



**Portland General Electric Company**

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**J. Jeffrey Dudley**

*Associate General Counsel*

January 18, 2005

*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 Portland General Electric Company's Opposition to BOMA's Motion to Lift Protective Order for filing in the above-captioned 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,

A handwritten signature in black ink, appearing to read "J. Dudley", written in a cursive style.

JJD:am



BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON

UM 1121

In the Matter of the Application of  
OREGON ELECTRIC UTILITY  
COMPANY, LLC, et al.,  
For Authorization to Acquire Portland  
General Electric Company\_\_\_\_\_

**PORTLAND GENERAL ELECTRIC  
COMPANY'S OPPOSITION TO  
BOMA'S MOTION TO LIFT  
PROTECTIVE ORDER**

Portland General Electric Company ("PGE") submits this Opposition to the Portland Building Owners and Managers Association ("BOMA") Motion to Lift Protective Order ("BOMA's Motion"). Although BOMA's Motion is not entirely clear on this point, BOMA's request appears to include two separate components: (1) A motion generally to lift or vacate Order No. 04-139 (the "Protective Order") and (2) a specific challenge to the confidentially designations of certain Oregon Electric documents (the "Oregon Electric Documents"). PGE's Opposition concerns the first part - BOMA's request to lift the Protective Order.

It would appear that the second part of BOMA's Motion is now moot in light of Oregon Electric's decision to declassify from "confidential" to "public" all of the Oregon Electric Documents that are specifically identified in the Motion. *See* Letter dated January 10, 2005, from Lisa Rackner, and ALJ Ruling dated January 11, 2005. Nevertheless, the first part of BOMA's Motion is not moot given that there is confidential material in the record that has not been reclassified *and* there remains confidential material that was produced in discovery but not made part of the record. The terms of the Protective Order continue to apply to the remaining confidential material either produced in the docket *and/or* made part of the record.

The Commission or the ALJ should reject BOMA's Motion for three reasons: (1) BOMA misstates the legal standard for entry of a Commission protective order. The appropriate standard is "good cause," and the ALJ properly entered the Protective Order under that standard; (2) BOMA's Motion is procedurally defective in several respects; and (3) vacating the entire Protective Order after discovery has been completed is unjustified and would be fundamentally unfair to parties who have produced confidential information, abided by the terms of the Protective Order, and relied on the protections and process the Protective Order provides.

**I. The Protective Order was Properly Entered Upon a Showing of Good Cause.**

BOMA's Motion argues that the Protective Order was improperly issued because the "public has a right to know" (Motion at 3) and the Applicants "did not make a factual case showing identifiable risk of harm" sufficient to counterbalance "the public's interest in disclosure." Motion at 2. BOMA misunderstands the legal standard in at least two fundamental ways.

First, under the Commission rules, a protective order should be issued upon a showing of "good cause." OAR 860-012-0035(k). The ALJ appropriately found that Oregon Electric satisfied the "good cause" standard because "discovery requests may reveal sensitive and proprietary information, such as financial records and projections, strategic plans, and other information." Protective Order at 1.

BOMA is just wrong when it claims that the requirements of ORCP 36(C)(7) must be met in order to enter the Protective Order. ORCP 36(C)(7) governs whether any particular document is entitled to protection or confidential treatment. The Protective Order does not address or prejudge that question. It simply establishes the process by which (i) the disclosing party may initially designate confidential documents and (ii) any other party may challenge that

designation. Protective Order, ¶¶4, 15. If a party challenges a designation, then the designating party bears the "burden of showing that the challenged information falls within ORCP 36(C)(7)." Protective Order, ¶ 15. The Protective Order shields no documents and makes no judgment about whether any particular document satisfies the legal requirements of ORCP 36(C)(7). It simply establishes the process through which parties resolve disputes concerning confidentiality. As such, the ALJ may enter the Protective Order upon a showing of "good cause," which Oregon Electric made here.

Second, even if ORCP 36(C)(7) applied to entry of the Protective Order, BOMA has misstated the legal standard. Under ORCP 36(C)(7), the party seeking protection must meet a two-prong test. It must show that (1) the information is a "trade secret or confidential commercial information" and (2) disclosure will cause serious injury. *See, e.g., CUB v. OPUC*, 128 Or App 650, 658, 877 P2d 116 (1994). BOMA claims that "the Commission is required to balance the public's interest in disclosure against the potential harm." BOMA Motion at 2. This is wrong. The Oregon Court of Appeals rejected precisely this same argument when CUB made it in an appeal of an OPUC ruling granting confidential treatment.

We reject CUB's contention that there is a third prong to the test for determining whether to issue a protective order, which would require a balancing of the public's interest in disclosure against the potential harm to [the disclosing party]. Although that may be a relevant factor in determining whether material that has become a part of a judicial record should remain subject to a protective order, *it has no bearing on the determination as to whether materials that are sought to be discovered should be subject to a protective order.*

*CUB v. OPUC*, 128 Or App at 660 (emphasis added) (internal citations omitted). And the Court of Appeals rejected the "public interest" exception BOMA suggests in the very case BOMA acknowledges "sets forth the analysis required for a protective order to be issued." BOMA Motion at 1.

## **II. BOMA's Motion Violates Commission Rules and the Protective Order.**

BOMA's challenge to the Protective Order is procedurally deficient in several ways. The Commission rules provide a process for challenges like BOMA's, and BOMA has not followed those rules. OAR 860-012-0035(k) provides that a party may challenge the entry of a protective order by seeking certification of the ruling within 10 days of the ruling. OAR 860-014-0091. This rule was called to BOMA's attention at the end of the Protective Order. Not only did BOMA not oppose Oregon Electric's motion to enter the Protective Order, but BOMA never sought certification of the Protective Order as required. In fact, BOMA's representatives signed the Protective Order without objection or reservation on March 15, 2004, just five days after it was entered.

Also, BOMA signed the Protective Order certifying that it "would be bound by its terms." As discussed above, the Protective Order sets forth a process for a party to challenge a confidentiality designation. It provides that the parties should first attempt to resolve the dispute informally. Protective Order, ¶ 15. If the dispute cannot be resolved informally, the party desiring disclosure may file a motion "specifically identifying the contested information." *Id.* Again, BOMA failed to follow this process. BOMA did not confer with PGE prior to filing the motion to lift the Protective Order. And BOMA's blanket request to lift the Protective Order does not comply with the Protective Order's requirement of "specifically identifying the contested information."

The Commission rules and the Protective Order made available to BOMA a number of avenues in which to pursue its concerns. BOMA decided not to follow those rules and the terms of the Protective Order. Its failure alone is sufficient to warrant denial of the Motion.

### **III. Lifting the Protective Order Would Be Unfair.**

Other than the Oregon Electric Documents, BOMA's Motion fails to identify any specific documents which should be reclassified. It provides no evidence that specific documents were improperly designated as confidential. A blanket lifting of the Protective Order could result in harm to PGE's customers. Exhibit ICNU/806 contains PGE documents from an October 2004 presentation made to Moody's Investor Services, a securities rating agency. Confidential material in that Exhibit presents information about PGE power trading. PGE must compete in a competitive power market. Disclosure of confidential PGE power trading data to other market participants could affect the future price PGE pays for power, which in turn could harm PGE customers.

In addition, a number of PGE confidentiality designations withstood challenge. In a Ruling dated September 3, 2004, the ALJ ruled that a number of PGE confidentiality designations were appropriate under the Protective Order. BOMA did not dispute these determinations. Nor does BOMA argue now that the ALJ's determination was incorrect. BOMA's Motion provides no basis for reclassifying any of PGE's confidentiality designations.

At this late stage in the proceeding, it would be fundamentally unfair to lift the Protective Order. Parties have submitted confidential material relying on the process and protections the Protective Order affords. It would be wrong to lift the Protective Order under these circumstances penalizing designating parties who have complied with the Commission rules and the Protective Order.

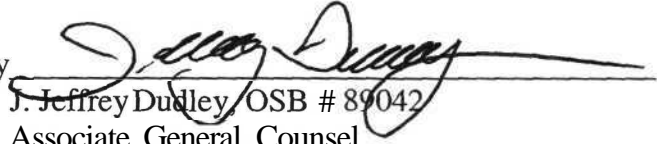
### **Conclusion**

All documents marked as confidential should be treated according to the terms of the lawfully entered Protective Order. If BOMA wants to challenge the specific confidentiality

designations, it may do so under the terms of the Protective Order it signed and never contested. See Signature Page signed by BOMA dated March 15, 2004. The ALJ or Commission should deny BOMA's Motion.

DATED this 18<sup>th</sup> day of January, 2005.

PORTLAND GENERAL ELECTRIC COMPANY

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CERTIFICATE OF SERVICE

I certify that I have caused to be served the foregoing Portland General Electric Company's Opposition to BOMA's Motion to Lift Protective Order 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 18<sup>th</sup> day of January, 2005.

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