

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1804

In the Matter of)	
)	
NORTHWEST NATURAL GAS)	OREGON CITIZENS' UTILITY
COMPANY, dba, NW NATURAL,)	BOARD'S REPLY TO
)	NORTHWEST NATURAL'S
Application for Approval of Corporate)	RESPONSE TO MOTIONS TO
Reorganization to Create a Holding)	COMPEL
Company.)	
_____)	

I. INTRODUCTION

1 Pursuant to OAR 860-001-0500(7), the Oregon Citizens' Utility Board (CUB)
2 hereby files its Reply to Northwest Natural's (NWN or the Company) Response to
3 Motions to Compel filed by CUB and the Public Utility Commission of Oregon's (Staff)
4 in the above-captioned docket. CUB, again, moves Administrative Law Judge (ALJ)
5 Power for an order compelling the Company to produce un-redacted responses to CUB's
6 Data Requests ("DRs") 2 and 3. All of the information sought by CUB and Staff—
7 requested in its separately filed motion to compel—are directly relevant to this
8 proceeding.

9 Although CUB and Staff's pending motion to compel, along with the Company's
10 response, have offset and temporarily delayed the procedural posture of this case, CUB
11 continues to have difficulty determining the risks and benefits to the Company, its

1 customers, and Oregonians as a whole that may arise from NWN’s Application for
2 Approval of Corporate Reorganization to Create a Holding Company (the “proposed
3 reorganization”). A thorough understand of the risks associated with the proposed
4 reorganization is essential in order for stakeholders and Staff to place adequate conditions
5 on the potential holding company (“HoldCo”) restructuring to ensure that adequate
6 ratepayer safeguards are in place. The information sought in CUB DRs 2 and 3¹ is not
7 only necessary to evaluate whether the Company’s proposed reorganization meets the net
8 benefits standard under ORS 757.511, but it is essential to evaluate to ensure that the
9 Company’s residential customers are insulated from harm from any potential future
10 transactions that NWN’s HoldCo, if approved, would enter into.

11 Due to the sheer level of redacted material in the information sought by CUB and
12 Staff in their respective pre-filed motions to compel, it is impossible to tell whether the
13 Company has correctly asserted the attorney-client and work product privileges. After
14 extensive conferral, parties are at an impasse regarding the substance and privileged
15 nature of the requested material. Therefore, CUB continues to respectfully request that
16 ALJ Power perform an *in camera* review of the materials in question to determine
17 whether the Company has correctly asserted the work-product doctrine and/or attorney-
18 client privilege. In doing so, CUB asks that ALJ Power order NWN to produce copies of
19 its responses to CUB DRs 2 and 3 with any portions of the documents that the ALJ
20 determines are not subject to the privileges un-redacted.

¹ 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.”

1 A substantive discussion of the controlling legal standards governing both the
2 attorney-client privilege and the attorney work-product doctrine has been outlined in both
3 CUB and Staff’s pre-filed motions to compel in this docket, as well as in the Company’s
4 response.² Similarly, many of the issues discussed in CUB’s pre-filed motion remain
5 unresolved at this time and are still before the ALJ for consideration. Therefore, in an
6 effort to maintain brevity, CUB’s discussion in this reply will focus on individual issues
7 brought up in the Company response, rather than reiterating CUB’s initial motion. In
8 wake of the Company’s response, CUB’s central request remains the same. That is, CUB
9 respectfully requests that the ALJ conduct an *in camera* review of the following to ensure
10 that the Company’s assertion of the attorney-client and/or attorney work-product
11 privileges is appropriate, and that any non-privileged information be made discoverable:

- 12 • CUB DR 2: Confidential Attachments 1, 2, and 3; and
- 13 • CUB DR 3: Confidential Attachments 1 and 2.

14 II. ARGUMENT

15 The central theme of CUB’s request has been consistent throughout the ongoing
16 discovery dispute with NW Natural. Uncertainty regarding the amount and content of
17 redacted information in the Company’s responses to CUB’s DRs 2 and 3 have brought
18 parties to an impasse, and CUB believes that an *in camera* review of the contested
19 information is necessary to move forward. In its response, the Company notes that Staff
20 and CUB have failed to demonstrate that NW should be compelled to produce
21 information that “plainly falls within the attorney-client or work product protection.”³ To
22 be clear, CUB is not even insinuating that otherwise privileged information should be

² See generally CUB’s Motion to Compel and Staff’s Motion to Compel.

³ NW Natural’s Response to Motion to Compel Production at 2.

1 made discoverable. The policy and practical effect of doing so would run counter to
2 traditional norms defining the attorney-client relationship. Instead, CUB argues that an *in*
3 *camera* review is appropriate in this matter due to the aforementioned uncertainty
4 surrounding the redacted content.

5 The Company points to Ninth Circuit Court of Appeals case law to assert that the
6 party requesting an *in camera* review of materials to which the attorney-client privilege
7 has been asserted must “show a factual basis sufficient to support a reasonable, good faith
8 belief that *in camera* inspection may reveal evidence that information in the materials is
9 not privileged.”⁴ The Oregon Supreme Court has similarly held that a reasonable belief
10 that non-privileged information will be revealed is necessary to demonstrate that an *in*
11 *camera* review is appropriate.⁵ *Frease v. Glazer* also noted that “[i]n camera review is
12 the least intrusive means for determining” whether an exception to the attorney-client
13 privilege applies.⁶

14 It is worth noting that an *in camera* review is one of the least intrusive means
15 through which a discovery dispute can be settled. CUB’s belief that non-privileged
16 information will be revealed is reasonable. CUB has been a party to many previous
17 contested cases in which a corporate reorganization or ownership change has been
18 contemplated.⁷ Although the Companies implicated in those dockets have not always
19 been immediately forthcoming with the information requested, CUB has largely been

⁴ *Id.* at 3-4, citing *IndyMac Res., Inc. v. Carter*, 2013 U.S. Dist. LEXIS 197784 (CD Cal Jan. 9, 2013).

⁵ *Frease v. Glazer*, 330 Ore. 364, 372 (June 29, 2000) (“[The] party [requesting the *in camera* review] ‘must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception’s applicability.’”) citing *U.S. v. Zolin*, 491 U.S. 554 (1989).

⁶ *Frease v. Glazer*, 330 Ore. 364, 372 (June 29, 2000).

⁷ 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.

1 able to access large portions of Board of Directors presentations, minutes, rating agency
2 presentations, and analyses of risks and benefits.⁸ Given CUB’s experience in similar
3 matters, it is extremely difficult to believe that all of the redacted information implicated
4 attorney-client privileged information and work-product regarding the regulatory and
5 legal risk of the proposed reorganization, as the Company contends. The Company has
6 done a good job of outlining the benefits of the proposed reorganization. The attendant
7 risks have been far less accessible, although it is certain that the Company has made its
8 senior management and Board of Directors aware of the risks. While the volume of
9 redacted material makes it incredibly difficult to determine whether this information is in
10 the redacted portions, CUB’s history in similar matters demonstrates that it is likely. At
11 the very least, an *in camera* review is necessary, as the “least intrusive means”⁹, is
12 necessary to determine whether any relevant, non-privileged information is present.

13 CUB appreciates the work of the Company’s attorneys in conferring with the
14 parties, and in providing supplemental responses to CUB’s DRs 2 and 3 that revealed
15 small amounts of previously redacted information. However, the Company’s response to
16 the implications of this un-redacted information in Staff’s motion to compel is misguided.
17 Staff argued that since the Company subsequently un-redacted phrases and words after its
18 initial DR responses, there is likely further information that should not have been
19 redacted in the first place.¹⁰ The Company attacks this line of logic by arguing that if
20 “the law required parties to perform redactions on a word-by-word basis, no single word,

⁸ 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).

⁹ *Frease*, *supra* note 6.

¹⁰ Staff’s Motion to Compel at 10.

1 standing alone, would be privileged, and no redactions would remain.”¹¹ This argument
2 takes the position of Staff’s initial assertion far too literally. The fact is that the Company
3 *voluntarily* un-redacted portions of the requested information after initially asserting to
4 parties—over several conferral conferences—that all redacted information was accurately
5 subject to privilege. The fact that the Company did so voluntarily after numerous
6 assertions that all redactions were appropriate makes the total volume of redacted
7 material suspicious. If some information can be revealed, it is very likely that other
8 information should not be redacted as well. An *in camera* review by the ALJ is the
9 appropriate procedural step to ensure that all of the Company’s redactions are
10 appropriate.

11 The Company notes that it “declines to voluntarily disclose attorney-client
12 privileged information.”¹² Importantly, neither CUB nor Staff is asking the Company to
13 do so. As has been stated, the volume of redacted material coupled with uncertainty
14 surrounding its content, have led parties to an impasse. CUB appreciates and understands
15 the protections afforded by the attorney-client and work-product privileges. The remedy
16 here is not to ask the Company to voluntarily disclose information—thereby waiving the
17 privilege—but to have the ALJ examine the contested information *in camera* to
18 determine whether the privileges are correctly applied.

19 III. CONCLUSION

20 It is telling that both CUB and Staff have been involved in a number of corporate
21 reorganization and merger cases over the years, and this is one of the first times that such
22 a robust dispute surrounding discoverable information has occurred. The broadly

¹¹ NW Natural’s Response at 8.

¹² NW Natural’s Response at 11.

1 asserted privileges, high level of redacted material, and the Company's inability to
2 enumerate specific risks of the proposed reorganization cast a veil of suspicion over the
3 entire process. If approved, the proposed reorganization would enable the HoldCo to
4 acquire an out-of-state entity in a transaction that would not be subject to Commission
5 approval. The Commission's inability to provide effective oversight to such a transaction
6 would undoubtedly come at some detriment to Oregon ratepayers. The net benefits
7 standard that provides the lens through which to view the proposed reorganization is put
8 in place to protect ratepayers and Oregonians as a whole. Without a transparent
9 discovery process that accurately details how the Company has been conveying the
10 proposed reorganization to its senior management and Board of Directors, it is extremely
11 difficult to ascertain whether the net benefit standard has been met.

12 CUB respectfully requests that the ALJ perform an *in camera* review of the
13 Company's responses to CUB's DRs 2 and 3, as well as an *in camera* review of all
14 information sought in Staff's pre-filed Motion to Compel in this docket. The documents
15 sought by Staff and CUB are relevant to this contested case and are subject to discovery
16 if not privileged. Although CUB appreciates the Company's diligent efforts in working
17 to resolve the discovery dispute with parties in good faith, parties are at an impasse and
18 CUB believes that an *in camera* review is necessary to determine whether the attorney-
19 client privilege and/or work-product doctrine have been correctly asserted. In the event
20 of a finding that the privileges have been incorrectly asserted, CUB asks that the ALJ
21 compel the Company to produce any discoverable information.

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Dated this 4th day of May, 2017.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Michael P. Goetz". The signature is stylized and cursive.

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