ISSUED: November 19, 2004

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1121

In the Matter of	)	
	)	
OREGON ELECTRIC UTILITY	)	
COMPANY, LLC, *et al*.,	)	RULING
	)	
Application for Authorization to Acquire	)	
Portland General Electric Company.	)	

DISPOSITION: REQUEST FOR EXPEDITED RECONSIDERATION OF RULING GRANTED; REQUEST FOR OFFICIAL NOTICE DENIED; REQUEST FOR CERTIFICATION DENIED.

On November 4, 2004, Bonneville Power Administration (BPA) and the Eugene Water & Electric Board (EWEB) filed a joint request asking for official notice to be taken of four documents: a complaint filed on January 6, 2004 with the United States Court of Federal Claims, a General Accounting Office report dated December 2001, a U.S. Department of Energy Report dated July 2004, and PGE's Decommissioning Plan of the Trojan Nuclear Plant dated January 26, 1995.

On November 8, 2004, Administrative Law Judges (ALJs) Kathryn Logan and Christina Smith denied the request for official notice. In our ruling, we stated that BPA and EWEB did not explain why the four documents, which were available prior to the record being closed, should be included in the record.

On November 10, 2004, BPA and EWEB filed a joint request, asking that we reconsider our ruling, or in the alternative, certify the issue to the Commission. BPA and EWEB also requested that we expedite a ruling.

Reconsideration Request

Position of the Parties

BPA and EWEB assert that we denied the official notice request for two reasons: lack of explanation of relevance, and availability of the documents prior to the closing of the record. BPA and EWEB then explain the relevance of the four documents to

the two issues they raised concerning the Trojan Nuclear Project.[1] They also contend that we mistakenly denied the request for official notice due to timeliness. Finally, they note that none of the other parties opposed the request for official notice.

In their initial request for official notice, BPA and EWEB contend that all four documents meet the requirements of OAR 860-014-0050.

Discussion

OAR 860-014-0050(1) states, in relevant part:

> (1) The Commission or Administrative Law Judge (ALJ) may take official notice of the following matters:
> (a) All matters of which the courts of the State or Oregon take judicial notice;
> (b) Rules, regulations, administrative ruling and reports of the Commission and other governmental agencies;
> * * * *
> (e) Documents and records in the files of the Commission which have been made a part of the file in the regular course of performing the Commission's duties;
> (f) General, technical or scientific facts within the specialized knowledge of the agency;
> (2) The Commission or the ALJ shall notify the parties when official notice is taken. The notice may be given on the record during the hearing or in findings of fact in a proposed or final order. A party may object to the fact noticed within 15 days of the notification. The objecting party may explain or rebut the noticed fact.

We begin with a brief discussion of judicial notice and official notice. ORS 40.060 through 40.080 governs judicial notice for adjudicative facts. ORS 40.065, known as Oregon Evidence Code (OEC) 201(b), states:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
> (1) Generally known within the territorial jurisdiction of the trial court; or
> (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

[1] In the Joint Issues List filed on July 30, 2004, EWEB and BPA identified two issues for the Commission's consideration: 1) Do the proposed terms of the acquisition of Portland General Electric (PGE) increase the probability that PGE will be unable to pay its share of future costs related to the Trojan Nuclear Project, and 2) Should the Public Utility Commission of Oregon (PUC) require PGE to post or provide a financial instrument for some period of time to ensure that the public and other Trojan owners are protected in the event that PGE is unable to pay Trojan-related expenses?

While ORS 40.070(2) requires a court to take judicial notice "if requested by a party and supplied with the necessary information," there is no parallel provision for mandatory official notice in the Commission's rules.

Official notice, while similar to judicial notice, is somewhat broader. Official notice acknowledges that administrative agencies have specialized knowledge, information, and expertise. Agency presiding officers may utilize this specialized knowledge to take official notice of general, technical, or scientific facts.[2]

In their request, BPA and EWEB asked that we take notice not only of the existence of the four documents, but of the information contained in those documents – documents that constitute approximately 188 pages. This is not permissible under Oregon law.

In *Arlington Ed. Assn. v. Arlington Sch. Dist. No. 3*, 177 Or App 658 (2001), *rev den* 333 Or 399 (2002), the court addressed the issue of official notice under ORS 183.450.[3] While this statute does not apply to our dockets, the case is instructive in its discussion of the type of information that may be officially noticed.

In *Arlington*, the court initially concluded, "a judicially *noticed* fact must, of necessity, be judicially *cognizable*," holding that ORS 183.450(4) corresponds to OEC 201(b). *Id.* at 663 (emphasis in original). The court then went on,

> "[T]here is a distinction between judicially noticing the existence of a court record and noticing the truth of the contents of that record, . . . Even under the federal rules, *although it may be appropriate to judicially notice the former, it is inappropriate to notice the latter.*"

Arlington at 665, *quoting Thompson v. Telephone & Date Systems, Inc.*, 130 Or App 302, *adhered to as mod on recons* 132 Or App 103 (1994) (emphasis in original).

While the *Arlington* case discusses judicial and official notice pursuant to statutes, and not Commission OAR 860-014-0050, the rationale still applies. Although it may be appropriate to officially notice that these four documents exist, it is not appropriate to take official notice of the contents of each document. We address each document in turn.

The first document (labeled Attachment A) is a complaint filed with the United States Court of Federal Claims on January 6, 2004. BPA and EWEB claim that

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[2] Oregon Attorney General's Administrative Law Manual at 132 (2004).

[3] ORS 183.450(4), which is part of the Administrative Procedures Act, states in pertinent part:

> The hearing officer and agency may take notice of judicially cognizable facts, and may take official notice of general, technical or scientific facts with the specialized knowledge of the hearing officer or agency. . . .

official notice can be taken of this document pursuant to OAR 860-014-0050(a) because it is a legal pleading of which the courts in Oregon would take judicial notice. BPA and EWEB, however, fail to acknowledge that in a complaint, a plaintiff alleges facts which may be admitted or denied by a defendant. While Oregon courts might take judicial notice that a complaint had been filed, the courts certainly would not take judicial notice of the contents of the complaint. The request to take official notice of Attachment A is denied.

The second and third documents (labeled Attachment B and C) are reports generated by the United States Government. The United States General Accounting Office (GAO) generated Attachment B, entitled *Nuclear Regulation - NRC's Assurances of Decommissioning Funding During Utility Restructuring Could Be Improved*, in December 2001. Attachment C, entitled *Acceptance Priority Ranking & Annual Capacity Report*, was published by the United States Department of Energy in July 2004. BPA and EWEB contend that both documents may be officially noticed pursuant to OAR 860-014-0050(b). We could take official notice that such reports exist. However, we have no knowledge of the accuracy of the reports, or that the facts asserted in the reports are not subject to reasonable dispute. The request to take official notice of these reports is denied.

The final document (labeled Attachment D) is a section of the Trojan Nuclear Plant decommissioning plan, dated January 26, 1995. BPA and EWEB ask for official notice to be taken of the information contained in the plan pursuant to OAR 860-014-0050(e). In their initial request, BPA and EWEB stated that this document was part of the Commission's files in docket UE 88, and was part of the review leading to Order No. 95-322. While we have no reason to doubt Mr. Geoffrey Kronick, as he was the attorney of record for BPA in January 1995, Order No. 95-322 states that last phase of hearings were held the week of January 9, 1995. Attachment D is dated January 26, 1995. It is not clear that this document was part of docket UE 88.

However, assuming *arguendo* that Attachment D was an exhibit in another Commission docket, we are not required to take official notice of all documents contained in Commission files. The *Arlington* case is an example of where taking official notice is inappropriate. In *Arlington,* the administrative agency was found to have abused its discretion by taking official notice of a document contained in its official record for the proceeding. In the present case, the admission of an exhibit does not mean that all the information within the exhibit is accurate. The request to take official notice of Attachment D is denied.

We now turn to our main concerns with the process put forth by BPA and EWEB. First, they are attempting to introduce evidence into the record after the record is closed. Under ORS 756.588(1), once we declare that the taking of evidence is concluded, no additional evidence may be received without an order of the Commission and an opportunity for parties to rebut the information. Second, official notice is not a substitute for proffering evidence during the proceeding. While we agree that official notice can be taken at any time, including in the Commission's final order, such notice is usually taken as a matter of convenience regarding facts that are not subject to reasonable dispute. For example, it is appropriate to take official notice that November 4, 1986, was a Tuesday.

Finally, BPA and EWEB had ample opportunity to submit these documents during the proceeding. All of the documents were available prior to the closing of the record. This was the rationale for our statement regarding timeliness in our November 8, 2004 ruling.

Certification Request

OAR 860-014-0091 provides that an ALJ ruling may not be appealed to the Commission except where the ALJ certifies the question upon a finding that the ruling may result in substantial detriment to the public interest or undue prejudice to any party; or denies or terminates any person's participation.

We do not certify our ruling to the Commission. BPA and EWEB have not had their participation denied or terminated in this docket. Further, we do not find that there has been substantial detriment to the public interest. BPA and EWEB may continue to make arguments as to why certain guarantees should be required of PGE. As for the ruling being unduly prejudicial, we note that both BPA and EWEB could have submitted all four documents prior to the closing of the record. Further, the law regarding official notice is contrary to BPA's and EWEB's position.

Summary

We have reconsidered our November 8, 2004, ruling and affirm our initial decision. The November 8, 2004 ruling, as well as this ruling, will not be certified to the Commission, as the necessary findings that are a condition precedent to certification cannot be made.

Dated at Salem, Oregon, this 19th day of November, 2004.

Kathryn A. Logan Administrative Law Judge	Christina M. Smith Administrative Law Judge