

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1804

In the Matter of

NORTHWEST NATURAL GAS
COMPANY, dba NW NATURAL,

Application for Approval of Corporate
Reorganization to Create a Holding
Company.

RULING

DISPOSITION: MOTIONS GRANTED IN PART

I. INTRODUCTION

On April 12, 2017, the Commission Staff filed a motion for an order compelling Northwest Natural Gas Company, dba NW Natural to provide specified discovery materials. On April 13, 2017, the Oregon Citizens' Utility Board (CUB) also filed a motion to compel discovery. Because of the overlap in the subject matter of the two motions, NW Natural filed a single reply to both motions on April 27, 2017. On May 4, Staff and CUB filed replies to NW Natural's response.

Both requests seek copies of presentations relating to NW Natural's proposal to create a holding company. Staff seeks copies of presentations the company made to its Board of Directors and to third-party rating agencies, as well as copies of the Board of Directors' meeting minutes. CUB seeks copies of all presentations that NW Natural gave to its Board of Directors and senior management, some of the same materials requested by Staff.

Staff and CUB challenge NW Natural's claim that the documents subject to the requests are protected as privileged attorney-client communications and work product. Staff and CUB request that an administrative law judge perform an *in camera* review of the unredacted versions of the documents to determine whether the attorney-client privilege of work product doctrine has been incorrectly asserted.

II. DOCUMENTS REQUESTED

A. Board Presentations

Staff Data Requests 6 and 16 and CUB Data Requests 2 and 3 seek copies of all Board of Directors' materials that discuss or deal with the planned reorganization, including risk assessments prepared by NW Natural for third parties. NW Natural objects to the requests from parties, asserting attorney-client privilege or the attorney work product doctrine.

Without waiving its objections, NW Natural produced the materials with the assertedly-privileged information redacted. After discussions among the attorneys, the company produced a supplemental version of its response with some redactions removed.

1. Staff and CUB

At the outset, Staff notes that NW Natural has never clarified whether it is asserting the attorney-client privilege or the attorney work product doctrine. If the former, Staff notes it is unclear whether the specified employees who prepared the materials were acting in the capacity of attorneys and whether they were the ones giving or receiving legal advice. Staff questions whether the underlying communications constituted professional legal services, and suggests that the subject matter may have been more in the nature of business advice.

Assuming the privilege could apply, Staff questions whether NW Natural has waived the privilege. Staff notes that the attorney-client privilege is waived if a third party is present when the communication was made, and seeks the identities of all persons who were present at the board meetings in question. Staff also questions whether NW Natural intended to protect the materials, claiming that the company made no such notations on the documents at the time they were presented to the Board.

If NW Natural is asserting the work product doctrine, Staff and CUB contend that one of two exceptions to that doctrine require the requested information to be disclosed. Staff argues that the information must be disclosed because the work was not prepared in anticipation of litigation. Both Staff and CUB also contend that NW Natural must disclose the information because there is a substantial need for the materials and they cannot obtain by other means.

Both Staff and CUB also seeks an *in camera* review to address these issues.

2. NW Natural

NW Natural defends its assertion that the materials sought are protected by the attorney-client privilege and work product doctrine. Regarding the attorney-client privilege, NW Natural states that it claims the privilege only for communications made to facilitate legal advice. The company identifies the various lawyers and others who provided information and advice regarding the presentations, and asserts that each was providing professional legal services that appropriately fall under the privilege. The company also confirms that each presentation was labeled with a caption indicating that the information was attorney-client privileged, and that no third parties were present during the presentations.

With regard to the work product doctrine, NW Natural argues that, contrary to Staff's assertion, the materials were prepared in anticipation of litigation—this proceeding. The company also disputes that Staff and CUB have shown a substantial need for the information contained in the presentations that they cannot obtain in any other way. NW Natural concludes that “a desire to obtain information about the other party’s case does not constitute substantial need.”¹

¹ NW Natural Response at 14.

3. *Resolution*

I find that NW Natural has made a *prima facie* case that its materials are protected by the attorney-client privilege and the work product doctrine. However, whether those privileges have been properly applied by the company can only be confirmed by an *in camera* review of the documents. Accordingly, I direct NW Natural to provide redacted and unredacted copies of the documents to Chief Administrative Law Judge Michael Grant within five days of the date of this ruling to facilitate that review.

B. **Rating Agency Presentations**

1. *Staff and CUB*

In its DR 15, Staff requests copies of presentations made by NW Natural to any rating agencies. Staff argues that such documents are relevant to how the company may be affected by the reorganization. Staff contends that this is a standard discovery request, and expresses surprise that a number of pages in those documents were completely redacted on the grounds of attorney-client privilege. Staff argues that the privilege is generally waived when the materials are provided to third parties. CUB concurs with Staff's assessment.

2. *NW Natural*

NW Natural objects to Staff's request on both relevancy grounds and the work product doctrine, not the attorney-client privilege. NW Natural explains that it provided Staff with several presentations made by the company to the investor community and rating agencies. Attached to some of those presentations was a financial forecast, prepared by NW Natural's Finance and Budget Department. That financial forecast was included in the presentations to share with the rating agencies the potential or likely impact of a rate case on the company. The financial forecast relies on and incorporates an analysis by company attorneys and others regarding the Commission's likely resolution of critical issues, such as return on equity. According to NW Natural, "the financial forecast is not in any way related to the proposed Reorganization or the Application. It just happened to be appended to a document that was requested by Staff in discovery in this case."²

NW Natural states that it redacted the financial forecast from the documents it produced because the forecast reflects confidential work product prepared in anticipation of litigation and is not relevant to any matter at issue in this proceeding. Disclosure would, according to the company, reveal its attorneys' and analysts' predictions and recommendations regarding the potential resolution of issues in the company's upcoming general rate case, which will be a contested proceeding. The company adds that disclosure of the document to the rating agencies, who are bound by confidentiality provisions, does not trigger waiver under the doctrine.

² *Id.* at 15.

3. *Resolution*

First I consider NW Natural's relevancy objection. In its response, NW Natural states that the forecast is not related to the proposed reorganization and does not include any assumptions regarding the reorganization or this application. Those claims, if proven, would support a finding that the material is not relevant to this proceeding. Accordingly, I direct NW Natural to provide redacted and unredacted copies of the complete documents to Chief ALJ Grant within five days of the date of this ruling to facilitate an *in camera* review of the relevance of that material.

If the materials are found to be relevant, NW Natural's work product claim will be denied—the materials were prepared for the rating agency presentations and would not have been prepared in anticipation of litigation. I note, however, that the company's concerns regarding the sensitive nature of the materials would be mitigated in part by the protections afforded by the Modified Protective Order.

C. **Board of Directors Minutes**

1. *Staff*

In its DR 43(a), Staff requests unredacted copies of NW Natural's 2016 Board of Directors' meeting minutes—the meeting where the Board authorized the filing of the application to form a holding company with this Commission. In Staff's view, these minutes are relevant because they memorialize what was discussed at the meeting and Staff was able to glean from the unredacted text that the Board discussed highly relevant matters with management.

2. *NW Natural*

NW Natural claims that the redacted portions of the meeting minutes subject to the attorney-client privilege and work-product doctrine because they capture its attorneys' legal advice seeking regulatory approval of the reorganization. Specifically, the company explains that, at the September 22, 2016 Board Meeting, counsel provided an overview of advice previously provided to the Board regarding the application, and contends that her overview was included in the meeting minutes and then redacted as attorney-client privileged.

3. *Resolution*

I find that NW Natural has made a *prima facie* case that the material is protected by the attorney-client privilege. However, whether that privilege has been properly applied by the company can only be confirmed by an *in camera* review. Accordingly, I direct NW Natural to provide redacted and unredacted copies of the documents to Chief ALJ Grant within five days of the date of this ruling to facilitate that review.

D. Incomplete Responses to Data Requests

1. Staff

Staff contends that NW Natural failed to adequately respond to two requests for discovery. First, in DR 37, Staff asked NW Natural to identify and describe in detail all net benefits to its Oregon customers that will result from the formation of the holding company. In its DR 39, Staff asks NW Natural to explain in detail how its proposed reorganization will not harm Oregon citizens as a whole. Staff states that, rather than answer these questions, NW Natural simply referred Staff to the company's testimony. Staff considers this response unfair and asks that NW Natural be ordered to provide complete responses in order to develop a full evidentiary record – particularly in light of the expedited schedule set for this proceeding.

2. NW Natural

NW Natural argues that Staff's concerns would be better addressed in its own testimony rather than through a motion to compel responses from the company. NW Natural cites the Commission's discovery rule that provides that a party will not be required to develop information or provide a study for another party unless the capacity to prepare the study is possessed uniquely by the party from whom discovery is sought.³ NW Natural believes that Staff has the same ability as the company to analyze risks and benefits.

Similarly, NW Natural believes that its cited testimony, together with its response to Staff's DR 39 (and incorporating its response to DR 38) provide a strong basis for finding that the reorganization will not harm Oregonians as a whole.

3. Resolution

Staff's request to order NW Natural to provide supplemental replies to Staff's DRs 37 and 39 is denied. The information sought by Staff relates directly to NW Natural's burden of proof in meeting the statutory standard for approval of its application. If Staff believes that the company's showing is insufficient, its recourse is to make that point in its testimony and briefs.

NW Natural shall provide the requested information above to Chief ALJ Grant no later than close of business May 22, 2017.

Dated this 17th day of May, 2017, at Salem, Oregon.



Patrick Power
Administrative Law Judge

³ OAR 860-001-0500(4).