

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1121

In the Matter of)	
)	RESPONSE OF THE INDUSTRIAL
OREGON ELECTRIC UTILITY)	CUSTOMERS OF NORTHWEST
COMPANY, LLC, et al.,)	UTILITIES IN OPPOSITION
)	TO PORTLAND GENERAL ELECTRIC
Application for Authorization to Acquire)	COMPANY'S MOTION FOR PROTECTIVE
Portland General Electric Company)	ORDER
)	
)	
_____)	

INTRODUCTION

Pursuant to OAR § 860-013-0050 and Administrative Law Judge Christina M. Smith's Ruling on May 21, 2004, the Industrial Customers of Northwest Utilities ("ICNU") submits this Response ("Response") in Opposition to the Motion for Protective Order ("Motion") filed by Portland General Electric Company ("PGE" or the "Company") on May 21, 2004, in Oregon Public Utility Commission ("OPUC" or the "Commission") Docket No. UM 1121. In the Motion, PGE requests "a protective order precluding [ICNU] from taking the deposition of Peggy Fowler, PGE's President and Chief Executive Officer."^{1/} Motion at 1. ICNU requests that the Commission deny PGE's Motion for the following reasons:

1. Ms. Fowler possesses unique and personal knowledge of the proposed transaction. Ms. Fowler is the *only* PGE employee that Texas Pacific Group ("TPG") has named as a member of the Oregon Electric Utility Company ("OEUC") Board of Directors. Ms. Fowler also has been the only individual who has spoken publicly about the proposed transaction on behalf of PGE. As a result, no PGE employee

^{1/} ICNU issued a Notice of Deposition for Ms. Fowler on May 13, 2004, stating that Ms. Fowler's deposition would be taken on June 14, 2004.

other than Ms. Fowler has demonstrated specific, first hand knowledge of the proposed transaction or shares Ms. Fowler's unique position.

2. The Commission rules favor broad discovery, and protective orders prohibiting a deposition rarely are granted. PGE has the burden to demonstrate good cause why Ms. Fowler should be subject to protective order, but has provided no specific evidence or examples of the "undue and needless burden" that the Company claims her deposition will impose. Ms. Fowler failed to include an affidavit attesting to such hardship.
3. PGE's claims that the OPUC statutes and rules preclude the deposition of Ms. Fowler ignore the schedule adopted in this Docket and minimize the importance of this proceeding.

PGE's Motion indicates that ICNU seeks to depose Ms. Fowler for the purposes of annoyance, embarrassment, or creating undue burden. This is untrue. As described below, Ms. Fowler has unique and personal knowledge of the proposed transaction, has submitted testimony in support of the two previous applications to acquire PGE, and has spoken publicly about ownership of PGE by OEUC and TPG. Ms. Fowler's deposition is entirely appropriate and necessary under these circumstances.

ARGUMENT

A. The ORCP Allows for Broad Discovery and Protective Orders Prohibiting Depositions Rarely are Granted

The Oregon Rules of Civil Procedure ("ORCP") and the Commission encourage broad discovery. ORCP 36B(1); Re PGE, Docket No. UE 102, Order No. 98-294 at 3 (July 16, 1998). As PGE points out, the Commission has adopted the ORCP. Motion at 2; OAR §§ 860-11-0000(3). ORCP 36B(1) allows discovery of information "regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery" PGE

requests entry of a protective order pursuant to ORCP 36C, prohibiting the deposition of Ms. Fowler. Motion at 2.

The ORCP are modeled on the Federal Rules of Civil Procedure. Thus, the decisions of the federal courts often inform both the analysis of the Oregon courts and the Commission. Vaughan v. Taylor, 79 Or. App. 359, 363 n.3 (1986). The federal courts have developed a substantial body of law relating to the substantive showing necessary to obtain a protective order. Citizens' Util. Bd. v. OPUC, 128 Or. App. 650, 658 (1994); see Jennings v. Family Mgmt., 201 F.R.D. 272, 275 (D.C. Cir. 2001). To obtain a protective order, the moving party must show "good cause" exists to limit the discovery sought. Jennings, 201 F.R.D. at 275. In Jennings, the court described in detail the requirements to establish good cause to prevent a deposition:

[T]he movant must articulate specific facts to support its request and cannot rely on speculative or conclusory statements. In fact, '[t]he moving party has a heavy burden of showing 'extraordinary circumstances' based on 'specific facts' that would justify such an order.'

Moreover, in the case of a protective order related to deposition testimony, courts regard the complete prohibition of a deposition as an 'extraordinary measure[] which should be resorted to only in rare occasions.'

Id. (internal citations omitted). In other words, PGE has the burden to demonstrate good cause for issuing the protective order sought based on specific examples of the undue burden alleged by the Company. Id. Furthermore, protective orders such as the one PGE requests, precluding the deposition of Ms. Fowler, "are rarely granted." Id. PGE has not justified its request for a protective order prohibiting the deposition of Ms. Fowler. The Motion relies entirely on

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speculative and conclusory statements of the “undue burden” that a deposition allegedly would impose on Ms. Fowler, rather than articulating specific facts to support the request.

B. Ms. Fowler Possesses Unique Knowledge of the Transaction that Should Be Included in the Evidentiary Record in this Proceeding

Ms. Fowler’s deposition is necessary and appropriate in this proceeding. PGE argues that ICNU has not demonstrated that Ms. Fowler has “personal knowledge of the underlying facts at issue” with respect to the proposed transaction. Motion at 3. However, Ms. Fowler’s unique and personal knowledge of the proposed transaction has been evident since the sale of PGE to TPG was first announced. In a news release announcing the sale, Ms. Fowler stated: “We’re pleased to have such high quality investors who understand local concerns. We are hopeful we can work through the bankruptcy and OPUC processes to complete this transaction and bring renewed stability to PGE.” News Release, Enron to sell Portland General Electric to Oregon Electric Utility Co. (Nov. 18, 2003). On April 7, 2004, Ms. Fowler spoke at a Portland City Council work session and described the sale: “In terms of stable ownership, I believe that Oregon Electric is a good ownership solution for PGE. For over four years now, I’ve been CEO of a company that’s been for sale. My co-workers have been doing a great job, but we’re ready to move forward. We’re excited by Oregon Electric’s proposal; this option gets us out from under Enron quickly.” Peggy Fowler, Portland City Council Work Session (Apr. 7, 2004). Ms. Fowler’s factual statements about the proposed transaction, TPG, and OEUC warrant further examination in this Docket.

As Ms. Fowler stated to the Portland City Council, she has been PGE’s CEO during the period that the Company has been for sale and has been through two previous

acquisition proceedings during her tenure—Northwest Natural Gas Company (“Northwest Natural”) in 2001 (UM 1045) and Sierra Pacific Resources (“Sierra Pacific”) in 2000 (UM 967). Similar to the current proposed acquisition by OEUC and TPG, Ms. Fowler played a prominent role in the Northwest Natural and Sierra Pacific proceedings as well. In fact, Ms. Fowler submitted testimony in support of both of those applications. Re Northwest Natural Holdco et al., OPUC Docket No. UM 1045, NW Natural/300 (Nov. 28, 2001); Re Sierra Pac. Res., OPUC Docket No. UM 967, PGE/100 (June 9, 2000), PGE/200 (Aug. 24, 2000). Furthermore, in the Northwest Natural proceeding, Ms. Fowler was voluntarily made available for questioning in clarification sessions. PGE has not demonstrated that ICNU’s request for the same information in this proceeding that Ms. Fowler has voluntarily provided in the past will impose an undue burden.

Finally, in addition to Ms. Fowler’s status as PGE’s CEO while the Company has been for sale, she is in the unique position of being the only PGE official who has been named to sit on the OEUC Board of Directors. Re OEUC et al., OPUC Docket No. UM 1121, Application of OEUC to acquire PGE at 20 (Mar. 8, 2004). No other employee of PGE, OEUC, or TPG is in this position. Thus, PGE’s claim that a lower level employee would have knowledge that Ms. Fowler does not possess is unfounded.

C. ICNU Does Not Have the Burden to Justify Ms. Fowler’s Deposition

PGE also argues that ICNU has not demonstrated the need to depose Ms. Fowler, because ICNU has not shown that Ms. Fowler has more personal knowledge of the proposed transaction than other PGE employees. Motion at 3-4. PGE cites a number of cases that indicate

that deposition of a CEO is inappropriate when a corporate official has *no* personal knowledge of a matter. Id. at 3 citing Liberty Mut. Ins. Co. v. Superior Court, 13 Cal. Rptr. 2d 363 (1992); Crown Cent. Petroleum Corp. v. Garcia, 904 S.W. 2d 125 (Tex. 1995), Evans v. Allstate Ins. Co., 216 F.R.D. 515 (N.D. Okla. 2003). Regardless of the fact that Ms. Fowler’s public statements about the proposed transaction contradict PGE’s arguments, these cases are inapplicable.

According to PGE, these cases establish that “courts frequently limit the broad reach of deposition power and require the proponent to demonstrate first that the officer has personal knowledge of the underlying facts at issue, and, second that less intrusive means of discovery have been exhausted.” Motion at 3. PGE misstates the law. As described above, it is PGE that has the burden to establish “good cause” why the Commission should issue a protective order prohibiting Ms. Fowler’s deposition. The rule in the cases cited by PGE applies to resolving a dispute about deposing a high level corporate official in a case about which that official truly has no knowledge. As the Crown Central Petroleum case cited by PGE states, this analysis applies “[w]hen a party seeks to depose a corporate president or other high level corporate official and that official (or the corporation) files a motion for protective order to prohibit the deposition *accompanied by the official’s affidavit denying any knowledge of relevant facts*” Crown Cent. Petroleum, 904 S.W. 2d at 128 (emphasis added). Indeed, the corporate officials in each of the cases cited by PGE filed sworn statements denying *any* personal knowledge of the facts of the case. Id. at 127 n.3; Evans, 216 F.R.D. at 519; Liberty Mut. Ins., 13 Cal. Rptr. 2d at 364-65. The officials’ lack of knowledge was consistent with the claims in

those cases, which consisted of personal injury or workers' compensation claims brought by specific employees.

The circumstances in this Docket are much different. First, Ms. Fowler has not denied that she has any personal knowledge of the transaction and, thus, the rule cited by PGE is inapplicable. There is no question about Ms. Fowler's personal knowledge of the proposed transaction. Her public statements demonstrate both her knowledge of the transaction and her belief that "Oregon Electric is a good ownership solution for PGE." Peggy Fowler, Portland City Council Work Session (Apr. 7, 2004). Under these circumstances, there is no basis to require ICNU to obtain this information by other means or from other PGE employees, because PGE has not fulfilled one of the fundamental requirements of the test it urges the Commission to apply. This is not a personal injury suit brought by a specific employee that is unrelated to the responsibilities of a CEO. It is a proceeding to determine whether the purchase of PGE by TPG and OEUC for \$2.35 billion is in the public interest, which in turn will affect PGE's corporate policies. Where corporate policies are at issue, "as a matter of logic, a top executive . . . will likely have knowledge of the reasons for the . . . policy that a subordinate will not." Gen. Star Indem. Co. v. Platinum Indem. Ltd., 210 F.R.D. 80, 84 (S.D. N.Y. 2002). In these cases, depositions of high-level corporate officials are appropriate. Id.; Nafichi v. New York Univ. Med. Ctr., F.R.D. 130, 132-33 (S.D. N.Y. 1997). The details of the proposed transaction undoubtedly were discussed at the highest levels of the corporate organization. Depositions of lower level employees would likely lead to less information that is relevant to the case, rather

than more. Ms. Fowler also is uniquely qualified to discuss PGE's future if the TPG transaction does not go forward.

Finally, the courts do not, as PGE indicates, "frequently limit the broad reach of deposition power" Motion at 3. In fact, the Liberty Mutual case quoted by PGE notes that it is "very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." Liberty Mutual Ins., 13 Cal. Rptr. 2d at 366 quoting Salter v. Upjohn Co., 593 F.2d 649 (5th Cir. 1979). PGE has the burden to establish good cause for precluding deposition of Ms. Fowler by providing specific examples and support for the alleged "undue burden." The Company's unsupported and conclusory allegations are insufficient.

D. PGE's Procedural Arguments Ignore the Schedule in this Docket and Minimize the Importance of this Proceeding

PGE argues that the OPUC's statutes and rules prohibit ICNU from deposing Ms. Fowler in this proceeding, but the Company's arguments rely on an overly narrow interpretation of the rules that ignores the realities of this Docket. PGE first asserts that depositions by any party other than the Commission are prohibited in this proceeding because the "application of [OEUC] seeking authorization to acquire [PGE] is not an application 'requiring a hearing.'" Motion at 1-2. According to PGE, ORS § 756.538 governs depositions in OPUC proceedings and permits depositions by parties other than the Commission only in proceedings "requiring a hearing." Id.

First, the Commission has required a hearing in this docket. The Prehearing Conference Order issued on April 16, 2004, orders hearings on October 19-21, 2004. Re OEUC

et al., OPUC Docket No. UM 1121, Prehearing Conference Order at 2 (Apr. 16, 2004).

Although PGE has chosen to ignore the Prehearing Conference Order, the Commission should not adopt the Company's extremely narrow interpretation. Second, ORS § 756.538 orders the Commission to adopt additional rules and procedures to implement the statute.

ORS § 756.538(4). The Commission has adopted both its own administrative rule governing depositions and the ORCP, neither of which contain the prohibition alleged by PGE. OAR §§ 860-014-0065, 860-011-0000(3). Furthermore, the Commission's decision to require a hearing in this Docket, which invokes the ability of parties to engage in discovery by deposition, also informs the procedure to be used. OPUC Docket No. UM 1121, Prehearing Conference Order at 2. As a result, ICNU's intent to depose Ms. Fowler is entirely consistent with the statute. Finally, PGE cites the order from the Enron merger proceeding to claim that this is not a proceeding that requires a hearing; however, PGE ignores that a number of parties took depositions in that docket as well. Motion at 2; Re Enron, OPUC Docket No. UM 814, Transcripts of Deposition Proceedings (Nov. 21, 1996).

PGE also argues that there is "no need to examine Ms. Fowler" because she currently is not a witness in this proceeding. Motion at 2. PGE argues that OAR § 860-014-0065(1) provides for depositions of "witnesses" only and that Ms. Fowler "has no present intent to submit any written testimony." Id. PGE overstates the clarity of the rule. First, the rule itself uses both the terms "witness" and "person" when referring to individual to be deposed.

OAR § 860-014-0065(1), (4). Thus, the rule is subject to interpretation. Both ORCP 39 and ORS § 756.538, which PGE admits apply in Commission proceedings, permit the deposition of

any “person.” Motion at 2; ORCP 39A; ORS § 756.538(2). These rules indicate that depositions are not intended to be limited in the manner that PGE suggests. The Commission’s practice in previous ORS § 757.511 proceedings reinforces a broader applicability of the rules governing depositions. In the Enron merger proceeding, for example, the Commission permitted ICNU and a number of other parties to take the depositions of an entire panel of high-level corporate executives, none of whom had submitted written testimony. OPUC Docket No. UM 814, Transcript of Deposition Proceedings. Thus, there is no basis to preclude ICNU’s deposition of Ms. Fowler here.

PGE’s assertion that Ms. Fowler has “no present intent to submit written testimony” is curious. Motion at 2. As described above, Ms. Fowler submitted testimony in the last two proceedings related to the acquisition of PGE. It appears highly likely that Ms. Fowler will submit testimony in this case. ICNU will be prejudiced in its initial analysis of the case and preparation of testimony if Ms. Fowler is protected from deposition at this early stage, but later submits either oral or written testimony.

Finally, PGE’s arguments as a whole minimize the importance of this proceeding. Unlike the personal injury and workers’ compensation suits that PGE analogizes to the Application at issue in this Docket, this proceeding involves the acquisition of the largest utility in Oregon by an out-of-state investment firm. Public policy requires a well-developed record to determine whether this acquisition is in the public interest and Ms. Fowler possesses the unique knowledge that is necessary to inform customers and the Commission about the transaction from

PGE's perspective. Therefore, allowing the deposition of Ms. Fowler far outweighs the alleged burden on PGE.

ICNU and its members are very concerned about a pattern that appears to be developing early in this proceeding. TPG is refusing to turn over confidential documents and materials that Northwest Natural willingly made available in UM 1045. Now PGE seeks to prevent the deposition of its CEO when she willingly submitted to examination in similar proceedings in the past. Full and open discovery must be permitted in this proceeding given that a unique proposed purchaser (an investment company who will hold the company for a limited time) is seeking to acquire PGE in a multi-leveraged transaction. Given the cloud of secrecy surrounding TPG, PGE's attempts to prevent discovery of relevant information are alarming.

CONCLUSION

PGE has not demonstrated good cause to issue a protective order prohibiting the deposition of Ms. Fowler. PGE's only support for its request is unsubstantiated allegations of undue burden and complaints that ICNU has not demonstrated Ms. Fowler's personal knowledge of the proposed transaction. Ms. Fowler has demonstrated her knowledge of the issues surrounding a change in the ownership of PGE both in this proceeding and those that have occurred in the past. As such, it is important for the Commission to have evidence of her unique perspective on ownership of PGE by OEUC and TPG.

WHEREFORE, ICNU requests that the Commission deny PGE's Motion for Protective Order.

Dated this 27th day of May, 2004.

Respectfully submitted,

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