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December 4, 2006

Via Electronic and U.S. Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of PORTLAND GENERAL ELECTRIC COMPANY
Request for a General Rate Revision
Docket Nos. UE 180/UE 181/UE 184

Dear Filing Center:

Enclosed please find an original and one copy of the nonconfidential version of the Motion to Exclude Exhibit from Protective Order of the Industrial Customers of Northwest Utilities ("ICNU") in the above-referenced docket numbers. This version of ICNU's Motion is being filed based on PGE's agreement to remove the confidential designation of Exhibit ICNU 412. There is no longer any confidential information contained in ICNU's Motion.

Please call me at (503) 241-7242 if you have any questions. Thank you for your assistance.

Sincerely yours,

/s/ Christian Griffen
Christian W. Griffen

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Motion to Exclude Exhibit from Protective Order of the Industrial Customers of Northwest Utilities upon the parties, on the official service list, by causing the same to be served via electronic mail.

Dated at Portland, Oregon, this 4th day of December, 2006.

/s/ Christian Griffen
Christian W. Griffen

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 180/UE 181/UE 184

In the Matter of)
)
PORTLAND GENERAL ELECTRIC)
COMPANY)
)
Request for a General Rate Revision)
(UE 180),)
_____)

In the Matter of)
)
PORTLAND GENERAL ELECTRIC)
COMPANY)
)
Annual Adjustments to Schedule 125 (2007)
RVM Filing) (UE 181),)
_____)

In the Matter of)
)
PORTLAND GENERAL ELECTRIC)
COMPANY)
)
Request for a General Rate Revision relating)
to the Port Westward plant (UE 184).)
_____)

THE INDUSTRIAL CUSTOMERS OF
NORTHWEST UTILITIES' MOTION TO
EXCLUDE EXHIBIT ICNU/412 FROM
THE PROTECTIVE ORDER

Pursuant to OAR § 860-013-0031 and Order No. 06-111, the Industrial Customers of Northwest Utilities (“ICNU”) submits this Motion to Exclude Exhibit ICNU/412 from the Protective Order in this proceeding. ICNU requests that Administrative Law Judge (“ALJ”) Hayes determine that Portland General Electric Company (“PGE” or the “Company”) has inappropriately designated as confidential the documents contained in hearing Exhibit

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ICNU/412. The information in Exhibit ICNU/412 consists of public facts and details regarding PGE rather than sensitive commercial information or trade secrets. As such, there is no basis for designating the documents as confidential.

ICNU certifies that it has conferred with counsel for PGE regarding this issue, and the parties were unable to resolve the dispute.

BACKGROUND

On October 26, 2006, ICNU submitted data requests (“DR”) 18.232-18.234 to PGE, requesting information related to a Standard & Poor’s (“S&P”) research report that the Company attached to its sur-surrebuttal testimony as Exhibit PGE/2705. ICNU’s DR 18.232 requested “all information that PGE has provided to Standard & Poor’s between January 1, 2005, and September 25, 2006.” DR 18.233 sought “all communications between PGE and Standard & Poor’s between January 1, 2005, and September 25, 2006,” and DR 18.234 sought information about any meetings between PGE and S&P during the same time period.

The due date for DR 18.232 was October 31, 2006. PGE provided a response on November 1, 2006. PGE objected to DR 18.232 as “overly broad and unduly burdensome” but responded by providing three email messages sent from Kristin Stathis, PGE’s Assistant Treasurer, Corporate Finance, to Leo Carillo, a S&P Primary Credit Analyst, on September 22 and 25, 2006.^{1/} ICNU/412 at 3, 8, and 13. Attached to each email was a draft of S&P’s report with PGE’s proposed changes in redline form. PGE designated these documents as confidential

^{1/} The email headings on the top of pages 3, 8, and 13 of ICNU/412 reflect Ms. Stathis forwarding her correspondence with S&P to Patrick Hager, PGE’s Manager, Regulatory Affairs, on October 31, 2006.

pursuant to the protective order in this Docket. PGE responded to DR 18.233 by referring to the documents provided in response to DR 18.232.

On November 2, 2006, ICNU filed its hearing exhibits in this Docket. ICNU included PGE's response to DR 18.232 as Exhibit ICNU/412 and marked that exhibit as confidential under Order No. 06-111. On November 14, 2006, ALJ Hayes issued a ruling including ICNU/412 and other exhibits in the record in this proceeding. That same day, counsel for ICNU contacted counsel for PGE by email, requesting whether PGE would remove the confidential designation from the information in ICNU/412. Counsel for PGE replied on November 15, 2006, that the Company was unwilling to do so. Counsels for ICNU and PGE subsequently had additional discussions regarding the Company's designation of the documents in ICNU/412 as confidential, but the parties were unable to resolve the dispute. ICNU now files this motion, requesting that ALJ Hayes exclude Exhibit ICNU/412 from the protective order.

LEGAL STANDARD

Paragraph 15 of the protective order permits a party to challenge the designation of information as confidential:

If a party disagrees with the designation of information as confidential, the party shall contact the designating party and attempt to resolve the dispute on an informal basis. If the parties are unable to resolve the dispute, the party desiring to use the information may move for exclusion of the information from the protection conferred by this order. The motion shall:

- a. Specifically identify the contested information; and
- b. Assert that the information does not fall within ORCP 36(C)(7) and state the reasons therefor.

The party resisting disclosure has the burden of showing that the challenged information falls within ORCP 36(C)(7). If the party

resisting disclosure does not respond to the motion within ten (10) calendar days, the challenged information shall be removed from the protection of this order.

Order No. 06-111, Appendix A at 4.

The protective order defines “confidential information” as “information that falls within the scope of ORCP 36(C)(7),” which includes “a trade secret or other confidential research, development, or commercial information.” ORCP 36(C)(7) was modeled after its federal counterpart, FRCP 26(c). Based on the federal courts’ interpretation of FRCP 26(c), the Oregon Court of Appeals and the Commission have adopted the following six-part test to determine whether information is a trade secret or confidential commercial information:

1. The extent to which the information is known outside the business;
2. The extent to which it is known by employees and others involved in the business;
3. The extent of measures taken to safeguard the secrecy of the information;
4. The value of the information to the business or its competitors;
5. The amount of effort or money expended by the business in developing the information; and
6. The ease or difficulty with which the information could be properly acquired or duplicated by others.

Citizens’ Util. Bd. v. OPUC, 128 Or. App. 650, 658-59 (1994).

Even if the information that a party seeks to protect qualifies as a confidential according to this test, that party still must prove that “disclosure would result in a clearly defined and serious injury.” CUB, 128 Or. App. at 659. Broad allegations of harm unsubstantiated by

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specific examples or articulated reasoning do not satisfy the requirement. Id. at 658. In addition, the “harm must be significant, not a mere trifle.” Id.

ARGUMENT

The documents and information in ICNU/412 do not warrant the confidential designation, and PGE’s claim of confidentiality turns that designation on its head. The only reason for PGE to suggest adding information to a draft S&P report is so the public would read that information in the final version. PGE now seeks to apply confidential protection to information that the Company provided to S&P to include in a public document.

The documents in ICNU/412 do not discuss trade secrets or confidential research, development, or commercial information. The fact that S&P and PGE communicate about the Company is not confidential. PGE officials have publicly stated that such communications occur. PGE’s edits to the draft S&P report are not properly treated as confidential, because the underlying information in those edits does not include trade secrets or other sensitive information that has commercial value. Finally, PGE bears no risk of injury by removing the confidential designation, because doing so will reveal no information that is not already publicly available.

A. The Information in ICNU/412 Does Not Qualify as Confidential

“Confidential information” includes “a trade secret or other confidential research, development, or commercial information,” and the information in ICNU/412 does not qualify as confidential according to this definition. See Order No. 06-111, Appendix A at 1. All of the substantive information in the draft S&P report is public information. There is no discussion of trade secrets, confidential research, or commercially sensitive information, because the ultimate purpose of the report is to provide information about PGE to investors and the public.

The only potentially non-public aspects of the documents in ICNU/412 are:

1) the fact that PGE and S&P communicated about the report prior to its release; and 2) PGE's specific edits to the report. This information, however, also does not warrant confidential status. The fact that PGE communicates with S&P and provides it information related to the Company's ratings in general is no secret. PGE officials have publicly stated this fact. See, e.g., Re Oregon Elec., OPUC Docket No. UM 1121, Hearing Transcript, Vol. 1 at 33:24 – 34:2 (Statement of James Piro, PGE Chief Financial Officer) (“We do annual visits with our rating agencies to go over our forecast and discuss with them the business issues surrounding the company to help them make an informed judgment on what our ratings might be.”); ICNU/414.

The fact that PGE communicated about this particular report and the Company's specific edits also do not warrant confidential protection, because there was no communication about trade secrets or commercially sensitive information. PGE's edits do not convey any confidential information. In fact, most of PGE's edits involve wording changes, correcting statements about basic facts regarding PGE, or modifying S&P's descriptions of the Company's proposals in this case. See ICNU/412 at 4-7. The underlying information must be a trade secret or confidential for the communication about that information to be considered as such. See Carson Products Co. v. Califano, 594 F.2d 453, 461 (5th Cir. 1979) (“The subject matter of a trade secret must be secret.”) (internal citation omitted).

Finally, even if these documents could have qualified as confidential in the past, the designation no longer applies because S&P has now published its report, which includes the majority of the statements in ICNU/412. Id. at 462 (“[I]nformation that has been divulged in a public article . . . cannot be the subject of a trade secret.”). The public availability of those

statements demonstrates the absurd results that flow from PGE's confidentiality claim. Whether a particular statement, including those that PGE edited, is treated as "confidential" under the protective order now depends only on if a party cites the statement in non-confidential exhibit PGE/2705 or confidential exhibit ICNU/412. Compare PGE/2705, Hager-Valach/7 ("PGE is an integrated electric utility serving about 791,000 customers in Northwest Oregon, including the cities of Portland and Salem.") and ICNU/412 at 4, 9, 14 ("PGE is an integrated electric utility serving about ~~762~~791,000 customers in Northwest Oregon, including the cities of Portland and Salem."). There is no substantive basis for the second sentence to be considered confidential because the underlying fact is public information. The protective order's confidential designation was not intended to protect against disclosure of such information.

C. The CUB Factors Demonstrate that the Confidential Designation is Unwarranted

The CUB factors demonstrate that ICNU/412 does not warrant the confidential designation.

1. The Information in ICNU/412 is Widely Known Outside of PGE, Its Employees, and Others in the Business

The first three CUB factors focus on the extent to which the information is known outside the business or by its employees. As described above, all of the information about which PGE and S&P communicated is public information and is widely known. There is no secrecy or sensitivity associated with the content of the communications between PGE and S&P. The fact that PGE and S&P communicate about the Company is public knowledge as well.

2. PGE Has Not Taken Measures to Safeguard the Secrecy of the Information

PGE has not taken measures to safeguard the secrecy of the information that demonstrate that ICNU/412 warrants confidential status. In fact, PGE has destroyed any confidential status that this information ever had in multiple ways. Even if PGE considered information in ICNU/412 to have some generic confidential or trade secret status, the Company did not treat this information as an internal company document to be kept secret. See, e.g., US v. Int'l Bus. Machs. Corp., 67 F.R.D. 40, 47 (S.D.N.Y. 1975) (assertions of confidentiality insufficient where no representations were made to employees that information must be kept secret). PGE eliminated any claims as to generic confidential status by forwarding these documents to S&P, an outside third party.

In addition, PGE also has destroyed any specific confidential status under the protective order in this proceeding by providing the documents to multiple individuals who were not identified as qualified to receive confidential information. First, even though PGE identified numerous employees as appropriate recipients of confidential information under the protective order, the particular employee that originated the documents is not one of them.^{2/} Second, PGE sent the documents to an outside third party who also was not identified as a qualified recipient of confidential information. In other words, two separate individuals who are not designated to receive confidential information in this proceeding have already had access during this

^{2/} On April 18, 2006, PGE filed signed consent forms for: Douglas C. Tingey, J. Jeffrey Dudley, Adam Menendez, Mary Draper, Sheila Cox, Jennifer Busch, Dmitri Jemel-janov, Marc Cody, Bruce Werner, Doug Kuns, Randy Dahlgren, Patrick G. Hager, Carol Lindenberg, Ted Drennan, Debra Horvath, Mary Tavares, Mark Starrett, Linda Ecker, Hilary Showers, Alex Tooman, Steve Schue, Lori Hemmele, Brian Moffenbeier, Judy Froedge, Joel Gunz, Sharon Noell, Jay Tinker, Launa B. Harmon, and Eric Christenson. On August 14 and 17, 2006, PGE filed additional consent forms for: Douglas C. Tingey, Jennifer B. Frotton, Pamela G. Lesh, Steve Grove, Nick Klynn, Kim Eshelman, Huong Ta, Ben Bushong, David White, and Michael Morgan.

proceeding to the documents in ICNU/412, and it is unclear what other persons may have access to them through PGE or S&P. Now, however, PGE seeks to use the protective order to restrict access to these documents by other individuals who may not be qualified. PGE has no credible claim for confidentiality, because it has not taken basic steps to maintain the documents' alleged confidential status.

3. The Information in ICNU/412 Has No Value for PGE or its Competitors

The information in ICNU/412 has no commercial value to PGE or its competitors. All information that PGE gave to S&P is public information to be included in a public document. The fact PGE and S&P communicate and the details of those communications also have no particular value. PGE has no competitors for the bulk of its retail electricity service, and any of the competitors that were interested in the substance of the information could easily obtain it through public documents.

4. PGE Expended No Effort or Money in Developing the Information

PGE expended no resources developing the information in ICNU/412, and the Company will lose no value by making it public.

5. The Information in ICNU/412 is Easily Obtained or Duplicated by Others

A major factor in determining whether information is entitled to legal protection is the extent the information is available "by fair and honest means." Califano, 594 F.2d at 461. The information in ICNU/412 is easily obtained by the public. PGE provided the final S&P report as Exhibit PGE/2705, which is posted on the OPUC's website. All of the information discussed in the report is available through PGE's public filings in this case or the Company's filings with the Securities and Exchange Commission.

The communications between PGE and S&P are not publicly available, but, as described above, the fact that PGE and S&P communicate is public knowledge, and the underlying content of those communications does not deal with sensitive information or trade secrets.

B. Disclosure of ICNU/412 Would Not Result in Clearly Defined and Serious Injury

Even assuming that the information that PGE seeks to protect qualifies as a trade secret, PGE still must prove that “disclosure would result in a clearly defined and serious injury.” CUB, 128 Or. App. at 659. Here, PGE will suffer no injury by public disclosure of the information in ICNU/412. The information has no proprietary value to PGE. Most of the information is already publicly available and has no value to PGE’s competitors. PGE will suffer no competitive disadvantage as a result of disclosure.

The Oregon Court of Appeals has stated that balancing the public’s interest in disclosure against the potential harm “may be a relevant in determining whether material that has become part of a judicial record should remain subject to a protective order.” CUB, 128 Or. App. at 660. The public interest in disclosure far outweighs any potential harm to PGE. PGE has presented information as S&P’s objective, independent views of the Company, and PGE quoted S&P’s report as evidence to justify the Company’s proposals in this proceeding. See e.g., PGE/2400, Lesh/16. The public has a substantial interest in knowing if the information that PGE presents to justify customers’ rates is genuine. Similarly, the public has a substantial interest in knowing if PGE exerts influence over S&P, a purportedly independent rating agency that conducts research on all types of companies. PGE’s communications with S&P about reports that are presented as evidence in regulatory proceedings is worthy of public scrutiny.

CONCLUSION

For all the reasons stated above, ICNU requests that ALJ Hayes grant this Motion to Exclude Exhibit ICNU/412 from the Protective Order.

Dated this 20th day of November, 2006.

Respectfully submitted,

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