DAVE FROHNMAYER
ATTORNEY GENERAL
STATE OF OREGON

WILLIAM F. GARY
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400

internal advisory communication atty-client privilege

October 21, 1988

Charles L. Best, Esq.
Pacific Northwest Bell
421 Southwest Oak Street
Portland, OR 97204

Re: Pacific Northwest Bell's Petition for Public Records Disclosure Order; Public Utility Commission Records

Dear Mr. Best:

This letter is the Attorney General's order on Pacific Northwest Bell's (PNB) petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on September 22, 1988,[1] asks the Attorney General to direct the Public Utility Commission (PUC) to disclose records and documents prepared by the PUC staff for the administrative proceeding in PUC Docket No. UI 50. For the reasons stated below, we grant PNB's petition in part, and deny it in part.

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exceptions. ORS 192.420. If a public record contains material which is exempt from disclosure together with nonexempt material, it is the duty of the public body to separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. ORS 192.505; Turner v. Reed, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

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1 We appreciate your courtesy in allowing us to exceed the seven-day deadline for issuing public records orders.

We conclude in this particular instance that some of the PUC records PNB wishes to inspect contain information that is exempt from disclosure under ORS 192.502(1) and (8).

I. Internal Advisory Communications

ORS 192.502(1) exempts:

> "Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employes of public bodies clearly outweighs the public interest in disclosure."

Under this statute, a public record is exempt from disclosure if (1) it is a communication within a public body or between public bodies, (2) it is of an advisory nature preliminary to any final agency action, (3) it covers other than purely factual materials, and (4) in the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

We have reviewed the PUC records in question. They consist of internal advisory memoranda, notes and testimony, and preliminary drafts of same, prepared by the PUC staff and legal counsel in connection with PUC Docket No. UI 50. That case is a pending administrative proceeding in which PNB, a telecommunications public utility regulated by the PUC, has applied for the commission's authorization to enter into an agreement with US West Advanced Technologies, Inc., an affiliated interest. See generally ORS 757.495.

The PUC has informed us that, when a utility files an application for PUC authorization to enter into an agreement with an affiliated interest, the request ordinarily is handled as an ex parte matter. In this case, at the commission's regular public meeting on April 12, 1988, the PUC staff requested that the commission open a formal contested case docket on PNB's application so that the staff could present its recommendation to the commission. That recommendation was based in part on confidential information that PNB submitted to

the staff. Thus, PUC Docket No. UI 50 changed from an ex parte proceeding to a contested case.

The PUC staff has challenged PNB's application, filing testimony and exhibits in opposition thereto. The records sought contain frank "[c]ommunications within a public body or between public bodies of an advisory nature * * * preliminary to [a] final agency determination of policy or action." ORS 192.502(1). The records contain not only factual materials, but also frank and uninhibited subjective comments, opinions, evaluations and recommendations of various PUC staff and legal counsel with respect to the application and information submitted by PNB in UI 50.

The PUC contends that disclosure of the records would deter its employes from giving frank and uninhibited opinions, evaluations, reports and recommendations to their colleagues, supervisors and the commission. In the PUC's view, disclosure thus would interfere with the free flow and exchange of information and ideas which the PUC needs for the proper discharge of its regulatory responsibilities.

PUC's primary responsibilities are to supervise and regulate investor-owned and privately-owned utilities, and to protect their customers "and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates." ORS 756.040(1); Oregon Telephone Corp. v. P.U.C., 5 Or App 231, 236, 483 P2d 822 (1971).

We conclude that, in this particular instance--that is, in the context of a pending regulatory proceeding in which the PUC staff is challenging a utility's proposed undertaking--the PUC's ability properly to discharge its regulatory responsibilities would be "substantially prejudiced" by wholesale disclosure of the PUC staff's internal memoranda and notes. Cf. Turner v. Reed, supra, 22 Or App at 190 (subjective evaluations and recommendations to parole board). The public interest in allowing PUC employes to (1) exchange frank comments and recommendations concerning a utility's proposed undertaking, and (2) probe and test adequately the utility's proposal and claims, so that the commission can fully evaluate the proposal, would be significantly undermined if the utility could obtain wholesale access to the PUC staff's candid comments, evaluations and strategies during the pendency of the contested case proceeding.

This request readily contrasts with cases in which the Oregon Court of Appeals has rejected claims of exemption under the "internal advisory communication" exemption. For instance, in Bay Area Health District v. Griffin, 73 Or App 294, 698 P2d 977 (1985), the court held that the records were not exempt because the source of the non-factual material in dispute was not frank communications. 73 Or App at 300. Our detailed review of the documents here persuades us that portions of those documents did result from frank communications of the type protected by ORS 192.502(1). Nor is this a case, such as Coos County v. Ore. Dept. of Fish and Wildlife, 86 Or App 168, 739 P2d 47, rev den 304 Or 186 (1987), in which the interest in confidentiality is merely the avoidance of potential embarrassment to the agency or its employes. See 86 Or App at 173. Rather, the portions of the documents that we have concluded are exempt result from frank communications that go to the heart of the agency's regulatory functions.

We recognize the interest of PNB and the public in knowing what the PUC staff thinks about the utility's proposal in PUC Docket No. UI 50. In this instance, however, we conclude that the public interest in disclosure is clearly outweighed by the public's interest in encouraging frank intra-agency communication to effectuate the PUC's accomplishment of its regulatory mission.

II. Privileged Communications

ORS 192.502(8) exempts:

> "Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon Law."

This provision incorporates into the Public Records Law various prohibitions, restrictions, and privileges that exist elsewhere in Oregon law.

Some of the PUC records sought by PNB are memoranda which were sent by the PUC staff to its legal counsel and vice versa. The memoranda contain confidential communications made for the purpose of facilitating staff counsel's rendition of professional legal services to the PUC staff in PUC Docket No. UI 50. These communications are privileged and confidential communications under the attorney-client privilege, ORS 40.225. Accordingly, the communications are exempt from disclosure under the Public Records Law. ORS 192.502(8).

III. Conclusion

We conclude that some of the PUC records PNB wishes to inspect contain information that is exempt from disclosure under ORS 192.502(1) and (8). However, other information in the records is "purely factual material" and not exempt from disclosure. Therefore, the Attorney General grants PNB's petition in part. The Public Utility Commission must separate the exempt and nonexempt material and make the nonexempt material available for inspection by PNB if it is reasonably possible to do so while preserving the confidentiality of the exempt material. ORS 192.505; Turner v. Reed, supra, 22 Or App at 186 n 8. Department of Justice attorneys have been working with PUC staff to identify the portions of those records that may be excised, and will continue to do so. ORS 192.450(2) affords the PUC seven days in which to complete this process in order to comply with this order.

Very truly yours,

JAMES E. MOUNTAIN, JR.
Special Counsel to the
Attorney General

JEM:cm
cc: Mike Kane, Assistant Commissioner, Public Utility Commission
W. Benny Won, Assistant Attorney General
Keith Kutler, Assistant Attorney General
4039a
bcc: Lori Sauter, Affiliated Interest Analyst, Public Utility Commission
Woody Birko, Senior Utility Engineering Analyst, Public Utility Commission