

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1402

In the Matter of

PORTLAND GENERAL ELECTRIC
COMPANY,Application for Deferral of Incremental
Administrative Costs Associated with the
Trojan Refund.

ORDER

DISPOSITION: MOTION TO RESCIND BENCH REQUEST DENIED

I. INTRODUCTION AND BACKGROUND

On October 25, 2010, Portland General Electric Company (PGE) filed Advice No. 10-20, which would amortize in customer rates the deferred incremental administrative costs associate with the Trojan refund. The Public Utility Commission of Oregon (Commission) suspended Advice No. 10-20 for three months on January 12, 2011, and for an additional three months on March 17, 2011. During the suspension, Commission Staff and PGE filed a stipulation resolving all issues in the docket. Intervenors Utility Reform Project and Ken Lewis (collectively URP) objected to the stipulation, and a hearing was held on April 11, 2011.

On June 20, 2011, the Administrative Law Judge (ALJ) issued a bench request to PGE requesting further information. To allow sufficient time for PGE to respond to the bench request, and to allow further proceedings as necessary based on the responses received, we suspended Advice No. 10-20 for additional three months.¹ PGE submitted responses to the bench request on July 11, 2011. On July 15, 2011, URP filed an objection to the bench request. During a prehearing conference held on July 25, 2011, the Commission treated URP's objection as a motion to rescind the bench request and set a schedule for additional pleadings on the motion. PGE filed its response to the motion on August 4, 2011, and URP filed its reply in support of the motion on August 11, 2011.

Under OAR 860-001-00090(1)(j), the ALJ certified URP's motion to rescind the bench request to the Commission for resolution. In this order, we deny the motion.

¹ Order No. 11-197 (June 20, 2011).

II. PROCEDURAL ISSUES

URP's objection to the bench request presents three preliminary procedural issues for our resolution. First, no statute or administrative rule provides for objections to bench requests. Although we will consider the substance of the objection because the Chief Administrative Law Judge deemed it to be a motion to rescind the bench request and allowed further pleadings on the motion, we note that the administrative rules do provide a procedure that URP should have followed. OAR 860-001-0110 allows a party to request Commission review of an ALJ ruling by filing a motion for certification within 15 days of the date of service of the ruling. Although issued at the Commission's direction, the bench request was technically an ALJ ruling. URP should have filed a motion to certify the ruling within 15 days, rather than filing an objection 25 days after the bench request was served.

Second, URP attempts to incorporate new arguments by reference in its reply in support of the motion to rescind the bench request. Specifically, URP attempts to "adopt by reference the entire discussion" in an application for reconsideration filed in docket UE 196.² We will not consider arguments that are raised for the first time in a reply brief when those arguments are not directly in response to arguments made in another party's response. We therefore will not consider those arguments that URP attempts to incorporate by reference. In addition, we rejected the arguments raised in that application for reconsideration in Order No. 09-046 and see no reason to reconsider that decision in this docket.³

Finally, URP questions the impartiality of the ALJ assigned to this docket. If URP believes that the assigned ALJ's impartiality may reasonably be questioned, then URP may move to disqualify the ALJ under OAR 860-001-0100(2).

III. DISCUSSION AND RESOLUTION

In the motion to rescind the bench request, URP makes three primary arguments: (1) the bench request is unauthorized because neither the Commission's rules nor the Oregon Rules of Civil Procedure (ORCP) provide for bench requests; (2) a bench request is particularly inappropriate after the evidentiary record has closed; and (3) the bench request is inappropriate because it asks PGE to generate new evidence. We address each argument in turn.

A. **Is the Bench Request Unauthorized Because Neither the Commission's Rules nor the ORCP Provide for Bench Requests?**

1. *Parties' Positions*

In its motion to rescind the bench request, URP makes three primary arguments. First, URP argues that the bench requests are inappropriate because neither the Commission's rules nor

² Reply regarding Objection to Bench Request or Motion to Rescind Bench Request by Utility Reform Project and Ken Lewis (URP Reply) at 2 (Aug 11, 2011).

³ *In the Matter of Portland General Electric Company Application to Amortize the Boardman Deferral*, Docket No. UE 196, Order No. 09-046 at 3-8 (Feb 5, 2009).

the ORCP provide for bench requests. URP states that it has “never before encountered” a bench request in an administrative proceeding in Oregon.⁴ URP notes that it has “never seen such a request in any other agency case in any state” except in Washington, where bench requests are specifically permitted in the applicable administrative rules.⁵ URP also notes that the Oregon Attorney General’s Model Rules of Administrative Procedure do not provide for bench requests. URP claims that ORS 756.558 does not apply because that statute requires an “order of the commission,” not an ALJ ruling.

PGE responds that bench requests have become common practice in Commission proceedings, citing dockets UE 196 and UE 219. PGE notes that ORS 756.558 gives the Commission express authority to request additional information after the close of the record so long as the Commission gives other parties a reasonable opportunity to examine witnesses and offer rebuttal, which the Commission has done here.

2. *Resolution*

Although URP is correct that neither the Commission’s administrative rules nor the ORCP provide for bench requests in administrative proceedings, URP’s argument fails because the Commission is permitted to take additional evidence by ORS 756.558, and the ALJ has the delegated authority to request additional information under that statute.

An ALJ’s authority to act arises from the delegation of statutory authority made by the Commission under ORS 756.055(1), which provides that the Commission may delegate “any of the duties and powers imposed upon the commission by law” to any “named employee or category of employee.”⁶ Any act by an employee exercising delegated authority is considered “an official act of the commission.”⁷ In issuing the bench request, the ALJ was acting under the Commission’s direction and was exercising authority delegated by the Commission. The ALJ’s ruling is considered an “order of the commission” for the purposes of ORS 756.558(1).

B. Is a Bench Request Particularly Inappropriate After the Evidentiary Record is Closed?

1. *Parties’ Positions*

URP contends that bench requests are particularly inappropriate after the evidentiary record has closed. URP states that the evidentiary record in this docket closed “months ago,” and the bench request is a “reverse ex parte contact.” URP argues that it is inappropriate to request additional information from PGE without allowing other parties to conduct discovery, cross-examine witnesses, or submit rebuttal. URP contends that the Commission’s determination that further information is necessary is tantamount to a finding

⁴ Objection to Bench Request by Utility Reform Project and Ken Lewis at 1 (July 15, 2011).

⁵ *Id.*

⁶ The exceptions to the Commission’s ability to delegate its authority delineated in ORS 756.055(2) do not apply in this case.

⁷ ORS 756.055.

that PGE has failed to meet its burden of proof, and the appropriate remedy is to deny PGE's request. URP also argues that the bench request is inappropriate because it did not include an opportunity for other parties to examine witnesses and submit rebuttal testimony.

PGE responds by noting that the record in this docket was never officially closed. PGE also points out that the Commission has previously issued bench requests after closing the record, citing docket UE 196, and notes that ORS 756.558(1) allows requests for further information after the record has closed. PGE also argues that URP misunderstands the ex parte rules because an ALJ ruling served on all parties is not an ex parte communication.

2. *Resolution*

As PGE notes, the record in this docket was never closed. URP claims that the record closes at the close of the hearing, but URP is incorrect. The record closes upon an oral or written ALJ ruling. In this case, the ALJ did not close the record at the hearing because the parties had been instructed to submit revised exhibits. The Commission's decision to request further information came before the ALJ issued a written ruling closing the record.

Even if the record had been closed, ORS 756.558(1) allows the Commission (and the ALJ through delegated authority) to reopen the record and request additional information. As URP notes, the statute requires that other parties have the opportunity examine witnesses and rebut the additional evidence. Although the bench request itself did not give other parties this opportunity, we issued an order on the same day that the bench request was issued extending the suspension period in this docket for three months to allow for further proceedings.⁸ A schedule for those further proceedings, including an opportunity to URP to conduct discovery, submit testimony, and cross-examine witnesses was adopted during a prehearing conference on July 25, 2011.⁹

We agree with PGE that an ALJ ruling served on all parties is not an ex parte communication and the prohibitions on ex parte communications do not apply.

C. **Is the Bench Request Inappropriate Because it Asks PGE to Generate New Evidence?**

1. *Parties' Positions*

URP objects to the bench requests because the requests ask PGE to generate new evidence, and neither the Commission's rules nor the ORCP allow an ALJ to order a party to generate new evidence after the close of the evidentiary record. PGE did not specifically respond to this argument.

⁸ Order No. 11-197 (June 20, 2011).

⁹ Prehearing Conference Memorandum at 1 (July 26, 2011).

2. *Resolution*

URP cites no authority for the proposition that we cannot request that a party produce estimates of relative costs or assessments of the relative effectiveness of certain methods. The legislature has delegated broad authority to the Commission to supervise and regulate public utilities, including the right to compel information.


ORDER


IT IS ORDERED that URP's motion to rescind the bench request is denied for the reasons stated above.

Made, entered, and effective AUG 17 2011



John Savage
Commissioner



Susan K. Ackerman
Commissioner 



A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.