

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

DR 10, UE 88, UM 989

In the Matters of	)	
	)	
The Application of Portland General Electric	)	
Company for an Investigation into Least Cost	)	
Plan Plant Retirement (DR 10),	)	
	)	
Revised Tariffs Schedules for Electric Service in	)	RULING
Oregon Filed by Portland General Electric	)	
Company (UE 88),	)	
	)	
Portland General Electric Company's	)	
Application for an Accounting Order and for	)	
Order Approving Tariff Sheets Implementing	)	
Rate Reduction (UM 989).	)	

DISPOSITION: MOTION TO STRIKE GRANTED;  
MOTION TO COMPEL DENIED; AND  
MOTION FOR EXTENSION OF TIME GRANTED

On June 14, 2005, Portland General Electric Company (PGE) filed a motion to strike portions of testimony filed by the Utility Reform Project (URP). URP opposes PGE's motion, and claims, in part, that the challenged testimony was used because PGE failed to respond to URP's Data Request No. 9. URP has filed its own motion seeking to compel PGE to provide discovery. Finally, URP filed, on July 22, 2005, a motion for an extension of time to file surrebuttal testimony. For the reasons that follow, PGE's motion to strike is granted, URP's motion to compel discovery is denied, and URP's motion for an extension of time is granted.

**I. Motion to Strike**

*Positions of the Parties*

PGE seeks to strike URP 204/10, lines 5-32, which quotes an article from *Willamette Week* and refers to a document created by the Texas Pacific Group (TPG) in

docket UM 1121. PGE also seeks to strike URP Exhibit 206, which is a copy of the quoted article from *Willamette Week*. URP uses the testimony and exhibit to argue that PGE “over-earned” during the period following the Commission’s decision in docket UE 88.

PGE first contends that the testimony and exhibit are not relevant to this proceeding. PGE states that the question presented is, “what rates would the Commission have authorized in docket UE 88 had it known that rates could not include a return on the Trojan Nuclear power plant?” Therefore, PGE concludes, PGE’s actual earnings after that decision cannot possibly bear in that ratemaking question. Second, PGE contends that the testimony and associated exhibit are unreliable hearsay, as they are “not of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.” OAR 860-014-0045(1). PGE also contends that the challenged evidence does not meet the Oregon Supreme Court’s admissibility standards for hearsay under *Reguero v. Teacher Standards and Practices*, 312 Or 402 (1991).

URP responds<sup>1</sup> that, contrary to PGE’s assertion, the utility’s earnings during the post UE 88 era are relevant to this case. URP explains that PGE’s primary argument is that the Commission, had it not included a return on the Trojan investment, would have granted the utility a higher authorized return on investment. If the Commission is “allowed to see into the future (to see that its legal position would be rejected by the courts), URP contends that the Commission should also be allowed to see in the future regarding the actual effects of its orders on PGE’s earnings.”<sup>2</sup> URP also contends that PGE’s arguments about hearsay should be disregarded, because nothing prevents PGE from testifying about the challenged information. In fact, URP notes that

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<sup>1</sup> URP sought and obtained an extension to file its response, claiming that an injury to its counsel, Mr. Meek, had incapacitated him and required him to take narcotic painkillers that affected his alertness and ability to concentrate. Following Mr. Meek’s appearance the next day in Salem at a legislative hearing, I asked URP to address the apparent inconsistency between the allegations of Mr. Meek’s incapacitation and his appearance at the legislature.

Mr. Meek attempted to justify his actions by claiming that “there is utterly nothing inconsistent about taking such painkillers and appearing at a legislative hearing and speaking for about 3 minutes, in a manner that may or may not have been entirely coherent, on an issue with which undersigned counsel is extremely familiar. The side-effect of such painkillers is reduction in alertness and ability to concentrate, which is why the original June 28 deadline was not met in the first place.” URP Response to PGE Motion to Strike at 4.

Mr. Meek has previously submitted testimony in this docket. Therefore, he should not be representing URP while appearing as a witness. *See* Oregon Rules of Professional Conduct 3.7. Although he did not fully explain the inconsistency between failing to file a timely response and testifying before a legislative committee, I do find that he cannot act as both counsel and witness. His response to PGE’s Motion to Strike, while discussed in this ruling, is not properly filed. For purposes of this ruling, we will discuss URP’s response. URP’s other listed counsel, Ms. Williams may correct the defect by submitting the response under her signature.

<sup>2</sup> URP Response to PGE Motion to Strike at 1.

the crucial statement in the *Willamette Week* article is attributed to PGE's Chief Financial Officer.

### *Ruling*

PGE's motion is granted. As the parties are aware, the Commission reopened these dockets to comply with two remand orders by the Marion County Circuit Court (Circuit Court). Based on analysis of the two remand orders in context of each other, and the Court of Appeals' opinion in *Citizens' Utility Board v. PUC*, 154 Or App 702 (1998), the Commission determined that this proceeding requires a retrospective examination of what rates would have been approved in UE 88 had it interpreted ORS 757.355 to not allow a return on investment in retired plant. *See* Orders No. 05-091 and 04-597. Consequently, the Commission must engage in ratemaking in order to set end rates that comply with the pertinent statutes, including ORS 757.355 as interpreted by the Court of Appeals, and ORS 757.020, requiring just and reasonable rates.

Contrary to URP's assertion, this proceeding does not allow any party to present factual evidence that could not have been presented in the original proceeding. While the Commission must now apply a different legal interpretation of ORS 757.355, the factual evidence to which that statute is applied must encompass the same timeframe, that is, information that could have been presented during UE 88.

## **II. Motion to Compel**

### *Positions of the Parties*

URP seeks an order compelling PGE to respond to URP Data Request No. 9, which seeks information as to PGE's authorized and actual rate of return on equity for the years 1995 through 2004. In its initial motion, URP claims that PGE failed to provide "even a minimally adequate response to this request." URP Motion to Compel, at 1. Later, in a reply to PGE's response to the motion, URP claims that PGE has provided "tens of thousands of pages of documents (both hard copy and electronic), which may or may not contain the information sought.

PGE contends that it has provided URP the requested information.<sup>3</sup> PGE argues that, contrary to URP's allegations, the company did not dump "tens of thousands of pages" on URP. Rather, PGE states it identified its authorized rate of return by providing copies of the relevant Commission orders and specifying the page numbers where the specific information is found. As to its actual rate of return, PGE states that it provided copies of the company's Results of Operations Report for the years 1995-2004. To its surreply, PGE attached copies of the

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<sup>3</sup> After URP filed a reply to PGE's response, PGE filed a Motion to Strike the reply or, in the alternative, a motion for leave to file a surreply. PGE is correct that the Commission's rules contain no provision for the filing of a reply to a response to a motion. Nonetheless, I will allow the reply and grant PGE's motion to leave to file a surreply.

referenced tables, which set forth the company's rate of return and return on equity for each of the years requested.

*Ruling*

Given my ruling granting PGE's motion to strike, the relevance of the information sought by URP in its Data Request No. 9 is in doubt. Nonetheless, based on the exhibits attached to PGE's filing, I find that the company has provided the requested information and that there is no need to compel any further response. URP's motion to compel is denied.

**III. Motion for Extension of Time**

URP seeks a three-day extension of time to file surrebuttal testimony. URP contends there is good cause for the extension, which PGE does not oppose.

URP's motion for extension of time is granted. The extension also applies to the Commission Staff. All surrebuttal testimony shall be due July 28, 2005.

Dated this 25th day of July 2005, at Salem, Oregon.

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Michael Grant  
Chief Administrative Law Judge