

1 This discoverable information is essential to inform Staff's sole round of testimony due
2 May 12th.¹ Staff will need time to review the new information, and then will likely require
3 additional rounds of discovery for the newly received information. Given the two-week
4 turnaround time for discovery, the current procedural schedule only allows for one round of
5 discovery prior to Staff's reply testimony due on May 12th.

6 **DOCUMENTS REQUESTED**

7 **1. NW Natural** 

8 Staff DRs 6 and 16 request a copy of all Board of Directors' material that discusses or
9 deals with the planned reorganization, including risk assessments prepared for NW Natural by
10 third parties.² This discovery is directly relevant to Staff's investigation of the benefits to and
11 risks born by Oregon ratepayers as a result of the Company's complex restructuring; specifically,
12 it concerns the information the Board considered when it decided to file an application pursuant
13 to ORS 757.511 to create a holding company that will "exercise substantial influence over the
14 utility."

15 Because Staff's request sought essentially the same information as CUB DRs 2³ and 3,⁴
16 NW Natural's response to Staff DRs 6 and 16 referred Staff to the confidential attachments it
17 produced in response to CUB DRs 2 and 3. The Company's "response document" that preceded
18 the confidential attachments objected to the request, asserting attorney-client privilege *and/or*
19 attorney work-product doctrine, but noted that without waiving the objection, it would produce
20 the materials with the attorney-client privileged information *and/or* work product redacted.

21 The confidential attachments were extensively redacted, such that many pages did not
22 even reveal a single word. For example, CUB DR 2 Attachment 1 is comprised of 19 pages, 16

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24 ¹ Staff has the opportunity to file cross-answering testimony to respond to CUB and NWIGU, but will be unable to
25 respond to the Company after May 12th.

26 ² These DRs were issued on February 22nd and due March 8th.

³ CUB DR 2 request: "Please provide copies of all presentations and associated materials given to the Company's
Board of Directors regarding the proposed corporate reorganization."

⁴ CUB DR 3 request: "Please provide copies of all presentations and associated materials given to the Company's
senior management regarding the proposed corporate reorganization."

1 of which were fully redacted in black ink. After Staff and CUB's ongoing discussions with NW
2 Natural's attorneys, NW Natural agreed to produce a "supplemental" version of the attachments,
3 with some redaction removed. However, Staff and CUB are still unable to determine if the
4 privileges were correctly asserted because even the "supplemental" versions remain extensively
5 redacted.

6 Therefore, Staff respectfully requests the ALJ review of the following *in camera*:

7 • CUB DR 2:

- 8 ○ Confidential Attachment 1 (19 pages);
- 9 ○ Confidential Attachment 2 (9 pages);
- Confidential Attachment 3 (13 pages).

10 • CUB DR 3:

- 11 ○ Confidential Attachment 2 (23 pages);
- 12 ○ Confidential Attachment 2 (18 pages).

13 • As mentioned above, NW Natural filed "supplemental" versions of the
14 abovementioned attachments with slightly less redaction on April 7, 2017. Staff
15 notes that, on the supplemental versions, NW Natural added the notation "attorney-
16 client privileged" in the footer of every page—this notation did not exist on the
17 original documents produced to Staff and CUB. Staff points out this alteration so that
18 the ALJ does not attribute weight to it (that the Company intended for the [REDACTED] to be
19 privileged when it originally prepared them) given that the notation was added *after*
20 Staff pointed out that [REDACTED] were an atypical medium for attorney work
21 product, especially when all 82 pages of the attachments did not bear a single notation
22 indicating that they were intended to be privileged.

23 **2. NWN Presentations to Rating Agency**

24 In Staff DR 15, Staff requests copies of presentations regarding NW Natural common
25 stock, preferred stock, debt, operations, or the strategic restructure that were made by NW
26 Natural to any rating agencies, investment banks or investors, or by such an external entity to
NW Natural since January 1, 2015. This information is relevant to Staff's investigation of how

1 NW Natural may be affected by the HoldCo, including NW Natural's continued low cost access
2 to capital for the regulated utility and also helps determine whether the ring fencing provisions
3 proposed are adequate to protect the regulated utility from excess leverage at the HoldCo. This
4 is a standard discovery request. Staff has requested these types of documents in past
5 merger/holding company dockets before the Commission and does not believe it has ever
6 encountered redacted versions. CUB agrees with this assertion.

7 When Staff inquired of NW Natural's attorney as to why a number of pages in every
8 rating agency presentation were completely redacted, Staff was informed that they were
9 attorney-client privileged. It is impossible to determine whether an 8.5x11 inch page of pure
10 black redaction is appropriately covered by the attorney-client privilege, especially when Staff is
11 operating on the understanding that the NW Natural presentations were made to third-party
12 rating agencies, which would have destroyed the attorney-client privilege if it applied.

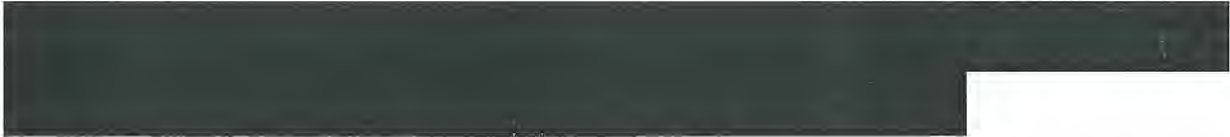
13 Staff respectfully requests the ALJ review of the following *in camera*:

- 14 • Staff DR 15:
- 15 ○ Confidential Attachment 3 – 2015 May Rating Agency ([REDACTED]);
 - 16 ○ Confidential Attachment 4 – 2015 Dec Rating Agency ([REDACTED]);
 - 17 ○ Confidential Attachment 5 – 2016 May Rating Agency ([REDACTED]).

18 **3. Board of Directors Minutes**

19 Staff DR 43, subpart (a) requests unredacted copies of NW Natural's September 22, 2016
20 Board of Directors (Board) meeting minutes—the meeting where the Board authorized the
21 application to form a holding company be filed at the Commission. Other subparts of Staff's DR
22 requested information that was alluded to in the unreacted portion of the September 22, 2016
23 minutes produced in response to Staff DR 21.

24 These minutes are relevant because they memorialize what was discussed at the meeting
25 where the Board determined that it should go forward with the HoldCo application, and Staff
26 was able to glean from the unredacted text that [REDACTED]



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In its response to Staff DR 43, subpart (a), NW Natural simply states:

NW Natural objects to this request because it requests attorney-client privileged information and attorney work-product. Without waiving its objection, NW Natural provided the minutes from the September 22, 2016 Board of Directors meeting with the attorney-client privileged information and attorney work-product redacted in response to UM 1804-OPUC-DR 21.”

However, NW Natural never asserted any privileges in its response to Staff DR 21 when it produced the redacted September 22, 2016 meeting minutes.⁵ Staff sees no basis for withholding these minutes from discovery.

Similarly, Staff DR 44 requests unredacted copies of the minutes from the Board meeting immediately prior to the September 22, 2016 Board meeting. The Company did not assert any privileges for this set of minutes, but stated: “This request seeks highly confidential information under the modified protective order in the docket and will be provided to Staff at the April 11, 2017 meeting scheduled to discuss highly confidential materials.”

This type of response from NW Natural improperly halts the discovery process. First, the Company gives no explanation as to why the minutes are “highly confidential.” Second, a modified protective order was approved by the ALJ, so there is no reason why the Company could not have produced these meeting minutes on the date they were due (April 7th). Third, the Company is choosing when *it wants* to produce discovery to the parties—in this particular instance—four days *after* the deadline, with no request for an extension, at a workshop to be held at NW Natural headquarters.

⁵ The Company’s response reads: “A copy of an excerpt from the minutes of the meeting of the NW Natural Board of Directors held on September 22, 2016, whereby the Board of Directors authorized the application to the OPUC to form Holdco, is attached as ‘Confidential OPUC DR 21 Attacement-3.’ The Board of Director has not yet approved the formation of Holdco and no stockholder approval has yet been obtained with respect to the formation of Holdco.” There is no assertion of attorney-client privilege.

1 Staff and other parties attended the April 11th workshop held at NW Natural, during
2 which the Company shared helpful information that the parties have been asking for in discovery
3 to adequately build the record for this case. The meeting minutes requested in Staff DR 44 were
4 provided to Staff and the Company assured the parties that more than 150 pages of responsive
5 highly confidential material would be delivered to the parties the following day (April 12th).
6 Staff would be remiss if it did not indicate that progress was made at the workshop with regard to
7 discovery. However, Staff must also note that much of the information provided at the workshop
8 was requested by Staff [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED] The information provided to Staff at the workshop was responsive to this
12 request, but it was provided over *one month after* it was due.

13 Further, Staff had asked four follow-up questions in Staff [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 [REDACTED]⁷ NW Natural's response to these
22 questions was due March 23, 2016. NW Natural responded that this information was highly
23 confidential and would require a modified protective order. Given that Staff is only now
24 beginning to receive copies of such material, it will likely require additional weeks of review and
discovery rounds, but Staff is limited to only one round prior to its testimony due date.

25 With regard to the following discovery, Staff respectfully requests:

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⁶ Staff DR 31.

⁷ Staff DR 33.

- 1 • Staff DR 43
 - 2 ○ Subpart (a): the ALJ review NW Natural’s response to Staff DR 21 –
 - 3 Attachment 3 *in camera* to determine if the attorney-client privilege is
 - 4 correctly applied (Note: NW Natural failed to assert the privilege when
 - 5 this DR response was produced).
 - 6 ○ Subpart (c): order NW Natural to produce the “other minutes, or other
 - 7 document sources, concerning the objectives of establishing a holding
 - 8 company, including facilitating the Company’s growth strategy” that it
 - 9 says are subject to the attorney-client privilege and work product for *in*
 - 10 *camera* review, and order the responsive information that the Company
 - 11 asserts is “highly confidential” be produced.
- 12 • Staff DR 44
 - 13 ○ Order the Company to produce highly confidential material on the due
 - 14 date, not on a date NW Natural chooses after the deadline has passed, if
 - 15 the Company has not requested an extension.

16 **4. Incomplete Responses to Data Requests**

17 In Staff DR 37, Staff requests that NW Natural identify and describe in detail all net
18 benefits to Oregon NW Natural ratepayers that will result from the HoldCo, including
19 quantitative benefits, financial benefits, legal/structural benefits, qualitative benefits, and any
20 other benefits. This information is relevant because it directly bears on whether the Commission
21 can approve the application given that the legal standard for ORS 757.511 applications requires
22 that the transaction or restructuring result in a *net benefit* to the utility’s customers.⁸

23 The Company refused to answer this simple, straightforward, and highly relevant
24 question, and instead replied that Staff could find the benefits in the Company’s testimony. Staff
25 requested the Company provide the “net” benefits that result from the transaction, in other
26 words, the benefits that remain after the risks of the restructuring have been considered. In its
27 testimony, NW Natural does not identify any risks to Oregon customers as a result of the holding
28 company structure that will wholly-own the utility and can invest in or purchase almost any
29 entity without coming under Commission jurisdiction. Therefore, NW Natural could not have
30 answered the net benefits question in its testimony.

⁸ Docket No. UM 1011, Order No. 01-778 (Sept. 4, 2001).

1 Likewise, Staff DR 39 asks for the Company to “explain in detail how the proposed
2 HoldCo structure will not harm Oregon citizens as a whole.” Again, this is a straightforward
3 question that the Company must have an answer to if it wants the Commission to approve its
4 application—Order No. 01-778 requires that “in addition to finding a net benefit to the utility’s
5 customers, we must also find that the proposed transaction will not impose a detriment on
6 Oregon citizens as a whole.”⁹

7 Again, the Company responded:

8 Please see NW Natural’s response to UM 1804-OPUC-DR 38, NW
9 Natural’s Application, the Direct Testimony of Shawn M. Filippi and the
10 Direct Testimony of Brody Wilson. NW Natural reserves its right to
11 provide additional evidence in the record, as the breadth of this data
12 request requires the Company to provide a narrative response and legal
13 argument that may more appropriately be developed throughout the record
14 in this docket, in response to positions taken by, or evidence provided by
15 parties.

16 This type of response is unfair to Staff and Intervenors and also prevents the development
17 of a robust record. NW Natural will not explain how Oregonians are not harmed when Staff is
18 diligently trying to gather evidence for its only round of testimony— yet NW Natural reserves
19 the right to discuss how Oregonians are not harmed later on—after Staff can no longer rebut the
20 Company’s assertions.

21 Staff respectfully requests that the ALJ order NW Natural to provide complete responses
22 to discovery requests in order to develop a full evidentiary record, especially in light of the fact
23 that Staff agreed to an expedited schedule in this docket, with only three total rounds of
24 testimony, based in part on the understanding that discovery would be forthcoming in a timely
25 fashion.

26 **ISSUE AND CONFERRAL**

Staff understands that documents subject to the attorney-client privilege are not
discoverable. However, NW Natural has not provided sufficient information for Staff to

⁹ Docket No.UM 1011, Order No. 01-778 at 11.

1 determine whether it has properly applied the attorney-client privilege to the extensively redacted
2 documents produced in response to Staff and CUB's discovery requests.

3 After reviewing NW Natural's response as to why the CUB DR 2 and 3 information was
4 privileged: "NW Natural objects to the extent it requests attorney-client privilege information
5 and/or attorney work-product. Without waiving this objection, the Company will provide the
6 requested materials with the attorney-client privileged information and attorney work-product
7 redacted from the materials," Staff began the conferral process on March 23, 2017. Staff
8 contacted NW Natural's outside counsel and requested an explanation as to why the attorney-
9 client privilege and work product doctrine applied. On April 3 and April 7, NW Natural hosted
10 discovery conference calls with Staff and CUB, during which its attorneys generally explained
11 which privilege was asserted and who had prepared the slides, and gave a high-level summary of
12 the nature of the redacted material. NW Natural claimed that the materials had been prepared by
13 attorneys in anticipation of litigation, and that the mental impressions and strategy from said
14 attorneys, especially as it pertained to litigation strategy and likely outcome of the application at
15 the Commission, were the primary reasons that the attorney-client privilege and/or work product
16 doctrine applied.
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19 To be clear, Staff and CUB very much appreciated the significant amount of time NW
20 Natural took to work through the documents at issue, going for the most part, page-by-page, and
21 offering high-level explanations to Staff and CUB during the conference calls. The parties did
22 make some progress, as the Company agreed to produce a "supplemental" version of the [REDACTED]
23 after the April 7 meeting, in which it removed some of the previously redacted material, mainly
24 titles. Unfortunately, even the slightly-less redacted versions of the materials make it impossible
25 to confirm whether the privileges were properly asserted. Further, in many instances during the
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1 discovery conference calls, NW Natural appeared to be over asserting the privilege. For
2 example, NW Natural attorneys indicated that the following information was privileged: [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 Additionally, some of the revealed titles in the “supplements” caused Staff to further
7 question whether the privileges were being over asserted. In CUB DR 2-Confidential
8 Attachment 1, p. 1, the Company had redacted the subtitle under [REDACTED]
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10 The subtitle was later revealed to read: [REDACTED] Clearly the words

11 “ [REDACTED] ” and “ [REDACTED] ” are NOT subject to the attorney-client privilege and would not waive the

12 privilege for other parts of the [REDACTED] if revealed. When Staff asked why the remainder of the

13 subtitle was redacted, NW Natural’s attorney responded that the few words used would reveal a
14 particular approach and analysis that the lawyer recommended be taken. Likewise, in CUB DR

15 3-Attachment 1 p. 5, the Company unredacted the subtitle from [REDACTED]
16

17 [REDACTED]

18 [REDACTED] stating that they were legal opinions of the outcome of a
19 litigated proceeding.

20 Staff asserts and certifies, consistent with OAR 860-001-0500(7), that it has discussed the
21 discovery issues on six different occasions with the Company’s attorneys, Lisa Rackner and/or
22 Zachary Kravitz, and is unable to resolve this dispute without an *in camera* review. NW Natural
23 maintains that the privileges were properly asserted for all of the remaining redacted material.
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25 At this point, Staff and CUB feel that the best resolution is for the ALJ review the documents *in*
26 *camera* for the following reasons:

- 1 1. The significant amount of redaction makes it impossible to determine whether the
2 privilege is properly applied;
- 3 2. Several explanations by NW Natural during the conferral process appeared to over-
4 assert the privilege;
- 5 3. NW Natural may be asserting the privilege for work produced by individuals not
6 serving as legal counsel to NW Natural;
- 7 4. The “supplemental” versions of the [REDACTED] confirmed that NW Natural did over-assert
8 the privilege in its initial production, i.e., redacting [REDACTED];
- 9 5. The “supplemental” versions of the [REDACTED] produced on April 7 were altered from their
10 original condition with the late addition of “attorney-client privilege” in the footers.

11 ARGUMENT

- 12 **1. NW Natural has failed justify its broad application of the attorney-client
13 privilege to all of the material redacted in response to CUB DRs 2 and 3, and
14 Staff DR 15; and because of the extensive redaction, it is impossible for Staff to
15 determine if the privilege is correctly applied.**

16 The purpose of the lawyer-client privilege is to encourage open communications and
17 full disclosure between the attorney and client,¹⁰ yet it has been criticized by evidence experts
18 for decades.¹¹ Wigmore on Evidence explains that the privilege “is worth preserving for the
19 sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It
20 ought to be strictly confined within the narrowest possible limits consistent with the logic of
21 its principle.”¹² Because the privilege impedes the discovery of relevant evidence, the *burden*
22 of establishing the existence of the attorney-client privilege and the privileged nature of the
23 communication is *on the party seeking to exclude the evidence*.¹³ In other words, it is *NW*

24 ¹⁰ *Baum v. Denn*, 187 Or. 401(1949).

25 ¹¹ Laird C. Kirkpatrick, Oregon Evidence 333 (6th ed. 2013) (quoting Wigmore, Evidence, Sec. 2291 at 554
26 (McNaughton rev 1961)).

¹² *Id.*; see also *Fisher v. United States*, 425 U.S. 391, 403 (1976) (“However, since the privilege has the effect of
withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose.
Accordingly it protects only those disclosures necessary to obtain informed legal advice which might not have been
made absent the privilege.”).

¹³ Laird C. Kirkpatrick, Oregon Evidence 333 (6th ed. 2013)(citing *U.S. v. Osborn*, 561 F.2d 1334 (9th Cir. 1977);
State v. Moore, 45 Or App 837 (1980).

1 *Natural's burden* to demonstrate that the privilege applies to the redacted material— which it
2 failed to do in its DR responses, and attempted to accomplish in discovery conferences, but
3 was unable to accomplish with regard to many of the attachments. Although it is *not Staff's*
4 *burden* to show that the privilege *does not apply*, Staff nonetheless discusses the reasons why
5 the ALJ should carefully consider whether the privilege applies to Staff's and CUB's standard
6 discovery requests. Staff notes that the Commission has stated that if a party questions
7 whether a document is discoverable under the work product doctrine, it shall submit it to the
8 ALJ to be reviewed *in camera*.¹⁴

10 In 1981, the Oregon State Legislature codified the current version of the attorney-client
11 privilege, Oregon Evidence Code (OEC) 503, in Oregon Revised Statutes (ORS) 40.225.
12 Oregon follows the general standard that certain elements must exist before the privilege can
13 be applied to protect a communication. Whether a communication (oral or in writing) is
14 protected by the attorney-client privilege hinges on on the following three findings:¹⁵

- 16 1. The communication must have been between a “client” and the client’s “lawyer,”
as those terms are defined in OEC 503(1)(a) and (c);¹⁶
- 17 2. The communication must be made for the purpose of facilitating the rendition of
18 *professional legal services* to the client as provided in OEC 503(2); and
- 19 3. The communication must be “confidential” as provided in OEC 503(1)(b).

20 **A. Proper Parties – meeting the OEC 503 definition of “lawyer” and**
21 **“client.”**

22 First, for the privilege to apply, the communication must be between a “client” and the
23 client’s “lawyer.” Staff does not dispute that the attorney-client relationship exists between NW
24 Natural’s in-house counsel and its Board of Directors (who Staff understands were the recipients

25 ¹⁴ See *Central Lincoln People's Utility District v. Verizon Northwest Inc.*, Docket No. UM 1087, Order No. 04-379
at fn 3 (July 8, 2004).

26 ¹⁵ OEC 503(2) (emphasis added); *Longo v. Premo*, 355 Or 525 (2014) (emphasis added); *State ex rel. Oregon
Health Sciences University v. Haas*, 325 Or 492, 501 (1997); *State v. Jancsek*, 302 Or 270 (1986).

¹⁶ These definitions are further expanded and described in OEC 503(2)(a) through (e).

1 of the [REDACTED] presentations) or between NW Natural's outside counsel and its Board of Directors;
2 OEC 503(1)(a) expressly includes "corporations" in the definition of a "client."¹⁷

3 However, the relationship in the attorney-corporate client context can be tricky to
4 determine. It is actually the definition of "representative of the client" that defines the scope of
5 the attorney-client privilege for corporations. A representative of the client in the corporate
6 context includes a principal, officer, or director of the client, or a person who, on behalf of the
7 corporation, has authority to obtain professional legal services or act on legal advice rendered.¹⁸
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9 Staff questions, in some instances, whether NW Natural is asserting the privilege for NW
10 Natural management or employees who are *by trade* attorneys, but *do not practice* in that
11 capacity—in other words, they are not currently serving as in-house counsel to NW Natural and
12 might not invoke the privilege. By way of example, on the discovery conference call, NW
13 Natural attorneys stated they were claiming the attorney-client privilege for some of the work
14 done by Shawn Filippi who was consulted for her "business" advice. Similarly Mark Thompson
15 also participated in the preparation of the [REDACTED] at issue, but Staff understands is currently
16 employed as the Director of Rates and Regulatory Affairs. Staff anticipates that NW Natural
17 will clarify Ms. Filippi's current position at NW Natural in its response to this motion, however,
18 Staff has relied on the Company's Opening Testimony filed on March 30, 2017, where Ms.
19 Filippi explains: "Since 2015, I have been Vice President and Corporate Secretary of NW
20 Natural and its subsidiaries, and in 2016, Chief Compliance Officer was added to my roles."¹⁹ If
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¹⁷ OEC 503(1)(a); Laird C. Kirkpatrick, Oregon Evidence 330 (6th ed. 2013).

25 ¹⁸ OEC 503(1)(d); Note: *Upjohn v. U.S.*, 449 U.S. 383 (1981) is the leading case on the lawyer-client privilege in the
corporate setting, but Oregon State Legislature's definition might be interpreted to be broader.

26 ¹⁹ Docket No. UM 1804, NW Natural Opening Testimony, NWN/100/Filippi/1 (March 30, 2017). Interestingly, the
dates printed on the slides at issue [REDACTED]

1 Ms. Filippi and Mr. Thompson are not in-house *attorneys* for NW Natural, the privilege might
2 not arise.

3 It is possible for the inverse argument to be made—that perhaps Ms. Filippi’s and Mr.
4 Thompson’s communications are privileged because they are “representatives of the client” (NW
5 Natural). Even if this were the case, the problematic issue is whether Ms. Filippi and Mr.
6 Thompson were receiving “professional legal services” within the meaning of OEC 503 from
7 NW Natural’s attorneys.
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9 **B. Facilitating the Rendition of Professional Legal Services**

10 Second, in order to be a “client” for purposes of the attorney-client privilege, the
11 client’s relationship with the attorney must be *for the purpose of* obtaining “professional legal
12 services.”²⁰ If the client consults with his or her lawyer as “a friend, counselor, business
13 advisor, executor, investigator, tax preparer, attesting witness, or scrivener, the privilege will
14 not arise.”²¹ Moreover, reports or other communications made by a corporate employee to the
15 corporation for business purposes that are later passed along to the corporate lawyer do not
16 qualify; said another way, “if obtaining legal services for the [corporation] is only a secondary
17 or incidental purpose of the communication courts are likely to find that the requirements of
18 the rule are not satisfied.”²² Either way, Staff’s point is that the line is very blurry in NW
19 Natural’s case and warrants clarification, especially given that it is NW Natural’s burden to
20 establish that the privilege applies in all instances where it has been asserted.
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25 ²⁰ OEC 503(1); Laird C. Kirkpatrick, Oregon Evidence 335-36 (6th ed. 2013). Note: unlike the work product
26 doctrine which is the only privilege dependent upon the prospect of litigation, all confidential communications made
to an attorney by the client for the provision of legal services are privileged, even though no suit or action had been
begun or was in contemplation at the time of the communication.

²¹ Laird C. Kirkpatrick, Oregon Evidence 336 (6th ed. 2013).

²² *Id.* at 342-43.

1 Additionally, during the discovery conference calls, the NW Natural attorneys
2 regularly emphasized that an in-house attorney for NW Natural presented many of the [REDACTED]
3 at the Board meetings. Just because an attorney with which with the attorney-client
4 relationship is established *presents* [REDACTED] does not automatically cloak them in the privilege—
5 attorneys often speak about a lot of things that do not fall under the rendition of “professional
6 legal services.” Similarly, “[a] client cannot make unprivileged, preexisting writings subject
7 to the attorney-client privilege by turning them over to an attorney.”²³
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9 Lastly, it is well accepted that in-house counsel to corporations serve many functions for
10 the client—they can be as business advisors, strategists, other counselors, and of course legal
11 counselors. Therein lies the obstacle to asserting the attorney-client privilege—determining
12 the nature of the advice, whether it is legal as opposed to merely business advice or other
13 advice, which is difficult to show due to in-house counsel’s range of daily functions.
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15 **C. Confidential Communication**

16 Third, a “confidential communication” means “a communication not intended to be
17 disclosed to third persons other than those to whom disclosure is in furtherance of the
18 rendition of *professional legal services* to the client or those reasonably necessary for the
19 transmission of the communication.”²⁴ Whether the communication is “confidential” depends
20 on *the intent* of the client.²⁵ If the client intends for the communication not to be disclosed to
21 third persons (other than third persons to whom disclosure is in the furtherance of the
22 rendition of professional legal services to the client²⁶), then the communication is
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25 ²³ *Id.* at 339.

26 ²⁴ OEC 503(1)(b) (emphasis added).

²⁵ *Id.*; Laird C. Kirkpatrick, Oregon Evidence 336 (6th ed. 2013).

²⁶ Such third persons should be viewed narrowly, but could include spouses, parents, business associates, or joint clients. See Laird C. Kirkpatrick, Oregon Evidence 336 (6th ed. 2013).

1 confidential,²⁷ as long as it is not waived or was never established. A communication is never
2 confidential to begin with if an unnecessary third party is present when the communication is
3 made.²⁸ Additionally, even if the communication is confidential, it can be waived—
4 intentionally or unintentionally.²⁹ Whether the client intended to keep the communication
5 confidential can be inferred from the precautions taken and the surrounding circumstances.³⁰

6 In the case of NW Natural's [REDACTED]
7 [REDACTED], if any third parties were present at the any of the meetings during which the [REDACTED]
8 were discussed, the [REDACTED] are not confidential communications, and are therefore not
9 privileged. Staff is interested in understanding who was present at the meetings. However,
10 Staff also maintains that NW Natural (the client) did not intend to keep the [REDACTED]
11 "confidential" and subject to the attorney-client privilege based on the lack of precautions
12 taken; specifically, a standard notation made on attorney work product or a deliverable is
13 "attorney-client privileged." This language did not appear on any of the original [REDACTED]
14 [REDACTED] the original [REDACTED] did bear the notation [REDACTED]
15 [REDACTED], but this was likely to indicate that they should not be distributed publically, not
16 that they were privileged, or else why would NW Natural have added "attorney-client
17 privileged" on the "supplemental" versions produced on April 7?

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20 Finally, it is important to keep in mind that there are *two larger concepts* to the
21 attorney-client privilege: (a) the *evidentiary privilege* (discussed at length in this motion) and
22 (b) the *ethical duty* of confidentiality. An attorney's *ethical duty* not to disclose client
23 confidences covers a broader range of communications between the attorney and client—
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25 ²⁷ OEC 1(b).

26 ²⁸ OEC 1(b); Laird C. Kirkpatrick, Oregon Evidence 336 (6th ed. 2013).

27 ²⁹ The holder of the privilege waives the privilege if he or she voluntarily discloses or consents to disclosure of any
significant part of the matter or communication. See OEC 511.

28 ³⁰ Laird C. Kirkpatrick, Oregon Evidence 336 (6th ed. 2013).

1 communications that would not be confidential under the evidentiary component of the
2 privilege; for example, a client's communication in the presence of a third party *is not*
3 protected for purposes of the evidentiary privilege, but the client's attorney still has an ethical
4 duty not to discuss the information publically. Staff is concerned that NW Natural may be
5 conflating the broad ethical duty of confidentiality with the more narrow evidentiary
6 component of the privilege.

7 8 **D. Past Commission Practice**

9 In past merger dockets at the Commission, information identical to that which NW
10 Natural claims is privileged was made available to the parties. Take for example, discovery
11 concerns in UM 918, PacifiCorp's merger with Scottish Power: "In addition, Scottish Power
12 maintains that some of the [commercially sensitive business strategy] information is protected
13 from disclosure under the attorney-client privilege and/or the work product doctrine, because
14 it reflects communications between Scottish Power and its attorneys. While the Company is
15 willing to disclose the information to Staff, it believes additional protection is necessary to
16 preserve the privileges."³¹ NW Natural has *already* been granted a highly confidential
17 protective order in this docket and could choose to proceed as PacifiCorp did in its merger
18 case.
19

20 **2. NW Natural has failed to show circumstances justifying the application of the** 21 **qualified attorney work product doctrine; and even if it could, the information** 22 **would be discoverable due to Staff and CUB's substantial need.**

23 Staff notes that NW Natural never specified which privilege, attorney-client or work
24 product doctrine, applied to particular [REDACTED] in its initial response. This distinction matters
25 because if the attorney-client privilege is accurately applied, the documents cannot be compelled;
26

³¹ See Docket No. UM 918, Order No. 99-293 (Apr. 27, 1999).

1 whereas, if the work product doctrine applies, the documents can be compelled with a showing
2 of substantial need.

3 The attorney-client privilege and the work product doctrine are not the same, but are
4 often asserted together. The work product doctrine originates from common law and in Oregon
5 is found in ORCP 36B(3): it protects documents and tangible things that have been prepared *in*
6 *anticipation of litigation or for trial* by or for another party, or by or for that other party's
7 representative (including an attorney, consultant, surety, idemnitor, insurer, or agent).
8

9 The work product doctrine is a "qualified" privilege because it can be overcome, and
10 documents will be compelled upon a showing that "the party seeking discovery has *substantial*
11 *need* of the materials in the preparation of such party's case *and is unable without undue*
12 *hardship to obtain the substantial equivalent of the materials by other means.*"³² When courts
13 order production of work product, ORCP 36B(3) instructs them to guard against the production
14 of "mental impressions, conclusions, opinions, or legal theories of an attorney or other
15 representative of a party concerning the litigation." The doctrine is applied in both civil and
16 criminal litigated cases.³³
17

18 It is well-settled that the work product doctrine only protects those things which are
19 prepared in "anticipation of litigation" and does not protect any documents prepared in the
20 regular course of business without reference to an existing or threatened lawsuit.³⁴ The
21 Commission has "acknowledge[d] that some documents may contain *both discoverable material*
22

23 ³² ORCP 36(B)(3).

24 ³³ Laird C. Kirkpatrick, *Oregon Evidence* 362 (6th ed. 2013).

25 ³⁴ *United Pac. Ins. Co. v. Trachsel*, 83 Or App 401, 404 (1987), *rev den*, 303 Or 332 (1987) (This case illustrates
26 when regular course of business shifts to anticipation of litigation. Before plaintiff's retention of a fire cause expert,
the fire marshall had informed plaintiff that the fire had been intentionally set. At that point, the evidence provided a
basis for plaintiff to believe that denial of the claim and litigation was likely. In ruling on defendant's request for
production, the trial court could believe that the investigation had shifted from one in the ordinary course of business
to one in anticipation of litigation); *Brink et ux v. Multnomah County*, 224 Or 507, 517 (1960).

1 and work product. The work product doctrine protects an attorney’s theory of the case under
2 litigation, but it only protects documents prepared in anticipation of litigation and not in the
3 regular course of business.³⁵

4 Take for example, *City of Portland v. Nudelman*, where the plaintiff assigned error to the
5 denial of its motion for an order protecting it from disclosing *for discovery purposes* information
6 contained in written appraisals of property. The court held that neither attorney-client nor work-
7 product privileges applied to the appraisal report because it was not made in preparation of
8 litigation, rather, it was prepared in the planning stage, prior to the contemplation of litigation.³⁶
9 The court reached this conclusion based on *the timing* of when the appraisal was made—the
10 attorney-client and work product privileges were not applicable because the appraiser was
11 engaged *nine months prior* to the commencement of the condemnation proceeding in the case.³⁷
12

13 As a threshold question, Staff questions whether “anticipation of litigation” in ORCP
14 36(B)(3) can be taken to mean a contested case in an administrative proceeding, but need not
15 reach the issue here. Northwest Natural’s scenario is the same as the *Nudelman* case. NW
16 Natural would be hard-pressed to argue that the [REDACTED]
17 [REDACTED] were prepared “in reference to an existing or threatened
18 lawsuit” given that they were prepared between [REDACTED] prior to when NW
19 Natural filed its application for HoldCo to assert substantial influence over the utility on
20 February 10, 2017. Clearly, there can be no dispute that there was existing “litigation” at the
21 time the [REDACTED] were prepared, nor could there have been the “threat” of litigation. The work
22 product doctrine cannot apply in NW Natural’s situation.
23
24

25 _____
26 ³⁵ Docket No. UM 1087, Order No. 04-379 at fn 3 (July 8, 2004) (emphasis added) (citing *United Pacific Insurance Company v. Trachsel*, 83 Or App 401, 404 (1987)).

³⁶ *City of Portland v. Nudelman*, 45 Or App 425, 433 (1980).

³⁷ *City of Portland v. Nudelman*, 45 Or App 425, 432 (1980).

1 For the sake of argument, even if NW Natural were to argue that the [REDACTED] were prepared
2 in “anticipation of litigation,” Staff meets the exception to the qualified work product privilege.
3 Staff and CUB have *substantial need* for the highly relevant materials titled “[REDACTED]
4 [REDACTED]” that were presented periodically to NW Natural decisionmakers so that Staff and CUB
5 can investigate the risks and benefits of the major corporate restructuring. Staff *cannot obtain*
6 *the information from any other source* but the Company; in fact, the Company has indicated in
7 other DR responses that it has not made any presentations to investors regarding the strategic
8 restructure to accelerate its growth strategy,³⁸ thus, no one else is privy to the associated risks
9 except NW Natural. Given that the Company is the sole keeper of this information, Staff and
10 CUB are unable to obtain the *substantial equivalent of the materials by other means*. Therefore,
11 the ALJ should compel production of all materials allegedly covered by the work product
12 doctrine.
13

14 **3. Presentations to third-party rating agencies are not typically protected by the**
15 **attorney-client privilege.**

16 Staff DR 15 requested a copy of presentations produced by NW Natural and made to
17 rating agencies because Staff has repeatedly asked the Company how its ratings will be
18 affected by the holding company structure but has received insufficient responses. In its
19 response to Staff DR 15, NW Natural simply says “Attached are the confidential rating
20 agency presentations, with privileged portions excerpted, that relate to NW Natural’s common
21 stock, debt and operations.” Staff can understand why these presentations are confidential
22 and subject to the protective order, but Staff does not understand how the rating agency
23 presentations are subject to the attorney-client privilege, which NW Natural did not explain in
24 its response. The rating agency is not the “client,” nor is there evidence that the rating
25
26

³⁸ Company Response to Staff DR 15.

1 agency is a “representative” of the client or the attorney—to be a representative of the
2 attorney, NW Natural’s attorneys would have had to hire someone from the rating agency to
3 assist them in the rendition of professional legal (not business or financial) services.³⁹ NW
4 Natural indicated in its response that the presentations relate to “common stock, debt and
5 operations.” These topics appear more akin to business or finance expertise, outside the
6 wheelhouse of an attorney’s legal advice.

7
8 What is settled is that a communication “meant to be relayed to outsiders or which is
9 divulged to third persons by the client or by the lawyer at the direction of the client can
10 scarcely be considered confidential.”⁴⁰ Further, a client cannot authorize his lawyer to speak
11 for him or her in dealing with third persons, and claim that to be a confidential
12 communication.⁴¹ Even if NW Natural claims that the rating agency was not an outsider or
13 third person, but was instead a hired expert, the state’s leading case on expert testimony
14 expressly says that an expert’s opinion and analysis can be parsed out from the confidential
15 communication with the attorney.⁴²

17 **4. Board of Director Meeting Minutes**

18 The mere presence of the general counsel or outside counsel at a board meeting does
19 not make Board of Director meeting minutes privileged. It is true that minutes can be
20 privileged when they capture legal advice rendered by the lawyer or discussions of ongoing
21 litigation, however, corporations exercising best practices typically note in the minutes that a
22 privileged discussion took place, and then prepare a separate privileged memo (not
23 incorporated into the minutes). These practices are commonly adopted due to the fact that
24

25 ³⁹ OEC 1(d) and (e).

26 ⁴⁰ Laird C. Kirkpatrick, Oregon Evidence 327 (6th ed. 2013).

⁴¹ See *Baum v. Denn*, 187 Or 401, 406-07 (1949).

⁴² *State v. Riddle*, 330 Or 471 (2000).

1 meeting minutes are readily shared with third parties. Also, the privilege would be waived
2 with the presence of third-parties at the board meeting, but it is unknown who was in
3 attendance based on NW Natural's limited response to Staff's DR.

4 A comparable situation with regard to access to meeting minutes arose in UM 1121,
5 Oregon Electric Utility Company's (TPG) application to acquire Portland General Electric
6 (PGE). CUB and ICNU requested discovery of: "Minutes of any governing group in which
7 the proposed transaction was discussed; and studies or analyses conducted for or by
8 Applicants, including studies related to value-creation potential and potential risks and
9 benefits from reorganization."⁴³ PGE objected to providing the requested minutes and other
10 documents under the standard protective order and sought to put a modified protective order
11 in place, however, PGE did not object to the production of the meeting minutes under an
12 assertion of attorney-client privilege. In fact, the ALJ's ruling reads: "All parties agree that
13 the information is discoverable."⁴⁴ Furthermore, the ALJ *denied* PGE's request for a
14 modified protective order, determining that PGE's argument that the information requested by
15 CUB and ICNU (meeting minutes and studies regarding the potential risks and benefits of the
16 transaction) was highly sensitive and related to the inner workings of TPG, *were not*
17 *persuasive* enough to warrant a modified protective order. By contrast, unlike PGE, NW
18 Natural *already has* a modified protective order in place, so there is no valid reason for NW
19 Natural to refuse to produce unredacted meeting minutes to the parties.

22 CONCLUSION

23
24 The documents requested by Staff and CUB are relevant to this contested case and are
25 subject to discovery if not privileged. Because the documents are significantly redacted, Staff

26

⁴³ Docket No. UM 1121, ALJ Ruling on May 28, 2004.

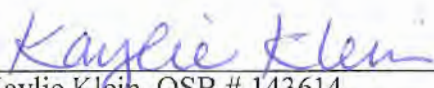
⁴⁴ *Id.*

1 cannot determine if the documents are appropriately designated as privileged or not. Staff's
2 motion is based upon (1) a challenge to NW Natural's claim that all of the redacted material
3 produced in response to CUB DR 2 and 3 is subject to the attorney-client privilege and/or (2)
4 the attorney work product doctrine; however, even if the redacted materials are covered by the
5 work product doctrine, Staff's substantial need for the relevant information and inability to
6 obtain similar information from any other source but the Company supersedes the qualified
7 work product privilege. Therefore, Staff respectfully requests that the ALJ perform an *in*
8 *camera* review of Staff DRs 6 and 16 (CUB DR 2-3) and Staff DR15 and 43, and order NW
9 Natural to produce unredacted versions of the documents the ALJ determines are not subject
10 to the privileges discussed herein. Staff also requests that the ALJ order NW Natural to
11 provide full and complete responses to Staff DRs 37 and 39 and discontinue delay of the
12 discovery process given that Staff's sole round of testimony is due in approximately four
13 weeks.
14

15 DATED this 12th day of April 2017.

16
17 Respectfully submitted,

18 ELLEN F. ROSENBLUM
19 Attorney General

20 
21 Kaylie Klein, OSB # 143614
22 Assistant Attorney General
23 Of Attorney for Staff of the Public Utility
24 Commission of Oregon
25
26

CERTIFICATE OF SERVICE

UM 1804

I certify that I have, this date, caused to be served Staff's Motion to Compel Production in Docket UM 1804 upon the parties listed below via first class mail.

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