ISSUED: June 21, 2004

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1121

In the Matter of	)	
	)	
OREGON ELECTRIC UTILITY	)	
COMPANY, LLC, *et al*.,	)	RULING
	)	
Application for Authorization to Acquire	)	
Portland General Electric Company.	)	

DISPOSITION: RULING ON PROTECTIVE ORDER HELD UNTIL ADDITIONAL INFORMATION IS SUBMITTED BY ICNU

On May 21, 2004, Portland General Electric Company (PGE) asked the Public Utility Commission of Oregon (Commission) to issue a protective order precluding the Industrial Customers of Northwest Utilities (ICNU) from taking the deposition of PGE's President and Chief Executive Officer, Peggy Fowler. PGE also asked for a shortened response time, due to the upcoming deposition. On May 21, 2004, PGE's request for a shortened time response was granted.

On May 27, 2004, ICNU filed its response. On June 3, 2004, PGE filed a reply to ICNU's response and asked for oral argument. On June 4, 2004, ICNU filed a motion asking to respond to PGE's reply, along with its response. On June 9, 2004, Administrative Law Judge Kathryn Logan held a procedural telephone conference call with representatives of ICNU and PGE, asking that the deposition scheduled for June 14, 2004, be postponed until a ruling was issued. Both parties agreed.

PGE's position

PGE raises three arguments in opposition to ICNU's request. First, PGE argues that there is no statutory authority for a party to take a deposition in this type of proceeding. According to PGE, parties may not take a deposition unless the proceedings require a hearing. As ORS 757.511, the statute governing this application, does not require a hearing, ICNU has no basis to seek a deposition from anyone.

Next, PGE asserts that if a deposition is appropriate, the applicable administrative rule provides that only witnesses can be deposed. As Ms. Fowler is not a witness in the proceeding, she cannot be deposed.

Finally, PGE contends that ICNU has failed to establish a need for Ms. Fowler's testimony. Allowing ICNU to depose Ms. Fowler places an unnecessary and undue burden on PGE. Based on all of its arguments, PGE asks that a protective order be issued.

ICNU's position

ICNU argues that depositions should be allowed in this application. PGE's assertions that depositions are precluded in a proceeding under ORS 757.511 rely on a narrow reading of the statutes and rules, and ignore the importance of this application. Further, a hearing has been scheduled in this docket, and the Commission expected parties to engage in discovery.

ICNU asserts that Ms. Fowler possesses unique and personal knowledge related to the application. Even though she has not sponsored testimony in this proceeding, she has submitted testimony in two previous applications regarding the acquisition of PGE. Also, she has spoken publicly about the acquisition of PGE by the Oregon Electric Utility Company. Therefore, a protective order should not issue.

Discussion

The purpose of this ruling is to not only address the issue at hand, but to set forth a test to be used in future dockets. A brief discussion of the cases cited is appropriate.

In *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995), the court adopted an "apex" rule: An officer at the apex of the corporate hierarchy cannot be deposed unless the officer has special or unique knowledge, or the information is first pursued by less intrusive means. Under this test, for either a deposition to occur or a protective order to issue, the following process is used:

> (1) A party must request information from an individual who is a high level official;
> (2) The official must move for a protective order, accompanied by an affidavit denying any knowledge of relevant facts;
> (3) The court evaluates the motion to determine if the party seeking the deposition has shown that the official has unique or superior personal knowledge of discoverable information;
> (4) If the party seeking the deposition *cannot* show that the official has unique knowledge, the trial court should not allow the deposition to go forward without a showing, after a good faith effort to obtain discovery through less intrusive means, that:
> (a) There is a reasonable indication that the official's deposition will lead to discovery of admissible evidence, and
> (b) The less-intrusive means were unsatisfactory, insufficient, or inadequate.

The standard applied by the court in evaluating the motion is a rigid one, requiring a showing beyond mere relevance that the official possesses knowledge of relevant facts "greater in quality or quantity than other available sources." In addition, the party requesting the apex deposition must show that the official's "unique or superior knowledge" is unavailable through less intrusive methods. Heidi M. Staudenmaier, *Effectively Defending High-Level Corporate Officials*, 37 Ariz. Atty. 12, 14 (July/ August 2001). Less intrusive methods include depositions of lower level employees, interrogatories, and requests for production of documents directed to the corporation.

The court in *Ford Motor Company v. Messina*, 71 S.W.3d 602, 607 (Mo. 2002) rejected the apex test and adopted a different test. According to the Court,

> A top-level employee – like anyone else – should not be deposed unless the information sought is relevant, or reasonably calculated to lead to the discovery of admissible information. . . The party seeking discovery has the burden of proving discoverability. . . (Citations omitted). *Id.*

The Court went on to state that even if the top-level employee has discoverable information, a protective order may be sought; however, the party opposing discovery has the burden of showing "good cause" to limit discovery. "A protective order should issue if annoyance, oppression, and undue expense outweigh the need for discovery." *Id.*

I adopt the test set forth above and adopted by the Missouri courts. The Court's rationale of treating top-level employees similarly to others is appropriate, particularly in light of ORCP 36B(1), which provides for discovery of information "regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery . . . ." The apex rule assumes that top-level employees need protection, a position which should be established rather than presumed. The test adopted today acknowledges the right of a party to engage in discovery and the right of a company to engage in business without the possible harassment of a chief executive officer.

While I could simply apply the test and rule on the protective order, I choose not to do so. This is the first time, to my knowledge, that this issue has arisen before the Commission. As there are differing standards used by the courts, and because the Oregon courts do not have a case directly on point, it is the better policy to announce the test and allow the parties an opportunity to comply with the requirements.

In applying this test to the present matter, ICNU must show that the information it seeks from Ms. Fowler is relevant, or reasonably calculated to lead to the discovery of admissible information. This position is consistent with the Commission's rule on depositions. OAR 860-014-0065(2) states, in part, that the deposition notice must state "the subject matter on which the witness is expected to testify . . . and the reason why the deposition is to be taken." In reviewing the deposition notice, these matters were

addressed in a cursory matter. Therefore, ICNU is to specify the information it seeks from Ms. Fowler, and show how the ORCP 36B(1) standard is met.

ICNU is to file its information by 5:00 pm on June 22, 2004. PGE's reply, if it chooses to file one, is due by 5:00 pm on June 24, 2004. I will issue a final ruling on June 25, 2004.

Finally, PGE raised two other defenses to the deposition. As evidenced by the ruling above, parties may take depositions in this docket. Further, it is not necessary that testimony be submitted before a person can be deposed. Such a requirement could lead to manipulation of a docket, allowing persons with information to shield themselves from discovery inquiries by choosing to not supply testimony. While there is no hint of such action by PGE in this case, such a determination could play havoc with a docket.

Dated at Salem, Oregon, this 21st day of June, 2004.

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Kathryn Logan
Administrative Law Judge