



Portland General Electric Company

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J. Jeffrey Dudley

Associate General Counsel

May 21, 2004

VIA FACSIMILE
VIA REGULAR MAIL

Trudy Jaynes
Administrative Hearings Division
OREGON PUBLIC UTILITY COMMISSION
550 Capital Street, N.E., Suite 215
PO Box 2148
Salem, Oregon 97308-2148

Re: In the Matter of OREGON ELECTRIC UTILITY COMPANY, LLC, et al.,
Application for Authorization to Acquire Portland General Electric Company
OPUC Docket No. UM 1121

Dear Ms. Jaynes:

Enclosed for filing in the above-captioned docket are an original and five (5) copies of Motion for Protective Order and for Shortened time for Response in the above-captioned docket.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

JJD:am

cc: UM 1121 Service List

Enclosure



BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1121

In the Matter of the Application of)	
)	
OREGON ELECTRIC UTILITY)	PORTLAND GENERAL ELECTRIC
COMPANY, LLC, et al.,)	COMPANY'S MOTION FOR
)	PROTECTIVE ORDER AND FOR
For Authorization to Acquire Portland)	SHORTENED TIME FOR
General Electric Company)	RESPONSE

Portland General Electric Company ("PGE") moves for a protective order precluding the Industrial Customers of Northwest Utilities ("ICNU") from taking the deposition of Peggy Fowler, PGE's President and Chief Executive Officer.¹ Because this is not a proceeding requiring a hearing, ICNU cannot compel any deposition testimony, let alone Ms. Fowler's. Even if depositions were allowed, Ms. Fowler would not be an appropriate witness. ICNU has failed to exhaust other less intrusive means of establishing its record. To insist on the deposition of PGE's President imposes an undue and needless burden. The parties have conferred by telephone prior to filing this Motion.

Because the deposition is noticed for June 14, 2004, PGE also requests a shortened time for response, to May 28, 2004, to accommodate a ruling on this Motion by June 7, 2004, a week before the scheduled date.

1. NO PARTY CAN DEMAND DEPOSITION TESTIMONY IN THIS PROCEEDING

ORS 756.538 governs the taking and use of depositions in Commission proceedings. The statute provides that the Commission may take testimony by deposition in any investigation. ORS 756.538(1). By contrast, parties, such as ICNU, may take depositions only in proceedings "requiring a hearing." ORS 756.538(2). This pending application of Oregon

¹ A copy of the Notice of Depositions for Peggy Fowler, Kelvin Davis and an Individual from Texas Pacific Group is attached as Exhibit A.

Electric Utility Company seeking authorization to acquire Portland General Electric is not an application "requiring a hearing." *See, In the Matter of the Application of Enron Corp.*, Order 97-196 (June 4, 1997) (ORS 757.511 requires the Commission to "examine and investigate" applications received, but does not provide for hearings); *Utility Reform Project v. OPUC*, 171 OrApp 349, 354, 16 P.3d 516 (2000) (affirming the Commission's conclusion in Order No. 97-196 that ORS 757.511 does not require a hearing). Therefore, ICNU has no statutory authority to seek deposition testimony from any individual.

2. MS. FOWLER IS NOT A WITNESS

In those proceedings where depositions may be appropriate, the Commission's rules provide for depositions of witnesses. OAR 860-014-0065(1). Ms. Fowler is not a "witness" in this proceeding. She has not submitted any written testimony. She has no present intent to submit any written testimony. Accordingly, there is no need to examine Ms. Fowler.

3. ICNU HAS FAILED TO ESTABLISH THE NEED FOR MS. FOWLER'S TESTIMONY

The Commission has adopted the Oregon Rules of Civil Procedure as its own. OAR 860-11-0000(3). Oregon Rule of Civil Procedure 36 governs Commission discovery practice in most instances. *See In the Matter of the Application of Portland General Electric*, Order 98-163 (April 20, 1998). With respect to protective orders, ORCP 36C provides: "upon motion by a party * * * and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance * * * or undue burden or expense, including one or more of the following: (1) that the discovery not be had; * * * or that the scope of the discovery be limited to certain matters." ICNU cannot demonstrate any good reason for Ms. Fowler's deposition to go forward. ICNU's insistence on the deposition of the utility's CEO in a proceeding of this sort imposes an unnecessary and undue burden on PGE. There may be cases where a CEO's deposition testimony is appropriate. This is not one of them.

There is a tremendous potential for abuse and harassment when a party conducts depositions of an entity's top executive officers before less intrusive means of discovery have been exhausted. Many courts have recognized the potential for abuse when discovery is initiated "at the top." As explained by one court:

"* * * [W]e hold that when a plaintiff seeks to depose a corporate president or other official at the highest level of corporate management, and that official moves for a protective order to prohibit the deposition, the trial court should first determine whether the plaintiff has shown good cause that the official has unique or superior personal knowledge of the discoverable information. If not, as will presumably often be the case in the instance of a large national or international corporation, the trial court should issue the protective order and first require the plaintiff to obtain the necessary discovery through less-intrusive methods. These would include interrogatories directed to the high level official to explore the state of his or her knowledge or involvement in plaintiff's case; the deposition of lower level employees with appropriate knowledge and involvement in the subject matter of the litigation; and the organizational deposition of the corporation itself, which will require the corporation to produce for deposition the most qualified officer or employee to testify on its behalf as to the specified matters to be raised at the deposition. * * * Should these avenues be exhausted, and the plaintiff make a colorable showing of good cause that the high level official possesses necessary information to the case, the trial court may then lift the protective order and allow the deposition to proceed."

Liberty Mutual Ins. Co. v. Superior Court, 13 Cal Rptr 2d 363, 367 (1992). See also, *Crown Central Petroleum Corp. v. Garcia*, 904 SW 2d 125 (Tex 1995), *Evans v. Allstate Ins. Co.*, 216 FRD 515 (ND Okla 2003). Accordingly, 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. ICNU fails both parts of this test and PGE's request for a protective order should be granted.

ICNU has ready access to all the relevant information from PGE that it might need. PGE has already responded to over a hundred data requests in this docket. Faced with ICNU's suggestion that Ms. Fowler's deposition is needed, PGE has asked that ICNU identify the

particular topic areas where they have further inquiry. ICNU has refused to do so and its Notice of Deposition merely states that deponents, including Ms. Fowler, will be asked to testify about "issues raised in the Application and testimony in this Docket." To the extent that written discovery fails to meet ICNU's needs, PGE is willing to consider providing an appropriate witness with personal knowledge about a particular area of inquiry. Surely, any legitimate inquiry can be met by PGE employees with more first hand knowledge about the matters at issue than Ms Fowler.

In the alternative, if ICNU can identify an appropriate topic area for inquiry where Ms. Fowler has the most relevant testimony, PGE will provide answers to interrogatories directed to Ms. Fowler. ICNU has rejected this compromise as well and refused to explore any alternative to an in person, open ended exploration with PGE's most senior executive. But ICNU has no basis whatsoever for a wide open deposition of PGE's President. To insist on deposing Ms. Fowler is an undue burden and does not further appropriate discovery in support of this proceeding.

4. REQUEST FOR SHORTENED TIME FOR RESPONSE

Because Ms. Fowler's deposition is set for June 14, 2004, PGE requests, pursuant to OAR 860-013-0050(3)(d), that time for reply to this Motion be shortened to Friday, May 28, 2004. This will allow the judge to rule by June 7, 2004, one week before the date scheduled for the deposition.

5. CONCLUSION

For the foregoing reasons, PGE's motion for a protective order should be granted. There is no authority for any party to demand deposition testimony in this application. Ms. Fowler is not a witness. She has not proffered any written testimony nor does she have any intention of doing so. To the extent deposition testimony might be appropriate, Ms. Fowler is not the proper individual to depose. ICNU's insistence on going to the top without first exhausting less intrusive means of establishing its record is unwarranted.

DATED this 21st day of May, 2004.

PORTLAND GENERAL ELECTRIC COMPANY

By 
J. JEFFREY DUDLEY, OSB No. 89042

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1121**

In the Matter of the Application of)	
)	
OREGON ELECTRIC UTILITY)	NOTICE OF DEPOSITIONS FOR PEGGY
COMPANY, LLC, et al.,)	FOWLER, KELVIN DAVIS AND AN
)	INDIVIDUAL FROM TEXAS PACIFIC
for Authorization to Acquire Portland General)	GROUP
Electric Company)	
_____)	

Pursuant to OAR § 860-014-0065 and ORCP 39, the Industrial Customers of Northwest Utilities ("ICNU") submits this Notice of Depositions in this Docket and will take the depositions of Peggy Fowler, Kelvin Davis, and an individual from the Texas Pacific Group ("TPG") who has knowledge of the Applicants' financial model. The depositions will be taken by the undersigned counsel before certified court reporter Kelly Polvi, 1584 Doaks Ferry Rd. NW, Salem, OR 97304. The subject matter of the depositions will be issues raised in the Application and testimony in this Docket regarding the Applicants' request for approval to acquire Portland General Electric Company. The depositions are to be taken in order to obtain additional information relating to the proposed transaction.

The depositions will be taken at the dates and times specified below, in Davison Van Cleve's conference room at 1000 SW Broadway, Suite 2460, Portland, Oregon 97205.

EXHIBIT A
PAGE 1 OF 2

<u>NAME</u>	<u>ADDRESS</u>	<u>DATE</u>	<u>TIME</u>
Peggy Fowler	121 SW Salmon St. Portland, OR 97204	June 14, 2004	9:00 am
Kelvin Davis	345 California St. Suite 3300 San Francisco, CA 94104	June 15, 2004	9:00 am
Individual from TPG with Knowledge of the Financial Model	unspecified	June 15, 2004	1:30 pm

Said depositions will continue until completed.

Dated this 13th day of May, 2004.

Respectfully Submitted,

DAVISON VAN CLEVE, P.C.

/s/ Melinda Davison

Melinda J. Davison

Davison Van Cleve, P.C.

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Of Attorneys for the Industrial Customers
of Northwest Utilities

EXHIBIT A
PAGE 2 OF 2

PAGE 2 - NOTICE OF DEPOSITIONS FOR PEGGY FOWLER, KELVIN DAVIS
AND AN INDIVIDUAL FROM TEXAS PACIFIC GROUP

CERTIFICATE OF SERVICE

I certify that I have caused to be served the foregoing Motion for Protective Order and for Shortened Time for Response of Portland General Electric Company in OPUC Docket No. UM 1121 by First Class U.S. Mail, postage prepaid and properly addressed, to the persons below, and by electronic mail to those persons on the electronic service list maintained by the OPUC.

Dated this 21st day of May, 2003.

J. JEFFREY DUDLEY



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