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January 15, 2009

Via Electronic and U.S. Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of PORTLAND GENERAL ELECTRIC COMPANY
Application to Amortize the Boardman Deferral.
Docket No. UE 196

Dear Filing Center:

Enclosed please find the original Joint Application for Reconsideration of the Industrial Customers of Northwest Utilities ("ICNU") and Citizens' Utility Board of Oregon ("CUB") in the above-captioned docket.

Thank you for your assistance.

Sincerely yours,

/s/ Brendan E. Levenick
Brendan E. Levenick

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Joint Application for Reconsideration of ICNU and CUB upon the parties, on the official service list by causing the foregoing document to be deposited, postage-prepaid, in the U.S. Mail, and via electronic mail to those parties who have waived paper service.

Dated at Portland, Oregon, this 15th day of January, 2009.

/s/ Brendan E. Levenick
Brendan E. Levenick

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 196

In the Matter of	)	**JOINT APPLICATION FOR**
	)	**RECONSIDERATION OF THE**
PORTLAND GENERAL ELECTRIC	)	**INDUSTRIAL CUSTOMERS OF**
COMPANY	)	**NORTHWEST UTILITIES AND THE**
	)	**CITIZENS' UTILITY BOARD OF**
Application to Amortize the Boardman Deferral.	)	**OREGON**
	)	

On December 8, 2008, the Administrative Law Judge ("ALJ") in UE 196 issued a bench request ("Bench Request") ordering PGE to provide responses to a number of specific questions and re-opening the record in this proceeding to allow additional testimony. Re PGE, UE 196, Bench Request at 1–2 (Dec. 8, 2008). Pursuant to ORS § 756.561 and OAR § 860-014-0095, the Industrial Customers of Northwest Utilities ("ICNU") and the Citizens' Utility Board of Oregon ("CUB") request that the Public Utility Commission of Oregon ("OPUC" or "Commission") reconsider the decision to re-open the record in UE 196. Concurrently with this Motion, Applicants are filing a Motion to Suspend the Procedural Schedule in this Docket.

The decision to re-open the record violates procedural due process standards. Moreover, basic considerations of prudence and sound public policy, as well as the Commission's own precedent, support reconsideration. ALJ Wallace cited no valid basis for re-opening the record in the Bench Request or at the prehearing conference on December 10, 2008. Therefore, ICNU and CUB respectfully request that the Commission reverse the decision to re-open the record. Granting this Application will obviate the need for further testimony or a second hearing in UE 196. ICNU and CUB base this Application on the ground that ALJ

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Wallace erred by failing to consider due process limitations inherent in the OPUC's authority to re-open evidentiary records. Additionally, the Commission has good cause to further examine the precedential policy ramifications of re-opening the record in UE 196. If the Commission grants this Application, then PGE's request to amortize deferred power costs in this Docket should be dismissed with prejudice.

I. BACKGROUND

PGE filed its Application for Deferred Accounting on November 18, 2005, twenty-six days after the Company took the Boardman generating plant off line. The Commission granted PGE's deferral application, in part, on February 12, 2007. Re PGE, UM 1234, Order No. 07-049. On October 9, 2007, PGE initiated filings in this docket to amortize and recover from ratepayers $26.4 million (plus interest) in excess net variable power costs associated with the Boardman outage.

From October 2007 to July 2008, PGE, OPUC Staff, ICNU, and CUB participated in five extensive rounds of testimony in this Docket. In addition, PGE deposed ICNU's expert witness on April 1, 2008. After a hearing on July 23, 2008—and following still further evidentiary submissions—ALJ Wallace closed the record. UE 196 Ruling at 1 (Aug. 19, 2008). Opening briefs and reply briefs were submitted in September 2008.

On December 8, 2008, ALJ Wallace issued a Bench Request re-opening the record in UE 196. Bench Request at 2. The Bench Request ordered PGE to provide responses to eight questions, including a number of sub-questions, and stated that the responses would be added to the record. Id. at 1–2. The Bench Request was motivated by the OPUC's determination "that there is insufficient information to determine whether [PGE] was prudent in the installation and maintenance of the" failed LP 1 turbine that caused the Boardman outage.

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Id. at 1. The questions in the Bench Request primarily relate to PGE's quality assurance and quality control procedures with respect to the LP 1 turbine.

On December 10, 2008, ALJ Wallace held a prehearing conference and established a schedule for admitting additional evidence into the record through three rounds of additional testimony. UE 196, Prehearing Conference Report at 1 (Dec. 11, 2008). At the prehearing conference, ICNU and CUB objected to the ALJ re-opening the record, and requested briefing on the issue. Id. Though unable to cite *any* positive authority for re-opening the record in light of the due process concerns raised,[1/] the ALJ nevertheless denied requests for briefing and advised ICNU and CUB of their right to "file a motion to reconsider the Commission's decision." Id. In response to the ALJ, ICNU and CUB have filed this Application for Reconsideration of the decision to re-open the record in UE 196. Unless the Commission grants this Application, three additional rounds of testimony and a second hearing are scheduled to commence on January 30, 2009. Id.

II. ARGUMENT

A. ICNU and CUB Have Satisfied the Legal Standard for Reconsideration

The Commission may grant reconsideration within 60 days from the date of service of the order "if sufficient reason therefor is made to appear." ORS § 756.561. The Commission may grant reconsideration if the applicant shows, inter alia, an error of law or fact in the order or good cause for further examination of a matter. OAR § 860-014-0095(3). Either of the above grounds, if essential to a decision, constitutes a sufficient reason to grant

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1/ At the prehearing conference, ALJ Wallace merely stated that she could not think of "any limitations on the Commission's ability to . . . re-open the record, and to get more information." Transcript of Prehearing Conference at 9 (Dec. 10, 2008) ("Transcript"). The Transcript is included as Attachment A to this Application.

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reconsideration. As discussed below, this Application should be granted because both grounds have been satisfied.

B. The Commission Should Grant ICNU and CUB's Application for Reconsideration Because the Decision to Re-open the Record Violates Procedural Due Process

An agency "must administer the law in accordance with constitutional principles." Employment Div. v. Rogue Valley Youth for Christ, 307 Or 490, 495 (1989). "If a statute tells an agency to do something that a constitution forbids, the agency should not do it." Id. Thus, regardless of its statutory authority, the OPUC can *never* claim authority to override constitutional guarantees of procedural due process. Instead, "[a]n agency ordinarily can interpret a statute so as to exclude unconstitutional applications before it is forced to question the statute's validity." Cooper v. Eugene School Dist., 301 Or 358, 365 (1986). The Commission, therefore, can and should exercise its authority to re-open records according to statute; however, the Commission must not apply this authority in any way that would violate federal and state constitutional guarantees of due process.

According to the Commission, "ORS § 756.558(1) governs the introduction of evidence after the record has closed." Re Pacific Power & Light, UE 170, Order No. 06-172 (Apr. 12, 2006). ORS § 756.558(1) provides that, after the record is closed, "no additional evidence shall be received except upon the order of the commission." On its face, the statute only allows a record to be re-opened "upon order of the commission." In this case, the record is being re-opened not upon the order of the OPUC, but upon the authority of a Bench Request issued by the ALJ assigned to the case. The ALJ indicated at the prehearing conference that the

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Commission and the ALJ had jointly discussed re-opening the record;[2/] however, the ALJ may have exceeded her statutory authority in allowing additional evidence to be received without an express order from the OPUC. Even assuming that the ALJ was acting pursuant to ORS § 758.558(1) under properly delegated authority, in light of the holdings in Rogue Valley and Cooper, ORS § 756.558(1) can *only* authorize the OPUC to re-open its records if doing so would not abridge other parties' due process rights.

The fourteenth amendment of the U.S. Constitution and the remedies clause of the Oregon Constitution "are the same insofar as each would prohibit the deprivation of the interests specified in the respective provisions of the federal and Oregon constitutions without fair procedures generally associated with the term 'due process.'" Tupper v. Fairview Hospital, 276 Or 657, 668 (1976). Thus, for purposes of challenging the due process ramifications of re-opening the record in this case, both federal and Oregon precedent are relevant.

A due process violation occurs whenever agency action "fails the 'fundamental fairness' test and violates fundamental concepts of justice that lie at the core of the civil and political institutions." State v. Wyant, 217 Or App 199, 205 (2007). Likewise, "[j]udges are not free, in defining due process, to . . . *disregard the limits that bind judges* in their judicial function." Dowling v. United States, 493 U.S. 342, 353 (1990) (internal quotations and citations omitted) (emphasis added). Moreover, the relevant due process inquiry is to determine "whether the action complained of . . . violates those fundamental conceptions of justice which lie at the

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[2/] See Transcript at 17–18. Moreover, speaking of the Bench Requests and the decision to re-open the record, ALJ Wallace stated: "let me clarify . . . I signed this, but these came from the Commission." Id. at 17. Likewise, the Prehearing Conference Report characterized the decision to re-open the record as "the Commission's decision." Prehearing Conference Report at 1.

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

Standing alone, these standards are somewhat vague. However, a number of Oregon decisions give concrete substance to these broad principles, and show that the ALJ's decision to re-open the UE 196 record is contrary to the established law of due process. First, the Oregon Court of Appeals forbids a proverbial second-bite at the apple when a party "had a full opportunity in the prior hearing to litigate the issue . . . and for tactical reasons did not put on the evidence." State v. Koennecke, 40 Or App 239, 242 (1979). In such circumstance, a party "is foreclosed from relitigating that issue on evidence that was available at the prior hearing." Id.

Koennecke is directly analogous to UE 196; specifically, whatever evidence PGE would now add to the record pursuant to the Bench Request was at all times available during the original compilation of the record. To allow PGE to disclose it now would run afoul of the proscription against tactical restraint and indiligence stated in Koennecke. PGE enjoyed no less than three rounds of testimony before the UE 196 record was initially closed in August 2008. All of the eight questions PGE has been ordered to answer in the Bench Request could have been and should have been answered in previous rounds of testimony. These are the very same issues raised in ICNU's testimony.

In fact, ALJ Wallace explicitly indicated which testimony submissions the questions referred to in six of the eight questions. In essence, PGE is being given two additional chances to provide more detail—on issues it either originally presented itself, or on issues that had been raised by other parties with sufficient time to respond before the original record was closed. Whether by reason of tactical incentive or simple neglect, PGE failed to meet its burden of proof on all these questions. The Bench Requests do not raise new issues. Due process

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forbids a re-opening of the record under these circumstances. In all, PGE will be given *five* bites at the apple, unless the Commission reconsiders the ALJ's decision to re-open the record.

The Oregon Supreme Court has declared, in no uncertain terms, that the presentation of evidence after the initial closing of a record "is not a technical matter" but a foundational concern of ultimate import. Waldow v. Waldow, 189 Or 600, 605 (1950). Indeed, the Court states that "enforcement of just rules governing orderly procedure is *of the essence*, and the disregard of such rules by counsel or court *imperils due process itself*." Id. (emphasis added). Consequently, the OPUC has not been given a statutory license via ORS § 756.558(1) to disregard just rules that govern orderly procedure. To the contrary, "disregard [of] the limits that bind judges" is a per se violation of due process. Dowling, 493 U.S. at 353.

In language closely echoing Koennecke, the Oregon Supreme Court explains:

> [T]o allow a party to withhold evidence and gamble on a favorable decision of the court, and then when a final decree, unsatisfactory to him, has been entered, to move for a new trial or for a vacation of the decree in order to do what he could, and should have done earlier, would be to open the door to delay, confusion, and at times to the tactics of the pettifogger. If the trial court were to permit such tactics, the result would be *the disruption of rules of procedure which have been honored for generations*.

Waldow, 189 Or at 605–06 (emphasis added). As the Oregon Supreme Court explained, record re-opening is far from a mere "technical matter." Rather, allowing PGE after a full and complete proceeding to in essence retry the case because of its failure to meet its burden imperils due process itself.[3/]

[3/] Utilities have "both the burden of persuasion and the burden of production in support of a deferred accounting request." Re OPUC, UM 1147, Order No. 05-1070 at 5 (Oct. 5, 2005). The Commission "has determined that there is insufficient information to determine whether [PGE] was prudent" in its actions leading up to the Boardman outage; therefore, the Commission *concedes* that PGE has failed to meet its requisite burden of proof, i.e., its burden of persuasion and production. Bench Request at 1. Therefore, since PGE has had more than ample opportunity to meet its burden of proof in the three rounds of testimony it has already been afforded, its failure can only be attributed to conscious tactics or indiligence.

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Re-opening the record in this case will disrupt the rules of procedure that have provided bedrock due process protections for generations. Unless the Commission grants reconsideration, ICNU, CUB, and more importantly all the PGE ratepayers represented by them will be deprived of their constitutional rights.

C. The Commission Should Grant ICNU and CUB's Application for Reconsideration Because Good Cause Exists for Further Examination on Prudence and Policy Grounds

1. Oregon Caselaw Prevents Re-opening the Record Based on These Facts

In explaining the proper understanding of its holding in Cooper, the Oregon Supreme Court maintains that "a government official must . . . take care to consider the meaning of the state and federal constitutions when executing official duties." Li v. State, 338 Or 376, 396 (2005). Even if the Commission does not believe itself positively foreclosed from re-opening the record in UE 196, good cause still exists for the OPUC to further examine the precedential effects of the ALJ's decision in light of Li's exhortation. Specifically, "strong reasons of policy militate against reopening a case where there has been a lack of due diligence in producing all available evidence." Miller v. Miller, 228 Or 301, 305 (1961).

Though the cases cited above concern the re-opening of records in circumstances in which a final decision was rendered, the Oregon Supreme Court did not limit the import of its strong due process declarations to these circumstances alone. In Waldow, the Supreme Court made clear that its holding would not have been altered "even if a motion to take further testimony had been made *before the decree was entered*." 189 Or at 606 (emphasis added). The key to the Supreme Court's reasoning is not whether a final decree has been entered in a

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proceeding, but whether or not the re-opening of a record to admit new evidence rewards a party for tactical restraint, neglect, or simply an inability to prevail on the evidence.

Due process concerns arise when new evidence is not of the sort that arises *after* a record closure. The Waldow Court refused to re-open a record because "nothing . . . occurred *since* the decree," and the new evidence was "not based on anything occurring *after* the judgment." Id. (emphasis added). Likewise, the Miller court justified the due process proscription in Waldow because to "reopen [the record] on the basis of new evidence" not initially admitted through indiligence "might have influenced the trial court to reach a different result." 228 Or 305.

Similarly, if the OPUC now allows PGE a fourth and fifth bite at the apple, the Commission could very well "reach a different result" than the automatic failure PGE should face for not meeting its burden of proof. The Commission should not set a precedent encouraging indiligence or tactical restraint, which would give utilities an incentive to be less than forthcoming in their initial disclosures, knowing the OPUC will allow further opportunities to supplement the record. The Commission, thus, has very good cause to further examine the effects of the decision to re-open the record and reconsider that action. Good public policy dictates finality particularly in a case that has been fully litigated.

Further, the Commission's refusal to re-open the record would be consistent with its *own* decisions:

> We . . . affirm that, under ORS 757.210, the burden of showing that the proposed rate is just and reasonable is borne by the utility throughout the proceeding. Thus, if PGE makes a proposed change that is disputed by another party, PGE still has the burden to show by a preponderance of evidence, that the change is just and reasonable. If it fails to meet that burden, either because the opposing party presented compelling evidence in opposition to the

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> proposal, *or because PGE failed to present compelling information in the first place*, then PGE does not prevail.

Re PGE, UE 115, Order No. 01-777 at 6 (Aug. 31, 2001) (emphasis added).

It is well-known by all parties to these matters that a utility has the burden of proof in cases in which it is attempting to increase customers' rates. PGE had ample opportunity during multiple rounds of testimony, briefing, and a hearing to carry its burden of proof in UE 196. In the final analysis, if PGE failed to carry this burden, the Commission should simply rule against PGE:

> The purpose of the burden of proof . . . is . . . to allocate the risk of nonpersuasion. In effect, assignment of the burden of proof is a way to declare which party loses if the evidence on an issue appears to be equally balanced *or if the factfinder cannot say upon which side the evidence weighs more heavily* . . . . Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (i.e., the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (i.e., the burden of persuasion) . . . .
>
> Logically, the allocation of the burden of proof has its greatest relevance at the stage of the proceeding in which the record is developed and a factfinder initially resolves the issues in dispute. At that stage, the failure to produce evidence at all, *or the failure of the evidence produced to persuade the factfinder*, will be fatal to the party with the burden of proof.

Marvin Wood Products v. Callow, 171 Or App 175, 179–80 (1999) (emphasis added) (internal citations omitted). PGE's failure to produce evidence—or its failure to produce *enough* evidence to persuade the Commission—should be fatal.

2. PGE had both Notice and Opportunity to Address the Issues Raised in the Bench Request

PGE attempted to argue at the prehearing conference that the issues raised by the Bench Request were only raised late in the proceeding, depriving it of a meaningful opportunity to respond. See, e.g., Transcript at 7, 14–16. This is simply not true. The Bench Request relates

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to PGE's oversight of the installation and maintenance of the LP1 turbine. ICNU first raised this issue in the direct testimony of John Martin, which was filed on February 20, 2008. Mr. Martin stated:

> When the new turbines were installed in 2000 and 2004, PGE did not provide for independent quality assurance and quality control to monitor Siemens' installation of the new equipment. In addition, PGE did not provide for independent quality assurance and quality control to monitor Siemens' maintenance of the turbines. PGE simply stated that it depended on Siemens. . . . [I]t was not prudent for PGE to rely on Siemens for quality assurance and quality control.

ICNU/100, Martin/4 (Direct Testimony of John Martin, dated February 20, 2008).

Similarly, in his Surrebuttal Testimony, Mr. Martin stated:

> I previously testified that PGE did not have a Quality Assurance/Quality Control (QA/QC) program in place at any time from the installation of the low-pressure turbines in 2000, through the installation of the HP/IP turbine in 2004, and the subsequent failure in 2005. ICNU/100, Martin/18. The installation of a new turbine is a major plant modification. As noted below, the design of the new turbine was significantly different from the original turbine. As a result, PGE should have had an active QA/QC program in place to review and check the installation and maintenance work being performed by Siemens. Primary features of any QA/QC program are written procedures and written records. Attached as Exhibit ICNU/201 is a PGE data response demonstrating that PGE does not have any written procedures or records to substantiate its position that PGE had an active QA/QC program to review the work performed by Siemens.

ICNU/200, Martin/1–2 (Surrebuttal Testimony of John Martin, dated June 5, 2008). ICNU properly raised the very issues described in the Bench Request at numerous points throughout the proceeding. In fact, two of the Bench Requests (2 and 4) specifically cite Mr. Martin's

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testimony as the basis for the requests. PGE even had the opportunity to depose ICNU's witness on these issues and to further cross examine ICNU's witness at the hearing.[4/]

3. Previous Decisions Relating to Re-opening Records are Inapplicable

The circumstances of UE 196 are easily distinguishable from the facts surrounding previous record re-opening decisions of the OPUC. Most notably, the Commission explained in some detail its decision to re-open the record in Docket No. DR 10/UE 88/UM 989, the Trojan refund case. However, in that docket, the primary justification for record re-opening was that the Commission logically and necessarily had to "take and consider new evidence"—due to a direct remand from the Court of Appeals. Re PGE, DR 10/UE 88/UM 989, Order No. 04-597 at App. A, 16 (Oct. 18, 2004).

In UE 196, the Commission has no similar justification for re-opening the record. The only relevant considerations for the OPUC here are the limitations that constitutional due process and precedent places upon its statutory authority.

4. Re-opening the Record Violates OAR § 860-011-0000(5)

If the Commission determines, notwithstanding all procedural due process concerns, that it does, in fact, have legal authority to re-open the evidentiary record in UE 196, then the Commission must still consider the prescriptions set forth in OAR § 860-011-0000(5) *before* following through on the ALJ's decision to re-open the record. Namely, re-opening the

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4/ In this regard, certain statements made by PGE at the prehearing conference are questionable. For example, PGE asserted: "We haven't produced a great deal of information about ongoing monitoring . . . because that hasn't been an issue . . .that's been particularly surfaced by any party here." Transcript at 7. Likewise, apparently referencing the Bench Requests in their totality, PGE stated that "[h]ad all these question's been asked . . . PGE would have had every incentive not to lie in the weeds, as there's been some suggestion that we're doing, but to respond to them fully . . . .These are different questions than the questions that CUB and ICNU posed." Id. at 16.

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evidentiary record must lead to the "just, speedy, and inexpensive determination of the issues presented." Id.

Re-opening the evidentiary record in UE 196—after five full rounds of testimony, briefing, and a hearing—manifestly does not comport with this rule. Instead, it further delays the process and greatly increases costs to the Joint Parties and the consumers they are designated to serve and protect. It also takes the "just" component out of an otherwise just process.

D. If the Commission Grants ICNU and CUB's Application for Reconsideration, PGE's Amortization Request Should be Dismissed with Prejudice

Prior decisions of the Commission support dismissal of this case with prejudice. First, utilities have "both the burden of persuasion and the burden of production in support of a deferred accounting request." Re OPUC, UM 1147, Order No. 05-1070 at 5 (Oct. 5, 2005). Second, in this very Docket, after a fully litigated case, the Commission "has determined that there is *insufficient information* to determine whether [PGE] was prudent." Bench Request at 1 (emphasis added).

If the Commission grants this Application, the record will remain closed and "insufficient information" will continue to exist as to PGE's prudency. Insufficient information is simply another way to state that PGE has failed to meet its burden of proof, i.e., its burden of persuasion or its burden of production. Unless the standard of deferred accounting requests—that *utilities* bear the burden of proof—is to be rendered meaningless, the Commission must dismiss UE 196 with prejudice. The Commission will undercut its own authority by not doing so.

ALJ Wallace erred by apparently failing to consider that PGE's amortization request could be dismissed with prejudice. At the prehearing conference on December 10, 2008,

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the ALJ stated only two options available to the Commission: re-open the record now, or dismiss *without* prejudice; in which case PGE would, presumably, file another request and subject the Commission and all parties to redundant, costly, and inefficient additional proceedings. See Transcript at 9, 17–18.

The ALJ justified the decision to re-open the record now as the more efficient of these two options. Id. at 17–18. This reasoning is flawed because it is based on the false premise that no third option exists—i.e., dismissing PGE's request *with* prejudice. Moreover, this neglected, third option is the most efficient of all three. Under the third option, PGE will bear the consequences for failing to meet its burden of proof. More importantly, under this option, ratepayers will not be burdened with unnecessary costs. Dismissing PGE's request for amortization with prejudice will prevent ratepayers from indirectly funding further proceedings *or* directly rewarding PGE for its failure to meet its burden of proof.

III. CONCLUSION

ALJ Wallace's Bench Request re-opened the record in UE 196. The Commission should grant ICNU and CUB's Application for Reconsideration because, under the present circumstances, the decision to re-open the record is contrary to constitutional guarantees of procedural due process. Alternatively, even if the Commission believes that due process has not been violated, the OPUC should still grant reconsideration due to policy and prudential concerns in light of Oregon precedent and agency rules. Upon granting this Application, and in light of PGE's failure to meet its burden of proof, the Commission should deny PGE's request to amortize the Boardman deferral and dismiss UE 196 with prejudice. Finally, the Commission should suspend the procedural schedule in this Docket pending a ruling on this Application, as requested in the concurrently filed Motion to Suspend Procedural Schedule of the Joint Parties.

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WHEREFORE, ICNU and CUB respectfully request that the Commission grant this Application for Reconsideration of ALJ Wallace's decision to re-open the record in UE 196.

Dated this 15th day of January, 2009.

Respectfully submitted,

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