

**BEFORE THE PUBLIC UTILITY COMMISSION**  
**OF OREGON**  
**UM 1804**

In the Matter of	)	
	)	
NORTHWEST NATURAL GAS	)	<b>OREGON CITIZENS' UTILITY</b>
COMPANY, dba, NW NATURAL,	)	<b>BOARD'S MOTION TO COMPEL</b>
	)	<b>PRODUCTION</b>
Application for Approval of Corporate	)	
Reorganization to Create a Holding	)	
Company.	)	
_____	)	

**I. INTRODUCTION**

1 Pursuant to OAR 860-001-0500(7) and OAR 860-001-0540(5), the Oregon  
2 Citizens' Utility Board ("CUB") hereby files its Motion to Compel Production, and  
3 moves Administrative Law Judge ("ALJ") Power for an order compelling Northwest  
4 Natural Gas Company ("NWN" or "the Company") to produce unredacted responses to  
5 CUB's Data Requests ("DRs") 2 and 3. CUB supports the Public Utility Commission of  
6 Oregon's ("Staff") pre-filed Motion to Compel Production in this docket and agrees that  
7 all materials sought by Staff, including the DRs that CUB references herein, are directly  
8 relevant to this proceeding.

9 At this point in the proceeding, CUB has had difficulty determining the risks and  
10 benefits to the Company, its customers, and Oregonians as a whole that may arise from  
11 NWN's Application for Approval of Corporate Reorganization to Create a Holding

1 Company (the “proposed reorganization”). The information sought in CUB DRs 2 and 3  
2 is relevant to the proceeding in order to examine the Company’s due diligence in  
3 considering the benefits and risks of its proposed reorganization. This information is not  
4 only necessary to evaluate whether the Company’s proposed reorganization meets the net  
5 benefits standard under ORS 757.511, but it is essential to evaluate to ensure that the  
6 Company’s residential customers are insulated from harm from any potential future  
7 transactions that NWN’s HoldCo, if approved, would enter into. In short, the information  
8 sought is essential to the preparation of CUB’s case. Because the Company’s responses  
9 to CUB’s DRs 2 and 3 are so heavily redacted, it is impossible to tell whether the  
10 information provided contains the information needed to help build an adequate record  
11 through which to analyze the proposed reorganization.

12 Therefore, CUB respectfully requests that ALJ Power perform an *in camera*  
13 review of the materials in question to determine whether the Company has correctly  
14 asserted the work-product doctrine and/or attorney-client privilege—which the Company  
15 has broadly asserted applies to all redacted materials. In doing so, CUB asks that ALJ  
16 Power order NWN to produce copies of its responses to CUB DRs 2 and 3 with any  
17 portions of the documents that the ALJ determines are not subject to the privileges  
18 unredacted.

19 **II. INFORMATION SOUGHT**

20 CUB’s DRs 2 and 3 ask that the Company provide copies of all presentations and  
21 associated materials that NWN gave to both its Board of Directors and senior

1 management regarding the proposed reorganization.<sup>1</sup> As discussed, this information was  
2 requested in order to glean a transparent understanding of the Company’s assessment of  
3 the risks, benefits, and overall strategy associated with the proposed reorganization. It  
4 was unclear—and, in fact, still is—whether the Company’s presentations to its Board of  
5 Directors and senior level management would give CUB a greater understanding of how  
6 the Company views the proposed reorganization. CUB’s belief is that reconciling the  
7 presentations to the Company’s Board of Directors and senior management with what has  
8 been portrayed to the Commission<sup>2</sup> is essential to understand the full scope of the risks  
9 and benefits of the proposed reorganization.

10 The Company’s response document that was provided alongside the confidential,  
11 heavily redacted presentation materials broadly objected to CUB’s DRs 2 and 3 to the  
12 extent that it requested attorney-client privileged information and/or attorney work-  
13 product. Given the volume of redacted information that the Company has provided in  
14 response to CUB’s DRs 2 and 3, it is impossible to tell whether the intended information  
15 sought—the Company’s analysis of the risks and benefits of the proposed transaction—is  
16 analyzed in the materials provided. In its initial response attachments to CUB’s DRs 2  
17 and 3, the Company partially redacted a significant number of pages in the presentations  
18 sought, and fully redacted many more. The sheer volume of redacted material rendered  
19 the responses largely meaningless, and led CUB and Staff to confer with the Company’s

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<sup>1</sup> See CUB DR 2: “Please provide copies of all presentations and associated materials given to the Company’s Board of Directors regarding the proposed corporate reorganization.” and CUB DR 3: “Please provide copies of all presentation and associated materials given to the Company’s senior management regarding the proposed corporate reorganization.”

<sup>2</sup> See generally *in re Application of Northwest Natural Gas Company for Approval of Corporate Reorganization to Create a Holding Company*, OPUC Docket No. UM 1804, Initial Application (Feb. 10, 2017); and *in re Application of Northwest Natural Gas Company for Approval of Corporate Reorganization to Create a Holding Company*, OPUC Docket No. UM 1804, Opening Testimony (Mar. 30, 2017).

1 counsel to hear explanations of why the attorney-client and attorney work-product  
2 privileges have been so broadly asserted. The parties are currently at an impasse, and it is  
3 uncertain whether the privileges have been incorrectly asserted to portions of the  
4 materials provided.

5 CUB appreciates the time and effort spent by the Company’s counsel to review  
6 and re-review the redacted information to determine the appropriateness of the attorney-  
7 client and attorney work-product privileges. After the Company confirmed that it  
8 believed the privileges were appropriate, both CUB and Staff held a number of discovery  
9 discussions with the Company’s counsel to intricately review, explain the rationale for  
10 each privilege, and provide a high-level discussion of the content of the redacted  
11 information in a manner that would not waive the attorney-client privilege. As a result of  
12 these discussions, the Company’s counsel agreed to provide a “supplemental” version of  
13 the attachments that provided a slightly less redacted version of the original attachments.  
14 However, the information that was unredacted in the supplemental attachments provided  
15 little new, useful evidence, and the content of the newly unredacted materials led CUB to  
16 believe that some of the information should not have been subject to privilege in the first  
17 place.<sup>3</sup>

18 As such, CUB has reason to believe that additional redacted material should also  
19 be discoverable. At the present moment, CUB does not know whether all redactions are  
20 appropriate, or, in the event that they are not, whether currently incorrectly redacted  
21 material contains discoverable evidence that is essential to the formation of CUB’s case.

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<sup>3</sup> See *in re Application of Northwest Natural Gas Company for Approval of Corporate Reorganization to Create a Holding Company*, OPUC Docket No. 1804, Staff’s Motion to Compel Production at 9-11 (April 12, 2017) (An in depth discussion of the content that was unredacted in the supplemental responses to CUB’s DRs 2 and 3).

1 Therefore, as stated previously, CUB respectfully requests that the ALJ conduct an *in*  
2 *camera* review of the following to ensure that the Company’s assertion of the attorney-  
3 client and/or attorney work-product privileges is appropriate, and that any non-privileged  
4 information be made discoverable:

- 5 • CUB DR 2: Confidential Attachments 1, 2, and 3; and
- 6 • CUB DR 3: Confidential Attachments 1 and 2.

7 CUB is also interested in the outcome of the ALJ’s *in camera* review of the information  
8 sought in Staff’s pre-filed Motion to Compel in this docket, and supports Staff’s efforts in  
9 ensuring that any discoverable information in the implicated DRs be made available.

10 **III. ARGUMENT**

11 The Company is broadly asserting both the attorney-client privilege and/or the  
12 work product doctrine to the redacted portions of the materials that it provided in  
13 response to CUB’s DRs 2 and 3.<sup>4</sup> While information that is properly protected by either  
14 privilege is not discoverable, limitations exist in the application of both. Due to the  
15 volume and uncertainty surrounding the content of the redacted materials, it is unclear to  
16 both CUB and Staff whether one or both of the privileges asserted by the Company  
17 legitimately apply. As such, an *in camera* review of the contested material is necessary  
18 to render a sound determination.

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<sup>4</sup> In response documents to CUB’s DRs 2 and 3, the Company stated: “NW Natural objects to this request to the extent it requests attorney-client privileged information and/or attorney work-product. Without waiving this objection, the Company will provide the requested materials with the attorney-client privileged information and attorney work-product redacted from the materials.”

1           **A. Attorney-Client Privilege**

2           Both the Oregon Evidence Code and federal common law recognize the existence  
3 of the attorney-client privilege.<sup>5</sup> In general, the attorney-client privilege applies if the  
4 following four elements are satisfied: (1) the asserted holder of the privilege is or sought  
5 to become a client; (2) the person to whom the communication was made is an attorney  
6 acting as such in connection with the communication; (3) the communication relates to a  
7 fact of which the attorney was informed by his or her client in confidence for the purpose  
8 of securing either an opinion on law, legal services, or assistance in some legal  
9 proceeding, and not for the purpose of committing a crime or tort; and (4) the privilege  
10 has been claimed and not waived by the client.<sup>6</sup> While the purpose of the privilege is “to  
11 encourage full and frank communication between attorneys and their clients,”<sup>7</sup> courts  
12 frequently find that it “should be strictly confined within the narrowest possible limits  
13 underlying its purpose.”<sup>8</sup> Wigmore’s treatise on Evidence, which has been cited on  
14 multiple occasions by the U.S. Supreme Court<sup>9</sup> states that any exemptions to the general  
15 duty to liberally produce discovery should be considered distinctly exceptional.<sup>10</sup>

16           The attorney-client privilege should be narrowly construed, and the burden of  
17 establishing the privileged nature of the communication in question is on the party

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<sup>5</sup> Oregon Evidence Code (OEC) 503; ORS 40.225; *United States v. Zolin*, 491 US 554, 109 S. Ct. 2619, 105 L Ed2d 469 (1989).

<sup>6</sup> OEC 503(1)-(2); *United States v. Cohn*, 303 F Supp2d 672, 679 (D. Md. 2003).

<sup>7</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389, 391 (1981).

<sup>8</sup> *Walsh v. Northrup Grumman Corp.*, 165 F.R.D. 16, 18 (E.D.N.Y. 1996).

<sup>9</sup> *United States v. Bryan*, 339 U.S. 323, 331 (1950); *United States v. Nixon*, 418 U.S. 683, 710 (1974).

<sup>10</sup> 8 Wigmore, Evidence (3d ed.) § 2192 (“For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.”).

1 seeking to exclude the evidence.<sup>11</sup> In this case, NWN has the burden to prove that the  
2 evidence it is seeking to redact from discovery is indeed privileged. While CUB and  
3 Staff appreciate the great length that the Company’s attorneys went through to work with  
4 parties to discuss the redacted information, questions remain. This is especially true after  
5 reviewing the Company’s supplemental responses to CUB DRs 2 and 3.<sup>12</sup> Because  
6 parties are at an impasse regarding whether or not the information sought has been  
7 properly redacted, CUB asks that the ALJ perform an *in camera* review of the  
8 Company’s responses to CUB DRs 2 and 3, as well as an *in camera* review of all  
9 information sought in Staff’s Motion to Compel in this docket.

10 **B. Attorney Work-Product Doctrine**

11 As discussed, the Company has broadly asserted both the attorney-client privilege  
12 and/or attorney work-product doctrine as the foundation to justify the amount of material  
13 redacted in response to CUB’s DRs 2 and 3.<sup>13</sup> In the seminal case *Hickman v. Taylor*, the  
14 U.S. Supreme Court recognized the work-product doctrine as generally protecting  
15 information gathered by a lawyer in preparation for litigation.<sup>14</sup> Unlike the attorney-  
16 client privilege, the work-product doctrine can be overcome, and documents sought can  
17 be compelled if “the party seeking discovery has substantial need of the materials in the  
18 preparation of such party’s case and is unable without undue hardship to obtain the  
19 substantial equivalent of the materials by other means.”<sup>15</sup> Taken another way, “where

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<sup>11</sup> *United States v. Osborn*, 561 F.2d 1334 (9<sup>th</sup> Cir. 1977).

<sup>12</sup> Staff’s Motion to Compel, *supra* note 3.

<sup>13</sup> *Supra* note 4.

<sup>14</sup> *Hickman v. Taylor*, 329 U.S. 495, 510-511, 67 S. Ct. 385 (1947).

<sup>15</sup> ORCP 36(B)(3).

1 production of [such material] is essential to the preparation of one’s case, discovery may  
2 properly be had.”<sup>16</sup>

3 The information sought in CUB’s DRs 2 and 3 was intended to discover the due  
4 diligence that NWN conducted in relaying the risks and benefits of the proposed  
5 reorganization to its Board of Directors and senior level management. This information  
6 is directly relevant to the dispute, and is essential for CUB to in order to place adequate  
7 safeguards and conditions necessary to protect customers during the proposed  
8 reorganization and future transactions that NWN’s HoldCo may enter into. It is  
9 impossible to know whether this information is included in the information sought in  
10 CUB’s DRs 2 and 3 due to the significant level of redacted material. However, to the  
11 extent that it is, there is likely no other source through which CUB could access the  
12 material sought. If this information happens to be in the documents requested, CUB asks  
13 that the ALJ find the information discoverable under the undue hardship exception to the  
14 attorney work-product doctrine. In the event that the information is present and does not  
15 fall under the attorney-client or work-product privileges, CUB respectfully asks that the  
16 ALJ to compel the Company to produce any non-privileged information.

17 **IV. CONCLUSION**

18 While the Company’s HoldCo application at issue in this docket considers its  
19 immediate strategy for proposed corporate reorganization, the effects of potentially  
20 granting the Company’s request has much broader implications. If the proposed  
21 reorganization is approved, any subsequent transaction in which HoldCo were to acquire  
22 or merge with an out-of-state entity or utility would not be subject to OPUC approval or

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<sup>16</sup> *Hickman*, 329 U.S. at 511.



1 oversight. Therefore, it is imperative that parties develop as robust a record as possible to  
2 ensure that all potential risks of the proposed reorganization are considered and  
3 adequately protected against. This is especially true in a contested case proceeding that  
4 only allows one round of Staff and Intervenor Reply Testimony.<sup>17</sup> The DRs that are the  
5 subject of this Motion to Compel—as well as the additional DRs considered in Staff’s  
6 pre-filed Motion to Compel—are meant to produce information that will enable the  
7 parties to adequately evaluate the proposed reorganization.

8 CUB has been a party to many previous contested cases in which a corporate  
9 reorganization or ownership change has been contemplated.<sup>18</sup> In those prior disputes,  
10 CUB and other parties have requested similar documents as those that are requested in  
11 CUB and Staff’s Motions to Compel in this docket. Although the Companies implicated  
12 in those dockets have not always been immediately forthcoming with the information  
13 requested, CUB has largely been able to access large portions of Board of Directors  
14 presentations, minutes, rating agency presentations, and analyses of risks and benefits.<sup>19</sup>  
15 While similar information sought in the Company’s proposed reorganization presently  
16 before the Commission may or may not be considered in the redacted data responses  
17 from NWN, the level of redaction makes it impossible to tell.

18 Therefore, CUB respectfully requests that the ALJ perform an *in camera* review  
19 of the Company’s responses to CUB’s DRs 2 and 3, as well as an *in camera* review of all

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<sup>17</sup> See *in re Application of Northwest Natural Gas Company for Approval of Corporate Reorganization to Create a Holding Company*, OPUC Docket No. 1804, Staff’s Motion to Compel Production at 9-11 (April 12, 2017)

<sup>18</sup> See, e.g. *in re The Application of Scottish Power PLC and PacifiCorp for an order Authorizing Scottish Power PLC to Exercise Substantial Influence over the Policies and Action of PacifiCorp*, OPUC Docket No. UM 918; *in re Oregon Electric Utility Company, LLC, et al., Application for Authorization to Acquire Portland General Electric Company*, OPUC Docket No. UM 1121.

<sup>19</sup> See, e.g. *in re Oregon Electric Utility Company, LLC, et al., Application for Authorization to Acquire Portland General Electric Company*, Ruling at 3-4 (May 28, 2004).

1 information sought in Staff's pre-filed Motion to Compel in this docket. The documents  
2 sought by Staff and CUB are relevant to this contested case and are subject to discovery  
3 if not privileged. Although CUB appreciates the Company's diligent efforts in working  
4 to resolve the discovery dispute with parties in good faith, parties are at an impasse and  
5 CUB believes that an *in camera* review is necessary to determine whether the attorney-  
6 client privilege and/or work-product doctrine have been correctly asserted. In the event  
7 of a finding that the privileges have been incorrectly asserted, CUB asks that the ALJ  
8 compel the Company to produce any discoverable information.

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Dated this 13<sup>th</sup> day of April, 2017.

Respectfully submitted,



Michael P. Goetz, OSB #141465  
Staff Attorney  
Oregon Citizens' Utility Board  
610 SW Broadway, Ste. 400  
Portland, OR 97205  
(503) 227-1984 phone  
(503) 224-2596 fax  
mike@oregoncub.org