

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1121

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

**DISPOSITION: MOTION TO ADMIT DEPOSITION TRANSCRIPT DENIED; CROSS-EXAMINATION WAIVED BY UTILITY REFORM PROJECT.**

On October 15, 2004, a prehearing conference was held in this docket to address last minute matters before the hearing. At that time, Industrial Customers of Northwest Utilities (ICNU) first raised the issue of a controversy in introducing the transcripts of depositions of Peggy Y. Fowler (Fowler) and Kelvin L. Davis (Davis), noting that Oregon Electric Utility Company, et al. (Applicants) and Portland General Electric Company (PGE) had objections.

ICNU filed its motion to admit the transcripts on October 18, 2004. Applicants and ICNU reached an agreement in which ICNU would not cross-examine Davis during the hearing and Applicants agreed not to object to the admission of Davis' deposition transcript. However, PGE objected to admission of the transcript of Fowler's deposition.

In its motion, ICNU argues that the transcript is relevant evidence, "the type of evidence that a reasonably prudent person commonly relies upon in the conduct of his or her serious affairs." ICNU motion at 3. ICNU asserts that the entire deposition should be admitted, and, as parties rely on portions of the transcript, specific ruling to specific objections should be made at that time.

PGE argues that submission of the testimony on the eve of hearing is untimely, and provides parties "no opportunity to identify and strike irrelevant matters, to submit further clarifying testimony nor to cross-examine." PGE motion at 2. Instead of

following the rules on relevant evidence, PGE asserts that the rules governing testimony and depositions should guide whether the transcript should be admitted into evidence. PGE notes that relevancy objections are not appropriate in a deposition, but are made at hearing when testimony is offered.

Oregon Administrative Rule 860-014-0065 governs depositions in Commission proceedings. Subsection (1) states, "The testimony of any witness may be taken by deposition." The rule further provides, "Unless received in evidence by the Commission or ALJ, no portion of a deposition shall constitute a part of the record in the proceeding. A party may object at the hearing in the proceeding to receiving in evidence any portion of the deposition." *Id.* at (7).

Typically, testimony is prefiled and rebutted by subsequent rounds of prefiled testimony. This circulation of testimony gives parties the opportunity to rebut the testimony in subsequent rounds of prefiled testimony, along with providing parties an opportunity to cross-examine the witness regarding her testimony. Ms. Fowler, who did not submit any prefiled testimony, was deposed by ICNU on July 12, 2004. ICNU had two opportunities under the agreed-upon schedule to present the deposition transcript as prefiled testimony (July 21 and September 22, 2004), but declined to do so. To introduce into evidence, on the eve of hearing, the deposition of a person who has not previously been identified as a witness comes too late. ICNU's action does not comport with our practice of circulating testimony in advance of the hearing.

Further, certain objections are not made in a deposition that would be made when the transcript was admitted as testimony. For instance, relevance objections are not made in a deposition, but may be made in relation to testimony. ORCP 41 C(1). ICNU attempts to avoid the relevance analysis by stating that the transcript is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. OAR 860-014-0045(1)(b). We are not sure that we agree, based on objections that can be foreseen because of certain subjects covered by the deposition.<sup>1</sup> Because ICNU has submitted the entire transcript at the last minute, PGE cannot make meaningful objections to every question that is objectionable. We would not only have to rule on every objection in the transcript, but rule on additional objections that might be made by PGE to admitting each answer into the record. This we will not do.

The motion to admit the transcript of Davis' deposition is granted because there was no opposition. The testimony will be considered for what it is worth. As to Fowler's deposition, the motion is denied.

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<sup>1</sup> The Ninth Circuit Court overturned a trial court's decision and required a new hearing for a similar reason: "[The admitted deposition] contained evidence to which legal objections could have been made and sustained. Much of such evidence went to the heart of plaintiff's case, and defendants' defense, and we cannot view the court's ruling as unprejudicial error." *Los Angeles Trust Deed & Mortgage Exch. v. SEC*, 264 F2d 199, 213 (1959), *cert den*, 366 US 919 (1961).

On October 19, 2004, Mr. Dan Meek, counsel for Utility Reform Project, contacted the ALJs by email. Due to his unavailability for hearing on October 20, 2004, he waived cross-examination for all witnesses scheduled for that date. We accept his waiver, and hold that witnesses McDermott, Johnson, Hager and Tinker need not appear for cross-examination and are released.

Dated at Salem, Oregon, this 20th day of October, 2004.

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Kathryn A. Logan  
Administrative Law Judge

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Christina M. Smith  
Administrative Law Judge