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J. Jeffrey Dudley
Associate General Counsel

October 19, 2004

Via Facsimile and U.S. Mail

Annette Taylor
Oregon Public Utility Commission
PO Box 2148
Salem OR 97308-2148

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

Dear Ms. Taylor:

Attached please find an original and five copies of the Opposition of Portland General Electric to ICNU's Motion to Admit Deposition Transcript of Peggy Fowler for filing in the above-captioned docket.

Please note that PGE has faxed this document to the OPUC and e-mailed it to the parties prior to 8:00 a.m. on Tuesday, October 19, 2004, to comply with the Status Conference Report issued October 18, 2004, in this docket.

Please stamp the extra copy of this letter and return it in the self-addressed envelope provided.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to call.

Sincerely,

JJD:am



BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1121

In the Matter of the Application of)	
)	PORTLAND GENERAL
OREGON ELECTRIC UTILITY)	ELECTRICS OPPOSITION TO
COMPANY, LLC, et al.,)	ICNU'S MOTION TO ADMIT
)	DEPOSITION TRANSCRIPT OF
For Authorization to Acquire Portland)	PEGGY FOWLER
General Electric Company)	

On the eve of hearing, well after the time set for filing testimony and exhibits, Industrial Customers of Northwest Utilities ("ICNU") has moved to admit the deposition transcript of Peggy Fowler. ICNU's untimely request should be denied because it ignores the timelines laid out in the scheduling orders that govern this proceeding, it ignores the procedural and substantive rules governing deposition testimony and exhibits and it unfairly prejudices Portland General Electric Company ("PGE").

I. DEPOSITION TRANSCRIPTS ARE NOT NECESSARILY ADMISSIBLE

The Commission's rules govern the use of deposition transcripts. *See* OAR 860-014-0065. The rule provides that unless received into evidence, no portion of the deposition shall constitute part of the record in a proceeding. OAR 860-014-0065(7). A party may object at the hearing in the proceeding to receiving in evidence any portion of a deposition. *Id.* To the extent ICNU wants to rely on portions of the transcript of Ms. Fowler's deposition, the parties must first be given a meaningful opportunity to object to the portions ICNU identifies as admissible. The admissible portions must then be received in evidence.

Accordingly, the proper way to place Ms. Fowler's deposition in the record would have been for ICNU to designate those portions of the deposition it deems relevant to the issues in this docket. Then other parties, including PGE, should be allowed to object to such portions at the hearing. The ALJ can then properly rule on all the objections including those reserved under

the Oregon Rules of Civil Procedure (“ORCP”). See Section VI. ICNU seems unwilling to use this proper method, so its blanket request for admission should be denied.

II. ICNU'S MOTION TO ADMIT THE TRANSCRIPT IS UNTIMELY

Ms. Fowler was deposed over three months ago, on July 12, 2004. ICNU's testimony and exhibits were due July 21, 2004. ICNU's surrebutal testimony was due on September 22, 2004. See Prehearing Conference Report dated June 23, 2004. ICNU failed to meet these filing deadlines. Instead, it waited until Friday, October 15, the week before hearing, to identify Ms. Fowler's deposition as potential evidence in this proceeding.

ICNU's untimely request prejudices the other parties. There is no opportunity to identify and strike irrelevant matters, to submit further clarifying testimony nor to cross-examine. ICNU suggests that its position would be somehow prejudiced if the deposition is not admitted. ICNU's Motion at p. 6. To the extent Ms. Fowler's deposition "fills an important evidentiary void" in ICNU's case, it was ICNU's obligation to fill that void in a timely manner. Its failure to do so should not be used to impose undue burden on others, nor to encumber the record.

III. ICNU HAS FAILED TO FOLLOW THE RULES GOVERNING SUBMISSION OF TESTIMONY AND EXHIBITS

ICNU has ignored a second provision of the Commission's rules.

OAR 860-014-0060(3)(a) provides that where an exhibit includes irrelevant material that would encumber the record, it shall not be received in evidence. Rather, the exhibit may be marked for identification and if properly authenticated, the relevant matter may be read into the record. *Id.* Not only has ICNU failed to timely raise submission of this deposition transcript, but in doing so, it has utterly failed any attempt to distinguish the portions of the testimony that might be relevant from those that clearly are not. ICNU cannot shift this burden to others. Its failure to follow the applicable rule means that its motion to admit the transcript in total should be denied.¹ There

¹ Clearly there are irrelevant portions of the transcript. For example: testimony about Enron's gas pipeline subsidiary, p. 2; questions concerning financial matters that require expert opinion, pp. 4-7; questions about an exhibit without foundation, pp. 8-10. These represent just a few examples found in the early pages of the transcript..

may be relevant excerpts in Ms. Fowler's testimony, but it is not Portland General Electric's obligation to identify them. Neither is it the Commission's.

IV. OBJECTIONS AS TO CONTENT

ICNU has the rules governing deposition testimony exactly backwards. It suggests that the only relevant objections relating to Ms. Fowler's deposition are those that were articulated at the time the deposition was taken. ICNU urges that the deposition transcript be admitted into evidence, with the objections made during the course of the deposition "reserved."

The problem with ICNU's suggestion is that it ignores the procedural rules governing depositions. There are only two kinds of objections appropriately raised during deposition testimony. The first is an objection as to the form of a question. Errors in form are the type of errors that might be cured if promptly presented. Therefore, they must be timely stated and are deemed waived unless raised at the time the deposition is taken. ORCP 41.C(2). For example, a question that is compound in form or ambiguous in nature must be corrected at the time of the deposition.

The second type of an objection appropriate at a deposition is an instruction not to answer a question. For example, it would be appropriate to instruct a witness not to answer a question that elicits information covered by the attorney-client privilege or a question that exceeds the scope of inquiry allowed by prior order. ORCP 39.D(3).

By contrast, it is wholly improper to make relevancy or materiality objections during a deposition. Relevancy is not the controlling legal standard in a discovery deposition. Irrelevant questions might lead to the discovery of admissible evidence. Accordingly, such objections are preserved and are not waived by the failure to make them before or during the deposition. ORCP 41.C(1). Questions calling for hearsay may be appropriate discovery questions, but that does not make the answers admissible at a later hearing. Facts and opinions may be elicited at deposition without any foundation. That does not mean that the testimony will be admissible. ICNU's assertion that the only "objections" that might matter are found in the deposition transcript is simply wrong. PGE participated in a discovery deposition. It never had


the opportunity to consider and raise the types of objections that are triggered when sworn testimony is later submitted for inclusion in an evidentiary record.

V. CONCLUSION

For the foregoing reasons, ICNU's Motion should be denied.

DATED this 19th day of October, 2004.

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CERTIFICATE OF SERVICE

I certify that I have caused to be served the foregoing OPPOSITION TO ICNU'S MOTION TO ADMIT, in OPUC Docket No. UM 1121 by First Class U.S. Mail, postage prepaid and properly addressed for mailing, to the persons on the attached list, and by electronic mail to those persons on the electronic service list maintained by the OPUC.

Dated this 19th day of October, 2004.

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