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November 8, 2021

**VIA ELECTRONIC FILING**

Attention: Filing Center  
Public Utility Commission of Oregon  
P.O. Box 1088  
Salem, Oregon 97308-108

**Re: UE 394 - In the Matter of Portland General Electric Company, Request for a  
General Rate Revision**

Attention Filing Center:

Attached for filing in the above-captioned docket is Portland General Electric Company's Reply in Support of Motion to Strike.

Please contact this office with any questions.

Thank you,

Suzanne Prinsen  
Legal Assistant

Attachment

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 394**

In the Matter of

PORTLAND GENERAL ELECTRIC  
COMPANY,

Request for a General Rate Revision.

**PORTLAND GENERAL ELECTRIC  
COMPANY’S REPLY IN SUPPORT OF  
MOTION TO STRIKE**

1           On November 4, 2021, the Alliance of Western Energy Consumers (AWEC), the Oregon  
2 Citizens’ Utility Board (CUB), and Public Utility Commission of Oregon Staff (Staff)  
3 (collectively, Joint Parties) filed a Joint Response in opposition to Portland General Electric  
4 Company’s (PGE) motion to strike their testimony related to AWEC’s and CUB’s request to defer  
5 costs in rates for the retired Boardman plant. The Joint Parties respond that their deferral testimony  
6 is consistent with the Administrative Law Judge’s (ALJ) Ruling denying their motion to  
7 consolidate, relevant to the Commission’s determination of just and reasonable rates for PGE, and  
8 necessary to support a hypothetical future settlement of this general rate case that involves the  
9 Boardman deferral.<sup>1</sup> None of these arguments justify the Joint Parties’ transparent attempt to  
10 relitigate the motion to consolidate, which should be disallowed as an impermissible collateral  
11 attack. The ALJ already considered and rejected AWEC’s and CUB’s arguments for including the  
12 Boardman deferral in the rate case, and the Joint Parties have reprised the same arguments here.  
13 Contrary to their claim, due process does not require that they be permitted to do so.

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<sup>1</sup> *In re Portland General Electric Company Request for a General Rate Revision*, Docket UE 394, Joint Response of the Oregon Citizens’ Utility Board, Alliance of Western Energy Consumers, and Staff of the Public Utility Commission of Oregon to Portland General Electric’s Motion to Strike (Nov. 4, 2021) (“Joint Response”).

1           The Joint Parties’ deferral testimony should be stricken because it is not relevant to the rate  
2 case and not supported by Commission precedent. Their effort to shoehorn the deferral testimony  
3 into this case under the guise of supporting a hypothetical future settlement is unpersuasive. The  
4 unauthorized and contested Boardman deferral is both large and unprecedented. Incorporating it  
5 into the rate case at this stage would constrain the schedule and complicate the already broad rate  
6 case, as the ALJ recognized.<sup>2</sup> Therefore, PGE respectfully requests that the Commission resolve  
7 the motion to strike on an expedited basis and strike the Joint Parties’ deferral testimony from the  
8 record.

**I.       DISCUSSION**

9       **A.       The deferral testimony is precluded by the ALJ’s Ruling, which the Joint Parties**  
10       **improperly seek to relitigate.**

11           The Joint Parties assert that their deferral testimony is permissible because the ALJ’s  
12 Ruling denying AWEC’s and CUB’s motion to consolidate the Boardman deferral with the rate  
13 case “explicitly enabled parties to address pending deferrals.”<sup>3</sup> This is incorrect. The ALJ’s  
14 Ruling stated that “the parties remain free to address any number of pending deferrals or  
15 amortizations *within a comprehensive settlement process* in this proceeding.”<sup>4</sup> This statement, in  
16 a Ruling *denying* consolidation, neither states nor implies that parties should file substantive  
17 testimony that would require parties to address the merits of the Boardman deferral in the rate

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<sup>2</sup> Docket UE 394 and *In re Alliance of Western Energy Consumers and Oregon Citizens’ Utility Board, Application for an Accounting Order Requiring Portland General Electric Company to Defer Expenses and Capital Costs Associated with the Boardman Power Plant*, Docket UM 2119, Ruling Denying Motion to Consolidate at 3 (Oct. 25, 2021) (“ALJ Ruling”).

<sup>3</sup> Joint Response at 5 (citing ALJ Ruling at 2).

<sup>4</sup> ALJ Ruling at 3 (emphasis added).

1 case.<sup>5</sup> The Joint Parties’ strained interpretation of the ALJ’s Ruling would undermine the Ruling’s  
2 denial of consolidation.

3 Recognizing that the Commission already rejected AWEC’s and CUB’s effort to bring the  
4 Boardman deferral into this case, the Joint Response transparently attempts to relitigate the motion  
5 to consolidate. This collateral attack should be rejected because an indirect challenge to a prior  
6 Commission decision is inappropriate.<sup>6</sup> The Joint Response reprises many of the same arguments  
7 AWEC and CUB made in support of their motion to consolidate, including that addressing the  
8 Boardman deferral in the rate case will promote judicial efficiency and will allow the Commission  
9 to set just and reasonable rates.<sup>7</sup> The ALJ already considered and rejected these arguments once  
10 and should do so again—both on the merits and as an impermissible collateral attack on the ALJ’s  
11 Ruling denying the motion to consolidate.

12 The Commission has previously determined that testimony that attempts to challenge a  
13 prior decision in the docket should be stricken because it is of little probative value and poses a  
14 significant risk of confusion of the issues and undue delay.<sup>8</sup> Here, the Joint Parties’ deferral  
15 testimony should be stricken because it seeks to bring consideration of the Boardman deferral into  
16 the rate case, contrary to the ALJ’s Ruling denying consolidation. If the deferral testimony were

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<sup>5</sup> The Joint Parties claim that PGE does not seek to strike AWEC’s testimony recommending amortization of PGE’s wildfire and ice storm deferrals. Joint Response at 5. However, PGE moved to strike UE 394, AWEC/100, Mullins/45-50, which includes AWEC’s discussion of four deferrals that PGE does not propose to amortize in this rate case, as Mr. Mullins acknowledges. AWEC/100, Mullins/45. Like the Boardman deferral, these other deferrals are being addressed in separate dockets and are not relevant to this case. The ALJ’s Ruling that pending deferrals may be addressed in a comprehensive settlement does not open the door for AWEC’s testimony.

<sup>6</sup> See *In re Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996*, Docket ARB 1, Order No. 97-126, 1997 Or PUC LEXIS 68 at \*3 (Apr. 7, 1997) (argument that amounted to collateral attack on prior proceeding should be addressed in that proceeding).

<sup>7</sup> See Dockets UE 394 and UM 2119, Joint Motion to Consolidate Dockets UE 394 and UM 2119 at 3-4 (Oct. 7, 2021); Dockets UE 394 and UM 2119, Joint Reply of AWEC and CUB to PGE’s Response at 3-5 (Oct. 21, 2021).

<sup>8</sup> *In the Matter of Oregon Public Utility Commission Staff Requesting the Commission direct PacifiCorp, dba Pacific Power, to file tariffs establishing automatic adjustment clauses under the term of SB 408*, Docket UE 177, Order No. 08-176 at 2-3 (Mar. 20, 2008) (striking testimony that collaterally attacked a protective order).

1 permitted to remain in the record notwithstanding the ALJ’s Ruling, PGE would be required to  
2 respond, and the Commission would be presented with significant testimony regarding an issue  
3 that is outside the scope of this case. This is not only inefficient, it would also create confusion  
4 and likely cause delay.

5 The Joint Parties assert, without citation, that striking their deferral testimony would  
6 amount to a denial of their right to due process.<sup>9</sup> Due process requires that a person have a  
7 meaningful opportunity to be heard before the state deprives that person of life, liberty, or  
8 property.<sup>10</sup> The Commission has previously noted that “it is unclear whether customer advocacy  
9 groups such as ICNU [AWEC’s predecessor] and CUB have a protected property interest that is  
10 implicated in rate proceedings.”<sup>11</sup> Even if the Joint Parties have a protected interest that will be  
11 impacted, they have had and will have a meaningful opportunity to be heard. AWEC and CUB  
12 already had the opportunity to present their arguments regarding why the Boardman deferral  
13 should be addressed in this case when they briefed their motion to consolidate. Due process does  
14 not require that parties be allowed to relitigate an issue they already lost. And the Joint Parties  
15 will have ample opportunity to present their substantive arguments regarding the Boardman  
16 deferral in docket UM 2119. Due process requires only a meaningful opportunity to be heard—  
17 not that the hearing must occur in the specific docket of the party’s own choosing.

18 Finally, the Joint Parties make no attempt to reconcile their position that the deferral  
19 testimony must be admitted with the ALJ’s Ruling that bringing the Boardman deferral into this  
20 case would constrain the case schedule.<sup>12</sup> They claim that Boardman deferral issues “will be

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<sup>9</sup> Joint Response at 5, 6, 8.

<sup>10</sup> *In re Portland General Electric Company Application to Amortize the Boardman Deferral*, Docket UE 196, Order No. 09-046 at 5-6 (Feb. 5, 2009).

<sup>11</sup> Order No. 09-046 at 6.

<sup>12</sup> ALJ Ruling at 3.

1 addressed using the existing procedural schedule” and that PGE “will have ample opportunity to  
2 respond.”<sup>13</sup> But elsewhere they acknowledge that docket UM 2119 will likely be a fully litigated  
3 proceeding.<sup>14</sup> PGE agrees that a very large, completely unprecedented deferral request like that  
4 filed by AWEC and CUB in docket UM 2119 will require significant process to resolve. Fully  
5 litigating the Boardman deferral within the existing procedural schedule in this case would have  
6 required the parties with the burden of proof (AWEC and CUB) to have filed their opening  
7 testimony four months ago when this case was initiated. The ALJ correctly ruled that the  
8 Boardman deferral could not be folded into this rate case at this late stage without significant  
9 burden and delay, and the Joint Parties have not explained why this is incorrect.

10 **B. The Boardman deferral testimony is not relevant to the issues in the rate case.**

11 The Joint Parties argue that their testimony regarding the Boardman deferral is relevant to  
12 this case because the Commission needs to determine that the rates it adopts are just and reasonable  
13 overall.<sup>15</sup> By this, the Joint Parties appear to mean that the outcome of this rate case cannot be just  
14 and reasonable unless it accounts for the amount in the Boardman deferral—which they assume  
15 will be approved. But the Commission’s obligation to set rates that are just and reasonable applies  
16 at the point in time at which the rates are set; it does not require the Commission to consider and  
17 resolve every possible factor that could potentially affect those rates in the future. The  
18 Commission can consider the issues in this case and set rates that are just and reasonable based on  
19 the record, and if necessary, those rates can be revised in the future following resolution of the  
20 Boardman deferral in docket UM 2119.

21 The Joint Parties also claim that their Boardman deferral testimony is relevant because

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<sup>13</sup> Joint Response at 6.

<sup>14</sup> Joint Response at 2, 7.

<sup>15</sup> Joint Response at 3-4.

1 PGE filed testimony regarding “issues related to Boardman.”<sup>16</sup> This argument is unpersuasive  
2 because the testimony they rely on has nothing to do with the Boardman deferral. Instead, it  
3 provides information regarding the Boardman shut down to explain how PGE determined its 2022  
4 test year O&M expenses given that actual 2020 O&M expenses included Boardman operations but  
5 the 2022 test year did not.<sup>17</sup> PGE’s testimony did not open the door for the Joint Parties to bring  
6 the Boardman deferral into this case.

7 **C. Commission precedent does not require addressing the Boardman deferral in this**  
8 **case.**

9 The Joint Parties assert that addressing pending deferrals in rate cases is a well-settled  
10 Commission practice that PGE itself has advocated for in the past.<sup>18</sup> Neither of the examples they  
11 cite as support for this proposition are analogous to their effort to bring the Boardman deferral into  
12 this case. First, in docket UE 262, PGE requested to include in rates the revenue requirements  
13 associated with capital projects that were the subject of an *authorized* deferral.<sup>19</sup> In docket UE 262,  
14 the deferral had already been authorized in a separate proceeding before PGE sought to include it  
15 in rates.<sup>20</sup> Here, the Boardman deferral has not been agreed upon or authorized.

16 In the Joint Parties’ second example, docket UE 335, PGE filed testimony regarding  
17 suggested changes to its major storm accrual mechanism.<sup>21</sup> At the end of this testimony, PGE  
18 briefly noted that it also had filed a deferral in a separate docket, UM 1817, for storm-related

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<sup>16</sup> Joint Response at 3, 5 (citing UE 394, PGE/700, Jenkins-Cristea/3:9-19; 14:4-16; 17:7-11).

<sup>17</sup> UE 394, PGE/700, Jenkins-Cristea/1, 3, 14, 17.

<sup>18</sup> Joint Response at 2.

<sup>19</sup> *In re Portland General Electric Company Request for a General Rate Revision*, Docket UE 262, PGE/300, Tooman-Liddle/2 (Feb. 15, 2013) (“This base rates request includes approximately \$26.8 million of revenue requirements associated with capital projects that were subject to a deferral authorized in UE 215 (capital deferrals). These revenue requirements would likely be recoverable absent this filing.”).

<sup>20</sup> *See In re Portland General Electric Company Request for a General Rate Revision*, Docket UE 215, Order No. 10-478 at 6 (Dec. 17, 2010) (adopting stipulation in which parties agreed to support deferred accounting for the revenue requirement associated with the recovery of the capital costs of certain capital projects).

<sup>21</sup> *In re Portland General Electric Company Request for a General Rate Revision*, Docket UE 335, PGE/800, Nicholson-Bekkedahl (Feb. 15, 2018).

1 restoration costs not covered by the accrual mechanism and requested that the Commission  
2 approve the deferral “[t]o the extent that UM 1817 is unresolved.”<sup>22</sup> PGE did not file substantive  
3 testimony addressing the merits of the storm deferral request in docket UE 335. After the parties  
4 to docket UE 335 stipulated that the storm deferral would be addressed outside the rate case, the  
5 Commission initiated a full contested case process in docket UM 1817 to address whether the  
6 deferral should be authorized.<sup>23</sup> PGE filed its substantive testimony regarding the storm deferral  
7 in docket UM 1817. PGE’s testimony in docket UE 335 is entirely different from the Joint Parties’  
8 deferral testimony in this case.

9         The Joint Response also claims that the Commission need not approve the Boardman  
10 deferral before considering amortization.<sup>24</sup> While the Commission does not always engage in a  
11 full proceeding to determine authorization of a deferral—if the deferral is uncontested, for  
12 example—it does use robust procedures to consider deferrals that are large and contested, like the  
13 Boardman deferral.<sup>25</sup> In this case, Staff’s testimony regarding the Boardman deferral addresses  
14 whether the deferral should be authorized,<sup>26</sup> but AWEC’s and CUB’s joint testimony skips the  
15 authorization analysis and attempts to move directly into litigating amortization.<sup>27</sup> As Staff’s  
16 testimony implicitly recognizes, the parties and the Commission must first address whether the  
17 deferral meets the Commission’s standards. There is insufficient time and process in this rate case  
18 for a full and fair analysis of both authorization and amortization, if necessary.

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<sup>22</sup> Docket UE 335, PGE/800, Nicholson-Bekkedahl/17.

<sup>23</sup> See Docket UE 335, Third Partial Stipulation at 2 (Sept. 6, 2018); *In re Portland General Electric Company Application for the Deferral of Storm-Related Restoration Costs*, Docket UM 1817, Order No. 19-085 (Mar. 13, 2019) (initiating contested case process to consider deferral application).

<sup>24</sup> Joint Response at 8.

<sup>25</sup> See, e.g., *In re Application of PacifiCorp for an Accounting Order Regarding Excess Net Power Costs*, Docket UM 995.

<sup>26</sup> UE 394, Staff/1800, Storm/2-4, 7.

<sup>27</sup> UE 394, AWEC-CUB/100, Mullins-Gehrke/2 (“We recommend that these amounts be amortized to the benefit of ratepayers over a three-year period . . .”).



1 **D. It is premature for the Joint Parties to file testimony regarding the Boardman**  
2 **deferral to support a hypothetical settlement.**

3 The Joint Parties claim their deferral testimony is necessary to provide a robust evidentiary  
4 record for a potential future settlement of this case that includes the Boardman deferral.<sup>28</sup> As no  
5 such settlement has yet been reached, their testimony is premature at best. The deferral testimony  
6 should be stricken from the record now, and the Joint Parties remain free to file this testimony later  
7 if and when parties reach a settlement that involves the Boardman deferral. But the possibility of  
8 settlement does not justify including the testimony in the record at present.

9 Similarly, the Joint Parties' argument that addressing the Boardman deferral in this case  
10 will make it more likely that parties reach a settlement of the deferral does not provide a valid  
11 reason for including irrelevant testimony in this case.<sup>29</sup> Filing irrelevant testimony in an effort to  
12 force PGE to settle the issues therein is wholly inappropriate.

13 **E. Delaying a decision on the motion to strike will prejudice PGE.**

14 In an effort to forestall a decision striking their testimony, the Joint Parties note that they  
15 have until November 9 to seek certification of the ALJ's Ruling denying the motion to  
16 consolidate.<sup>30</sup> Notably, the Joint Parties do not state that they intend to seek certification, or even  
17 that they are still evaluating whether to seek certification; they simply state that they have the  
18 opportunity to do so.<sup>31</sup> Even if the Joint Parties were to seek certification of the denial of  
19 consolidation on the last possible day—the day after this reply is due—the belated certification  
20 request should not prevent efficient resolution of this motion to strike. In expediting the briefing  
21 schedule for the motion to strike, the ALJ recognized the need to resolve the motion quickly given

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<sup>28</sup> Joint Response at 2-3.

<sup>29</sup> Joint Response at 2, 7.

<sup>30</sup> Joint Response at 2.

<sup>31</sup> Joint Response at 2.

1 the compressed scheduled in this case. PGE requests that the ALJ continue handling the motion  
2 to strike in an expedited manner so that PGE will not be required to prepare a response to testimony  
3 that may be stricken.

## II. CONCLUSION

4 The Commission should reject the Joint Parties' attempt to relitigate the motion to  
5 consolidate and place the Boardman deferral at issue in this case. The deferral testimony is not  
6 relevant, is not currently necessary to support a settlement, and is likely to confuse the issues and  
7 constrain the rate case schedule. Therefore, PGE respectfully requests that the ALJ strike AWEC's  
8 and CUB's joint deferral testimony, AWEC's separate deferral testimony, and Staff's deferral  
9 testimony from the record in this case.<sup>32</sup>

Dated November 8, 2021

**MCDOWELL RACKNER GIBSON PC**



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<sup>32</sup> Docket UE 394, AWEC-CUB/100, Mullins-Gehrke; Docket UE 394, AWEC/100, Mullins/45-50; Docket UE 394, Staff/1800, Storm.