BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 196

In the Matter of	) **PORTLAND GENERAL ELECTRIC**
	) **COMPANY'S RESPONSE IN**
PORTLAND GENERAL ELECTRIC COMPANY	) **OPPOSITION TO MOTION FOR**
	) **RECONSIDERATION**
	)
Application to Amortize the Boardman Deferral.	)
	)
	)

I. INTRODUCTION

Portland General Electric Company ("PGE") submits this brief in opposition to the Motion for Reconsideration of the Industrial Customers of Northwest Utilities ("ICNU") and the Citizens Utility Board ("CUB"). ICNU and CUB seek reconsideration of the Commission's December 8, 2008 Order, which directed PGE to answer eight Bench Requests in this docket.

II. BACKGROUND

The ALJ closed the record in this docket by Order on August 19. The record was reopened by an Order issued December 8. That Order, which was signed by the ALJ, stated that "the Public Utility Commission of Oregon" was requesting additional information from PGE in the form of eight Bench Requests. (December 8 Order at 1).

At a hearing on December 10, the ALJ set a schedule for responses and briefing on the Bench Requests. That schedule was memorialized in a Prehearing Conference Report on December 11, 2008. Since that time, PGE has been working to

respond to the Commission's Bench Requests and new data requests that it has received from Staff. PGE is filing its responses to the Commission's Bench Requests today, along with this Memorandum.

III. DISCUSSION

A. The Commission Had The Authority To Reopen The Record

After the record was closed, the Commission ordered it reopened for additional evidence and briefing. This procedure is authorized by law. ORS 756.558 provides, as relevant: "(1) at the conclusion of the taking of evidence, the Public Utility Commission shall declare the taking of evidence concluded. Thereafter, no additional evidence shall be received except upon the order of the commission and a reasonable opportunity of the parties to examine any witnesses with reference to the additional evidence and otherwise rebut and meet such additional evidence."

ICNU and CUB argue that re-opening the record was improper because ORS 756.558 allows re-opening only "upon the order of the commission," and the December 8 Order was signed by the ALJ, not the Commission. (ICNU/CUB Brief at 4/5).

However, a fair reading of the record shows that the December 8 Order, although signed by the ALJ, was in fact an "order of the commission" for purposes of ORS 756.558. The Order itself recites that "the Public Utility Commission of Oregon has determined" that additional evidence should be taken in this docket. (December 8 Order at 1). This indicates that the decision to reopen the record and issue the additional Bench Requests was the Commission's, not the ALJ's. This conclusion is reinforced in the Prehearing Conference Report, issued December 11. In that report, the ALJ states "the

primary purpose of the conference was to set a procedural schedule after the Commission's recent decision to reopen the record in this docket and issue a Bench Request to PGE." (December 11 Report at 1). This demonstrates, again, that this decision was the Commission's, not the ALJ's.

There is no prohibition against an ALJ issuing and signing an Order on behalf of the Commission. Quite the opposite: The Commission is authorized by statute to delegate certain of its powers to its ALJs. ORS 756.055. In its rules, the Commission has delegated a list of enumerated powers to its ALJs, including the powers to "make evidentiary rulings," "control discovery" and "take any other action consistent with the duties of an ALJ." OAR 860-012-0035(1)(d), (e), and (j). In the December 8 Order, the ALJ, apparently acting at the direction of the Commission, reopened the record and directed PGE to provide additional discovery. Issuing this Order was proper under the ALJ's delegated powers to "control discovery" and "take any other actions" consistent with her duties.

This conclusion is reinforced by the text of ORS 756.055 itself. The statute lists several classes of orders that may not be issued the Commission's ALJs (*e.g.*, final orders after a hearing), but an order reopening the administrative record is not on that list of prohibited orders. ORS 756.055(2). From this, it follows that (1) the ALJ has the general power to issue orders (or why would it be necessary to carve out a list of special orders that an ALJ cannot issue); and (2) the Oregon Legislature made the effort to create a list of "Commission only" orders, but decided not to place orders reopening the record on that exclusive list. Because ALJs are generally empowered to issue orders, and are not specifically barred from issuing orders reopening an administrative record, it

follows that the December 8 Order was within the ALJ's delegated powers. And because it was within the ALJ's delegated powers, the December 8 Order is an order of the Commission as a matter of law: "The official act of any * * * employee so exercising any such duties or powers is considered to be an official act of the Commission." ORS 756.055(1).

If this Order was not within the ALJ's delegated powers, however, then neither was the Order closing the record in the first place. That Order was also signed by the ALJ. (August 19 Order at 2). ORS 756.558(1) governs the closing and reopening of the record and provides: "At the conclusion of the taking of evidence, the Public Utility Commission shall declare the taking of evidence concluded. Thereafter no additional evidence shall be received except upon the order of the Commission * * *." If the ALJ could not exercise the Commission's delegated powers to reopen the record under ORS 756.558, it follows logically that she could not exercise the Commission's power to close the record under that statute, either. After all, the statute speaks only of the Commission closing the record and says nothing about the ALJ. If ICNU and CUB are correct that only the Commission has authority to act under ORS 756.588, then it would appear that this record was never properly closed. In that case, the December 8 Order reopening the record may have been unnecessary, but it cannot have harmed ICNU or CUB, since the record was still open.

Further, if ICNU and CUB are correct that the December 8 Order was issued by the ALJ rather than the Commission, and that the Order was beyond the ALJ's delegated authority, then this Motion is untimely and should be dismissed. This Motion

was filed under OAR § 860-014-0095, which allows a party 60 days to move for reconsideration "of an Order entered by the Commission."

But now ICNU and CUB are arguing that the December 8 Order was not a Commission Order at all, but instead was a ruling by the ALJ that exceeded her delegated authority. If so, then their remedy was to appeal the ALJ's ruling to the Commission; a party seeking to challenge an ALJ ruling must do so within 10 days, by seeking certification of an appeal to the Commission. OAR § 860-014-0091. But instead, ICNU and CUB waited 36 days and then filed this Motion for Reconsideration, rather than a certified appeal to the Commission. Thus, if they are correct that the December 8 Order is an Order of the ALJ, not the Commission, then this Motion is untimely and improper, and should be dismissed.

PGE believes that the December 8 Order was in fact an Order of the Commission under ORS 756.558(1), and may be challenged within 60 days through this Motion to Reconsider. But if PGE is wrong on this point – if this really was an ALJ ruling, not a Commission Order – then this Motion should be dismissed.

Finally, if the Commission concludes that the December 8 Order was improperly issued by the ALJ, then PGE respectfully requests that the Commission reissue the Order in proper form, effective December 8, 2008. PGE has spent considerable time responding to these Bench Requests and Staff's new Data Requests, and a technical defect in the form of the Order should not be the cause of further delay.

B. The Order Does Not Violate Due Process

ICNU's and CUB's primary argument is that the December 8 Order violates the Due Process Clause of the U.S. Constitution.[1]

A specialized body of law has developed around the application of the Due Process Clause in administrative proceedings. *See, e.g., Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (discussing applicability of Due Process Clause in administrative proceedings). Broadly speaking, the Supreme Court has "held that some form of hearing is required before an individual is finally deprived of a property interest" by an administrative agency. *Id.* In the administrative Due Process arena, case law has generally developed on two subjects: (1) whether a party to an administrative proceeding has a "property" or "liberty" interest sufficient to implicate due process; and (2) if so, whether the "form of hearing" that the agency provides is sufficient to protect that interest. In the typical case, a party being denied a government benefit is arguing that he or she is entitled to more "process" before the denial becomes final.

Here, by contrast, ICNU and CUB are arguing that the December 8 Order provides too much process by reopening the record for additional evidence. ICNU and CUB are not arguing that they have been denied a hearing or some other procedure that the Constitution requires, as in the ordinary administrative due process case. Rather, their argument is that reopening the record is unfair because PGE has already had an adequate chance to present its case.

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[1] ICNU and CUB also briefly reference Article 1, § 10 of the Oregon Constitution, the so-called "Remedies Clause." ICNU/CUB Brief at 5. But they do not cite any cases discussing the Remedies Clause or make any argument about that Clause, or the Oregon Constitution generally. Their argument focuses on due process under the U.S. Constitution (Oregon's Constitution does not contain a Due Process Clause), and we will focus our response accordingly. In any event, they cite no case, and we are aware of none, applying the Remedies Clause to the reopening of an administrative record.

In support of this argument, ICNU and CUB do not discuss a single case applying the Due Process Clause in an administrative proceeding. Instead, they rely on cases about due process in criminal and civil court trials. Those cases are not on point.

In the administrative context, as noted, the relevant due process questions are (1) does the party have a protected property interest; and (2) if so, has the party received an adequate notice and hearing? ICNU and CUB do not attempt to explain what their protected property interest is in this docket. Assuming they could articulate some constitutionally protected property interest, they have not explained how the notice and hearing that they have received was inadequate. Again, their argument essentially is that there has been too much process in this case.

ICNU and CUB do not cite any case in which a party was held to have been denied due process because an administrative agency reopened the record for additional evidence in a contested case. We can find no case that even hints at this outcome. Again, the cases ICNU and CUB cite involve court trials and raise significantly different issues than those presented here.

Instead of addressing due process in the administrative context, ICNU and CUB recite the general proposition that the Due Process Clause protects "fundamental fairness" and "fundamental conceptions of justice." (ICNU/CUB Brief at 5, citing *Dowling v. United States*, 493 U.S. 342, 353 (1990)). This is certainly true, but it does not aid ICNU and CUB here. Reopening the administrative record to allow all parties to present additional evidence and briefing on disputed issues is not fundamentally unjust. Indeed, it is specifically authorized by state statute. To prove a due process violation, a

party must show some specific deprivation of a constitutionally protected right; it is not sufficient to argue generally that some procedure is unfair.

Dowling – which ICNU and CUB quote at length – clearly illustrates this point. In *Dowling*, an accused bank robber was confronted at trial with testimony from an eyewitness who claimed she had seen him rob a different bank. But the accused had already been acquitted of robbing that bank, and argued that introducing the eyewitness identification from his first trial was fundamentally unfair.

The Supreme Court rejected that argument. The Court first noted that nothing in the Constitution specifically barred introduction of this evidence, and that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Id.* at 352. The Court then turned to the defendant's argument that allowing the evidence violated due process because it was "fundamentally unfair." In rejecting this argument, the Court cautioned against an expansive reading of the Due Process Clause: "Judges are not free in defining due process to impose on law enforcement officials [their] personal and private notions of fairness and to disregard the limits that bind judges in their judicial function." *Id.* at 353 (internal quotations omitted).

ICNU and CUB quote part of that sentence as support for the proposition that courts cannot ignore due process. (ICNU/CUB Brief at 5, 7). But the real meaning of the quote is in the text that ICNU and CUB omit: Judges are not free to impose their "personal and private notions of fairness" on government officials in the name of due process. They cannot "disregard the limits that bind judges in their judicial function." The "inquiry into fundamental fairness is limited to determining only whether the action complained of * * * violates those fundamental conceptions of justice which lie at the

base of our civil and political institutional" and "define the community's sense of fair play and decency." *Id.* (internal quotations and citations omitted).

Reopening the record in this proceeding does not come close to violating those fundamental standards. The Oregon Legislature has specifically empowered the Commission to reopen records and take new evidence administrative proceedings. ORS 756.558(1). This specific legislative authorization belies the suggestion that reopening the administrative record somehow offends "the community's sense of fair play and decency." And, since ICNU and CUB will be given their own opportunities to submit briefs and testimony concerning these Bench Requests, their constitutional rights to be heard on these issues have been vindicated. There is no Due Process violation in reopening the record.[2]

C. PGE Is Not Seeking A Rehearing

ICNU and CUB also discuss cases in which trial courts refused to reconsider issues on which they had already ruled, or denied motions for rehearing. Those cases are off point. No Final Order has been entered here, and PGE has not moved to relitigate a decided issue. The question here is simply whether the Commission's Order reopening the record under ORS 756.558 violated the Due Process Clause. Cases about whether a party is entitled to rehearing after an adverse ruling at trial do not help answer that question.

[2] CUB has previously argued that this record should be left open so that it can be supplemented with additional evidence from the *Turlock* litigation. This cuts against CUB's argument that reopening the record and allowing additional evidence – with accompanying delays – is unconstitutional, since CUB sought essentially the same outcome when it believed the new evidence would be favorable to its arguments.

D. PGE Has Not Improperly Withheld Evidence

ICNU and CUB also argue that PGE should be faulted for failing to offer evidence on the issues raised in Commission's Bench Requests before the record was closed. This criticism is unfounded.

The Commission's requests go primarily to (1) PGE's decision to hire Siemens for turbine installation and maintenance; (2) PGE's monitoring of Siemens; and (3) PGE's reliance on Siemens' QA/QC programs. PGE has submitted testimony and answered data requests on these issues. On the first issue, PGE has stated repeatedly that this is a common industry practice, and no party has seriously argued otherwise. The Commission appears to be seeking further confirmation on this point, and PGE is providing it.

On the second point, PGE has offered evidence that it monitored Siemens throughout the manufacture, installation and maintenance of the Boardman turbines. The Commission has asked for details of that monitoring, and PGE is providing them.

On the third point, ICNU has faulted PGE for not creating its own separate QA/QC program to govern Siemens' operations. PGE has responded that it does not create separate QA/QC programs to govern third-party vendors. The Commission has asked for more detail on this issue. PGE is providing testimony and evidence showing that (1) PGE verified that Siemens had its own certified, industry standard QA/QC programs; (2) PGE monitored Siemens' compliance with those programs; and (3) this is consistent with accepted practice in the utility industry.

In sum, PGE has previously submitted testimony and briefing on these issues. The Commission has requested more information, but that does not mean that

PGE has somehow acted improperly or withheld information. It simply means that the Commission wants more information on some disputed issues in a complicated case (and a case in which the allegations of wrongdoing against PGE appeared to change over time). ORS 756.588(1) provides a mechanism for the Commission to obtain that information, and the Commission's Order under that statute did not violate the Due Process Clause or any other limitation on the Commission's authority. Accordingly, ICNU's and CUB's Motion for Reconsideration should be denied.

IV. CONCLUSION

For the reasons stated herein, Portland General Electric Company respectfully requests that the Commission deny this Motion for Reconsideration.

DATED this 30th day of January, 2009.

PORTLAND GENERAL ELECTRIC COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused **PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION** to be served by electronic mail to those parties whose email addresses appear on the attached service list, and by First Class US Mail, postage prepaid and properly addressed, to those parties on the attached service list who have not waived paper service from PUC Docket No. UE 196.

DATED this 30th day of January, 2009.

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