BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 394

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, Request for a General Rate Revision.	)	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

I. INTRODUCTION

Pursuant to OAR 860-001-0420(4) and Administrative Law Judge (ALJ) Lackey's October 29, 2021 Ruling, the Oregon Citizens' Utility Board (CUB), Alliance of Western Energy Consumers (AWEC), and Staff of the Public Utility Commission of Oregon (Staff) (Joint Parties) hereby file this Response to Portland General Electric Company's (PGE or the Company) Motion to Strike, filed on October 28, 2021.

In order to support judicial efficiency by addressing issues related to the cessation of PGE's Boardman coal-fired power plant alongside the holistic review occurring in the ongoing general rate case (GRC), CUB and AWEC jointly moved to consolidate Docket No. UM 2119 (Boardman deferral) with UE 394 on October 7, 2021. PGE filed a response opposing consolidation on October 15, 2021. On October 25, 2021, ALJ Lackey issued a ruling denying formal consolidation because it would "require amending the schedule to add a separate track for testimony from the parties to address the Boardman deferral request."[1] Although the ALJ concluded that adding a separate testimony track was procedurally impracticable, the ruling noted "that deferrals and their associated amortizations are often addressed within the context of

[1] UM 2119 and UE 394 – ALJ Lackey's Ruling at 2 (Oct. 25, 2021).

a GRC. Even absent consolidation the parties remain free to address any number of pending deferrals or amortizations within a comprehensive settlement process in this proceeding."[2]

Initially, the Joint Parties note that they have the opportunity to seek certification of the ALJ's ruling on or before November 9, 2021; consequently, PGE's Motion to Strike is premature, as the Joint Parties have not yet exhausted their administrative remedies. Further, contrary to the assertions made by PGE, AWEC and CUB filed joint testimony in this case to align with the ALJ's ruling and further the well-settled Commission practice of addressing pending deferrals in GRCs, like PGE has done in the past.[3] Similarly, AWEC and Staff filed separate Boardman deferral testimony in order to provide the Commission a robust evidentiary record—consistent with its preference[4]—to aid in the consideration of potential future settlement, as the ALJ's ruling indicated. PGE has already expressed opposition to the UM 2119 Boardman deferral.[5] If PGE's Motion to Strike is granted, it is highly likely UM 2119 will be litigated fully. Settlement is more likely to happen in the context of the UE 394 GRC because issues related to the UM 2119 Boardman deferral can be reviewed holistically in the context of costs and benefits forecast across PGE's system in the GRC. In a standalone proceeding, this is less likely to occur.

Joint Parties' testimony therefore furthers the potential for settlement—as the ALJ's

[2] *Id*. at 3.
[3] *See, e.g.,* UE 335 – PGE/800/Nicholson – Bekkedahl/17, lines 1-5 ("To the extent that UM 1817 is unresolved, [PGE] request[s] the Commission approve our deferral and apply these costs to our proposed balancing account."); *see also* UE 262 – PGE/300/Tooman – Liddle/2, lines 1-3 ("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).") (Requesting recovery of deferred amounts in the context of a GRC.).
[4] *See, e.g., in re Public Utility Commission of Oregon Investigation to Determine the Resource Value of Solar,* OPUC Docket No. UM 1716, Order No. 16-404 (Oct. 19, 2016) ("[W]e do not believe it to be in the public interest to make findings unless the record is sufficiently robust to inform sound decisions and to provide meaningful guidance and direction.").
[5] UM 2119 – Comments of Portland General Electric Company (Nov. 2, 2020).

Ruling indicated was appropriate—by creating a more robust record in the GRC. Importantly, in order to approve a stipulation, the Commission must conclude there is a sufficient record upon which to do so.[6] If issues contained in Joint Parties' testimony are to be potentially settled, there must be a record. Joint Parties' testimony helps achieve that regulatory need.

Beyond aligning with the ALJ's Ruling and strengthening the evidentiary record in this case, Joint Parties' respective testimony meets the legal standard to be included as evidence. Issues related to Boardman are highly relevant to this proceeding and are even included in PGE's Direct Testimony.[7] Deferrals are commonly addressed in GRCs alongside issues related to revenue requirement and utility expenditures.[8] The Joint Parties' testimony is relevant, in part, because it provides the Commission with significant probative value to help determine the proper overall just and reasonable rates to set in this GRC.[9] This probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.[10] Therefore, the Joint Parties respectfully request that the Commission deny PGE's Motion to Strike.

II. STANDARD OF REVIEW

[6] *In re Northwest Natural Gas Company, dba NW Natural, Request for a General Rate Revision*, OPUC Docket No. UG 344, Order No. 18-419 at 18 ("[W]e are not convinced there is a sufficient record to support approval of the second stipulation. . . . [W]e must base our decision on a more robust demonstration that the public interest support full recovery of the balance in customer rates.").
[7] *See* UE 394 – PGE/700/Jenkins – Cristea/3: 9-19; 14: 4-16; 17: 7-11.
[8] *Supra,* note 3; *see also* UG 347 – CNGC/200/Parvinen/4, lines 16-17 ("Cascade recommends that the Commission consider and approve the request for deferral as well as the Company's proposed amortization in this rate case."); *and* UG 221 – NWN/400/Feltz/6, lines 6-8 ("[T]he Company has requested the balance of deferred environmental expenditures be recovered in rates on a rolling five-year basis, reflecting expenditures and recoveries through time.").
[9] *Federal Power Comm'n v. Hope Natural Gas Co*., 320 U.S. 591, 603 (1944) (Discussion of just and reasonable rates.) (hereafter *Hope*); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313-315 (1989) ("The economic judgments required in rate proceedings are often hopelessly complex, and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.").
[10] OAR 860-001-0450(1)(c).

Relevant evidence is "evidence tending to make the existence of any fact at issue in the proceeding more or less probable than it would be without the evidence."[11] Relevant evidence is admissible "if it is a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs."[12] Commission rules state that relevant evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.[13] Evidence may be excluded on relevancy grounds if it does not relate to a "fact at issue" in the case.[14]

III. ARGUMENT

A. The Joint Parties' Boardman testimony relates to a "fact at issue" and is relevant to this proceeding.

The Joint Parties' testimony is highly relevant to this proceeding. In a GRC, the Commission's core responsibility is to review the record to set rates that are "just and reasonable."[15] To determine whether rates are just and reasonable, the Commission must look at overall rates, not cost recovery of individual rate elements.[16] CUB and AWEC have calculated the balance in the Boardman deferral to include at least $89,549,246 per year of revenue in connection with the plant's retirement.[17] The treatment of this balance is a fact at issue in this proceeding because it will have a substantial impact on the setting of overall just and reasonable rates. Further, it is at issue because PGE already addressed issues related to Boardman in its

[11] OAR 860-001-0450(1)(a).
[12] OAR 860-001-0450(1)(b).
[13] *In re PacifiCorp, dba Pacific Power, Request for a General Rate Revision,* OPUC Docket No. UE 374, ALJ Lackey Ruling at 2 (Dec. 16, 2020) citing OAR 860-001-0450.
[14] *In re Madras PV1, LLC v. Portland General Electric Company*, Docket UM 2009, Ruling Denying Motion to Strike at 3 (Dec. 9, 2019).
[15] *Hope*, *supra* note 10; *see also* ORS 756.040(1) ("[t]he commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates."); *see also* ORS 757.210(1)(a) (The Commission "may not authorize a rate or schedule of rates that is not fair, just and reasonable.").
[16] *Duquesne*, *supra* note 10.
[17] UE 394 – AWEC – CUB/100/Mullins – Gehrke/1-2.

Direct Testimony.[18] Contrary to PGE's arguments, the Joint Parties would be prejudiced and denied procedural due process if they did *not* have the opportunity to respond. Finally, the Boardman deferral—and, indeed, other deferrals—are at issue in this proceeding because the ALJ explicitly enabled parties to address pending deferrals.[19] This is consistent with longstanding Commission practice.[20]

PGE's only argument in support of its contention that the Joint Parties' testimony is irrelevant is the fact that the ALJ's Ruling denied formal consolidation of Docket No. UM 2119 into this proceeding.[21] PGE argues that the ALJ's Ruling does not preclude a settlement of this case that also addresses pending deferrals, but that it did not enable the Joint Parties' to file substantive testimony.[22] This makes little sense. Any stipulation accompanying a settlement must be supported by robust evidence to ensure its terms result in "just and reasonable" rates.[23] In essence, the Joint Parties argue that amortization of the Boardman Deferral in this case is a necessary component of establishing just and reasonable rates. Whether the Commission will ultimately agree with that position or not is irrelevant at this stage – the Joint Parties have the right to advance their position. Indeed, the Joint Parties do not understand the ALJ's Ruling to put them in a different position than if CUB and AWEC had not filed their motion to consolidate at all. AWEC's testimony also includes a recommendation to amortize PGE's wildfire and ice storm deferrals (docketed as UM 2115 and UM 2156, respectively),[24] yet PGE does not seek to strike this testimony despite these deferrals also not being formally consolidated with this rate case. PGE itself has previously proposed to amortize separately docketed deferrals in its general

[18] *See* UE 394 – PGE/700/Jenkins – Cristea/3: 9-19; 14: 4-16; 17: 7-11.
[19] UM 2119 and UE 394 – ALJ Lackey's Ruling at 2 (Oct. 25, 2021).
[20] *See, supra* notes 3 and 9.
[21] UE 394 – PGE's Motion to Strike at 4-5.
[22] *Id*.
[23] *Supra*, note 7.
[24] AWEC/100, Mullins/45-50.

rate cases;[25] it would be inequitable and contrary to due process to prohibit other parties from doing the same.

If the ALJ's Ruling enabled potential settlement of the Boardman deferral and others, it follows that parties must be able to sponsor witness testimony on these issues. Failing to do so would run counter to the requirement that the Commission's decisions be based on substantial evidence.[26] Under that requirement, the Court of Appeals has overturned Commission decisions when there is "nothing in the record" to substantiate its decision.[27] The Joint Parties' testimony is both highly relevant to this proceeding and its inclusion is necessary to ensure a robust record for Commission review.

B. The probative value of the Joint Parties' testimony is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.

Including the Joint Parties' testimony on the record in this proceeding will aid a timely resolution of all issues by giving the Commission more evidence with which to determine just and reasonable rates. Indeed, consideration of the Boardman deferral may aid the Commission in its review of other issues in this case by considering holistic impacts in setting just and reasonable rates. Since the issues will be addressed using the existing procedural schedule, the proceeding will not be delayed. PGE cannot reasonably argue it will be prejudiced because it will have ample opportunity to respond.

Including the Joint Parties' testimony will not confuse the issues in this proceeding or result in undue delay. If anything, examining the impacts of the Boardman deferral alongside an examination of PGE's overall revenue requirement will more efficiently use resources and

[25] *Supra,* note 3.
[26] ORS 183.480(8)(c); *see also, e.g., Calpine Energy Solutions, LLC v. Public Utility Commission of Oregon*, 298 Or App 143, 160-161 (2019)
[27] *Calpine*, 298 Or App 143, 161.

enable the Commission to employ flexible ratemaking processes. As discussed, if issues related to the Boardman deferral are addressed on a standalone basis in the UM 2119 proceeding, that proceeding will likely be litigated fully. Rather than having two contentious proceedings—UM 2119 and UE 394—enabling the Joint Parties' testimony on the record will decrease the burden on the Commission.

To determine just and reasonable rates in a GRC, "it is the result reached, not the method employed, that is controlling."[28] This allows the Commission tremendous flexibility to employ a variety of ratemaking tools, as long as they reach a just and reasonable result.[29] The Commission "sets rates under a comprehensive and flexible regulatory scheme. The legislature has expressed no specific process or method the Commission must use to determine the level of just and reasonable rates, and the Commission has great freedom to determine which of the many possible methods it will use."[30] Beyond being efficient, logical, and in line with the ALJ's Ruling, enabling consideration of the Joint Parties' testimony in this proceeding enables the Commission to employ its broad authority to set rates under a flexible scheme. Rather than considering the impact of the Boardman deferral on a standalone basis, the Commission can consider its impacts within the context of an overall rate review. This will enable parties to explore various alternatives to treat the impacts of Boardman cessation and will help the Commission determine whether inclusion of these costs in rates is just and reasonable. Under its broad authority, the Commission is not constrained by any specific ratemaking method.[31] Considering the Joint Parties' testimony in this GRC enables true regulatory flexibility and will

[28] *Hope* at 602.
[29] *Id*.
[30] OPUC Order No. 08-487 at 5.
[31] OPUC Order No. 08-487 at 4 (The legislature has provided the Commission with "the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function.").

enable parties to consider potential settlement in an efficient manner that furthers the public interest.[32]

C. PGE's insistence that the Commission must approve the deferral as a threshold legal matter is a red herring and confuses the deferral standard.

PGE continues to assert that the Joint Parties' testimony is inappropriate because the Commission has never approved the deferral.[33] PGE's argument misrepresents the standard for approving deferred accounting applications and ignores Commission precedent. The Commission rarely, if ever, rejects deferrals at their outset. Such a practice would arguably deny parties due process rights to justify why a deferral is necessary, which is typically addressed at amortization if there are outstanding issues via a contested case or the Commission's public meeting process. Countless deferrals are filed that accrue costs or benefits without any Commission action until they are eligible for amortization. At that time, parties are able to argue for inclusion of the deferred amounts in rates under the ORS 757.259(2)(e) statutory standard or the Commission's discretionary analysis.[34] Indeed, in PGE's own Docket No. UM 1817 deferral, the Commission did not rule on the application at the outset, but, instead, decided its outcome at the end of a fully contested proceeding. The lack of Commission action in UM 1817 did not, however, stop PGE from proposing to amortize the costs of this deferral in its last general rate case, UE 335.[35] Now, the Company seeks to prevent the Joint Parties from affording themselves the same rights to which PGE previously believed it was entitled.

Nothing prevents the Commission from determining the merits of a deferral in a general

[32] Contrary to PGE's position, Joint Parties are not providing testimony as a part of settlement negotiations. Rather, the intent is to create a robust evidentiary record upon which the Commission can accurately determine the reasonableness of any future potential settlement. *See* UE 394 – PGE's Motion to Strike at 5, lines 5-6.
[33] UE 394 – PGE's Motion to Strike at 3, 5.
[34] *See* OPUC Order No. 19-274 at 2-3.
[35] UE 335 – PGE/800/Nicholson – Bekkedahl/17. PGE's testimony was filed on February 15, 2018. The Commission did not consider PGE's deferral in UM 1817 until its March 12, 2019 public meeting.

rate case, *if* a sufficient record exists on which the Commission can base its decision. The Joint Parties have begun the development of that record with their testimony in this case, which PGE now seeks to prevent. This will harm judicial economy and the Commission's decision-making in this case. PGE's arguments are misguided and represent an attempt to subvert established Commission processes.

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IV. CONCLUSION

For the reasons discussed above, the Joint Parties respectfully urge the Commission to deny PGE's Motion to Strike.

Dated this 4th day of November, 2021

Respectfully Submitted,

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