. *See* ORS 757.511. There was never a time when the transaction was being considered that litigation was not reasonably anticipated. Therefore, all e-mails related to the transaction could be said to be in "reasonable anticipation of litigation."

Joint Defense Privilege

The Joint Defense Privilege is actually a defense against arguments of waiver under the attorney-client privilege and work product doctrine, if one party discloses otherwise confidential information to another party with a common interest. *See United States v. Gulf Oil Corp.*, 760 F2d 292 (TECA 1985). PGE asserts that it has a common interest with Applicants in working towards completion of the transaction. PGE also notes that Enron is its parent company and that they are considered one entity for privilege purposes. ICNU expresses concern that the joint defense privilege cannot be exercised in the absence of the work product or attorney-client privileges. We agree with ICNU that the common interest, or joint defense, privilege alone is not enough to shield a document from discovery, but it is an effective defense against waiver when applied in conjunction with other the other privileges discussed above.

Conclusions

Binder 1, Bates No. 203067.

The redacted paragraph discusses PGE strategy in approaching the Commission in advance of a formal filing but clearly in anticipation of litigation. This falls under the work product doctrine and need not be disclosed.

Binder 1, Bates No. 203186.

The redacted sentences reveal general thoughts about the proposed transaction in conversation, but are not related to the process before the Commission. The passage should be disclosed under the protective order.[6]

Binder 1, Bates No. 203230.

This e-mail communicates advice from an attorney for PGE to employees through edits to a newsletter. It fits the definition of a protected communication under *Haas* and need not be disclosed.

Binder 2, Document 3; Bates No. 22.

This e-mail communicates advice from PGE attorneys to PGE employees. The last response on the e-mail relates to the "media-relations perspective." However, the heart of the message relays advice from PGE attorneys to employees; that message appears not to have been disclosed to others. The e-mail need not be disclosed.

Binder 2, Document 13; Bates No. 509-514.

This communication should be redacted. The first sentence deals with attorney discussions and should be protected. The rest of the written e-mail relates to time, location, and schedule of an event, items that are not protected under the attorney-client privilege. Therefore, the first sentence in the e-mal need not be disclosed, but the

[6] In each of these rulings, the passage to be disclosed is still subject to the protective order. In accordance with the practice of disclosing material to the party submitting the data request, the passages to be disclosed are detailed in a separate letter to ICNU and PGE. The third binder dealt with e-mails to be disclosed without the restrictions of the protective order but PGE did not object to initial ruling on the e-mails in the third binder and so those are not discussed further in this ruling. Further, e-mails on which the parties had agreed as indicated by the July 8, 2004, letter from ICNU but inadvertently included in the third binder were also not considered.

rest of it must be disclosed. The attachment is a draft document created by an attorney. Drafts are protected by the attorney-client privilege and need not be disclosed.

Binder 2, Document 24, copied at 98; Bates Nos. 621-622, 1425.

This communication is a mix between PGE activities that are not relevant to this transaction and PGE activities related to the PUC approval process. By interpreting communications related to the transaction narrowly, *i.e.*, the TPG application process, and communications related to the litigation process narrowly, *i.e.*, the PUC approval process, the message should be redacted.

Binder 2, Document 27, copied at 48 and 53; Bates Nos. 627, 699, 707.

PGE's explanation of its interactions with other parties as part of the litigation process was helpful, and we agree that documentation related to those interactions is covered by the work product doctrine. Therefore, we rule that these documents should be redacted.

Binder 2, Document 32, copied at 40 and 41; Bates Nos. 650, 667, 668.

This communication discusses a debate being held inside and outside the PUC approval process. Upon further review, we are satisfied that this particular communication relates to strategy within the PUC process and that it should not be disclosed under the work product doctrine.

Binder 2, Document 34, copied at 49, 76, 77, 80, and 81; Bates No. 657-658, 700-701, 1134-1136, 1137-1138, 1142, 1143-1144.

Again, this message is a mixture of material irrelevant to the transaction, material directly related to the PUC approval process, and material that is related to the transaction but not directly related to the PUC approval process. As discussed above, only this third category of information must be disclosed. Therefore, this document should be redacted.

Binder 2, Document 42, copied at 44; Bates Nos. 671, 673.

This communication relates to PGE's interactions with the City of Portland. Upon closer review, it relates to PGE's interactions with the City as an intervenor in the PUC approval process and should therefore be protected under the work product doctrine as part of its litigation strategy.

Binder 2, Document 117; Bates Nos. 1567-1579.

This group of documents includes many of the plans disclosed as public relations material in the initial ruling. However, the first three pages, titled "Rollout Considerations," Bates No. 1568-70, include some material that is protected as work product because it relates directly to the approval process at the Commission. In particular, the following passages need not be disclosed: In subsection A, the paragraph under the heading "Government," is protected. Subsections B, C, and D discuss strategy before the Commission and roles of the parties and should be protected. In the schedule set out in Bates Nos. 1571-1574, certain meetings need not be disclosed. The draft press

release at Bates Nos. 1575-1576 should be disclosed. The material set out in Bates Nos. 1577-1579 need not be disclosed as it suggests strategies for the application before the Commission.

Binder 2, Document 120; Bates No. 1620.

This communication takes place in August 2003, well before the application to acquire PGE was filed with the Commission. However, the subject matter relates to the transaction and the approval process before the Commission and clearly was made in anticipation of litigation. This e-mail, too, is protected.

The parties have indicated that disclosure of documents is ongoing. We encourage the parties to consider the guidelines set forth in this ruling before bringing additional disputes to the Commission.

Dated at Salem, Oregon, this 3rd day of September, 2004.

Kathryn A. Logan Administrative Law Judge	Christina M. Smith Administrative Law Judge