

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1742**

Surprise Valley Electrification Corp.,)	
Complainant,)	
)	SURPRISE VALLEY
v.)	ELECTRIFICATION CORP.'S REPLY
)	IN SUPPORT OF MOTION TO
PacifiCorp, dba Pacific Power,)	COMPEL DISCOVERY
Defendant.)	
)	
)	
_____)	

I. INTRODUCTION

Surprise Valley Electrification Corp. (“Surprise Valley”) files this reply in support of its motion to compel discovery.¹ Surprise Valley maintains its request that the Oregon Public Utility Commission (the “Commission” or “OPUC”) Administrative Law Judge (“ALJ”) Michael Grant require PacifiCorp to provide the last-known addresses of PacifiCorp’s former employees John Younie, Jim Partouw, and Eric Birch in accordance with Surprise Valley’s data request 12.1(c).²

Resolution of a motion to compel discovery does not get much easier. PacifiCorp does not even attempt to dispute the following key points:

- The applicable rules require production of “the identity and *location* of persons having knowledge of any discoverable matter”;³
- PacifiCorp has already indicated that the individuals in question have knowledge central to the facts in dispute; and

¹ See OAR § 860-001-0500(7) (allowing reply to response to motion to compel).
² Surprise Valley’s Motion to Compel Discovery at 2.
³ ORCP 36B(1) (emphasis added)

- PacifiCorp has not denied that it possesses last-known addresses of these individuals.

Accordingly, PacifiCorp must produce the addresses. It is really that simple.

PacifiCorp's arguments to the contrary are misplaced. To adopt PacifiCorp's arguments, the Commission would have to conclude the addresses are trade secrets, which they obviously are not. Or the Commission would have to proceed to the unripe question of whether Surprise Valley can admit the deposition testimony of these individuals and then ignore the language of a statute that plainly states Surprise Valley can do so.⁴ The Commission would also have to rule that, contrary to the statute, the only way to obtain information about PacifiCorp in an OPUC case is through the testimony of PacifiCorp's trained spokespersons or through the confusing and evasive written interrogatories filtered through those same spokespersons and their lawyers. The Commission should reject these arguments and grant the motion to compel discovery.

II. ARGUMENT

A. The Plain Language of Oregon's Rules of Civil Procedure Defeat PacifiCorp's Arguments

As already noted, ORCP 36B(1) plainly requires PacifiCorp to produce the "location of persons having knowledge of any discoverable matter." PacifiCorp cites no administrative rules to the contrary. Therefore, this rule applies in this proceeding.⁵

As applied here, PacifiCorp has already indicated that the individuals in question have knowledge central to the facts in dispute.⁶ PacifiCorp has not denied that it possesses last-known addresses of these individuals. Accordingly, this matter is easily resolved by the plain language

⁴ See ORS §§ 756.538, 756.543.

⁵ See OAR § 860-001-0000(1).

⁶ See Surprise Valley's Motion to Compel Discovery at 12-14 & Attachment 5 at 1-2.

of the discovery rules. PacifiCorp must produce the last-known addresses for these three individuals.

B. Former Employees' Addresses Are Not Legally Confidential Trade Secrets

PacifiCorp next argues that its former employees' addresses are subject to some unspecified legal protection against disclosure. But PacifiCorp cannot evade discovery by developing an internal company policy against providing addresses in its possession. PacifiCorp must provide some legal basis warranting protection from unrestricted public disclosure. Instead of doing so, it simply makes vague references to the confidentiality concerns and its preference to provide only the addresses subject to the restrictions of the Commission's protective order.

The protective order is no defense. The Commission issues protective orders to "limit disclosure of information that falls within the scope of ORCP 36(C)(7)."⁷ But the general protective order in place here "allows *the broadest possible discovery* consistent with the need to protect such information; it does not determine whether a particular document is exempt from disclosure."⁸ Further, ORCP 36C(7) merely allows for an order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Because PacifiCorp fails to explain how its former employees' last-known addresses are "trade secrets other confidential research, development, or commercial information,"⁹ this defense to production is baseless. The Commission should rule that former employees' addresses are not trade secrets or otherwise subject to protection under the Commission's general protective order.

⁷ OAR § 860-001-0080(1).

⁸ OAR § 860-001-0080(2) (emphasis added).

⁹ ORCP 36C(7).

Indeed, PacifiCorp even argues that the addresses are already publicly available on the internet.¹⁰ If that is so, then the addresses cannot be confidential and subject to protection because they are already in the public domain. In fact, to designate publicly available material as confidential would be an intentional violation of the general protective order.¹¹ Additionally, if the addresses PacifiCorp possesses are in fact publicly available, PacifiCorp could respond to the data request by simply directing Surprise Valley to the website containing addresses consistent the last-known addresses PacifiCorp possesses.

Furthermore, the fact that addresses may be available at unspecified locations on the internet does not absolve PacifiCorp of its obligation to confirm the information that may be publicly available by providing the last-known addresses in PacifiCorp's possession. It is unreasonable to require Surprise Valley to guess as to the accuracy of information on the internet, which can contain multiple addresses for individuals with the same name or is likely to be outdated. Surprise Valley should not be left to blindly issues subpoenas based on information on the internet. Instead, it is entirely reasonable to assume that the addresses in PacifiCorp's possession are likely to be more current and accurate, because PacifiCorp is likely to be providing at least some of these individuals with required post-employment communications. PacifiCorp does not deny that it possesses the addresses in question.

In short, there is no more basis for legal protection against disclosure here than there would be in court, where the case law firmly establishes PacifiCorp would be required to fully disclose the addresses of three former employees without restriction.¹²

¹⁰ See PacifiCorp's Response to Motion to Compel at 1 & n.1.

¹¹ See General Protective Order at 2 (stating "Any party may designate as Protected Information any information the party reasonably determines: . . . [i]s not publicly available).

¹² See Surprise Valley's Motion to Compel at 11 & nn.30–31 (discussing cases where far lengthier lists of former or current employees' addresses were ordered to be disclosed).

C. PacifiCorp’s Remaining Arguments Are Unripe and Wrong

The remainder of PacifiCorp’s response launches into a debate over how Surprise Valley might be able to use information these individuals possess once PacifiCorp provides their location. According to PacifiCorp, Surprise Valley cannot depose or utilize the testimony of these individuals. This argument should be rejected.

PacifiCorp fails to rebut, and therefore admits, that Surprise Valley possesses a statutory right to issue subpoenas and depose critical witnesses, even those persons who are non-parties.¹³ The statute declares “any party to the proceeding may take the testimony of *any person* by deposition upon oral examination . . . *for the purpose of discovery or for use as evidence in the proceeding, or for both purposes.*”¹⁴ The statute could not possibly be more unambiguous. Tellingly, PacifiCorp does not even cite the statute or provide any basis to ignore it. PacifiCorp fails to grapple with the statute whatsoever. Nor does PacifiCorp even attempt to rebut the obvious conclusion that the statute controls over any contrary administrative rules.¹⁵

PacifiCorp is also incorrect to suggest that it is too late to depose or subpoena its former employees. In fact, the very rule that PacifiCorp itself relies upon contradicts PacifiCorp’s argument.¹⁶ The rule proclaims: “The testimony of a witness may be taken by deposition *at any time before the record in a docket is closed.*”¹⁷ Thus, by rule, the depositions may be taken at any time – not just in the time period prior to the very first round of pre-filed testimony, several months before the scheduled hearing date. PacifiCorp can attend such depositions and if it

¹³ See ORS §§ 756.538, 756.543.

¹⁴ ORS § 756.538(2) (emphasis added).

¹⁵ Schultz v. Springfield Forest Products, 151 Or. App. 727, 731, 951 P.2d 169 (1997).

¹⁶ See PacifiCorp’s Response to Motion to Compel at 4.

¹⁷ OAR § 860-001-0520(1) (emphasis added).

deems it necessary to subpoena the witnesses to attend the hearing to be cross-examined by PacifiCorp.¹⁸

If PacifiCorp believes the deposition should not be admitted on the grounds of hearsay, it is free to make that objection at the proper time. However, hearsay does not apply in administrative proceedings.¹⁹ An agency can even rely entirely on hearsay evidence.²⁰ Indeed, almost all testimony that could be offered by PacifiCorp's two designated witnesses, Bruce Griswold and Richard Vail, will necessarily be hearsay because neither of those individuals were directly involved in the vast majority of the underlying communications with Surprise Valley. Even if hearsay did apply (and it does not), certain properly noticed depositions are admissible in court without requiring the witness to appear at trial.²¹ Additionally, as noted above, should PacifiCorp prevail on a motion in limine excluding the deposition testimony, Surprise Valley would still possess the statutory right to subpoena the witness's live testimony at the hearing.²² Thus, none of these objections preclude production of the addresses.

Moreover, even if there were no way to admit the testimony of these individuals, as PacifiCorp prematurely and incorrectly argues, the knowledge these individuals possess is central to the issues in dispute. Their locations are therefore discoverable on the ground that the information they possess is extremely likely to lead to discovery of information and other

¹⁸ See OAR § 860-001-0520(7).

¹⁹ OAR § 860-001-0450(1)(b) (evidence is "admissible if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.").

²⁰ See Cole v. Driver and Motor Vehicle Servs. Branch, 336 Or. 565, 587, 87 P.3d 1120 (2004) (holding that "the hearsay evidence in this case was sufficiently reliable and probative for the agency to employ it as a basis for its findings of fact" in license suspension proceeding).

²¹ See ORCP 39I (allowing for depositions in perpetuation of testimony to be admitted for specified reasons, including "good cause"); OEC 801(4)(c) (such deposition testimony is not hearsay). In this case, good cause would exist for a deposition in perpetuation of testimony because a statute specifically states that depositions may be admitted as evidence in Commission proceedings. ORS § 756.538(2).

²² ORS § 756.543.

evidence that Surprise Valley could use in deposing and cross-examining PacifiCorp's chosen spokesmen. That point is critical. Even if the Commission accepts PacifiCorp's argument that the statute is a nullity and Surprise Valley must obtain information through PacifiCorp's trained spokesmen, Surprise Valley has the right to obtain information from the former employees to develop cross-examination of PacifiCorp's chosen spokesmen.²³

Finally, PacifiCorp alleges it has already responded completely to interrogatory-style data requests regarding the metering and transmission issues.²⁴ Surprise Valley obviously disagrees, as explained in detail in the motion to compel. However, even if PacifiCorp had completely responded to data requests, depositions serve the entirely different purpose of testing the veracity of the written responses PacifiCorp has provided. Surprise Valley's discovery rights are not limited to obtaining PacifiCorp's written explanation filtered through its regulatory personnel and its lawyers. As the statute plainly declares, Surprise Valley has the right to put a knowledgeable witness of its choice under oath to test the veracity of PacifiCorp's position.

III. CONCLUSION

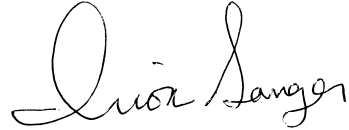
For the reasons discussed above and in Surprise Valley's motion, Surprise Valley respectfully requests that the ALJ require PacifiCorp to provide the last-known addresses of PacifiCorp's former employees John Younie, Jim Partouw, and Eric Birch in accordance with Surprise Valley's data request 12.1(c).

²³ ORS § 756.538 (stating "any party to the proceeding may take the testimony of any person by deposition upon oral examination . . . for the purpose of discovery").

²⁴ See PacifiCorp's Response to Motion to Compel at 5.

Dated this 13th day of April, 2016.

Respectfully submitted,

A handwritten signature in cursive script that reads "Irion Sanger". The signature is written in black ink and is positioned above a horizontal line.

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