

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

PCN 6

In the Matter of

PORTLAND GENERAL ELECTRIC  
COMPANY,Petition for Certificate of Public  
Convenience and Necessity.

ORDER

DISPOSITION: MOTION TO STRIKE GRANTED; TESTIMONY TO BE  
CONSIDERED AS COMMENTS

**I. SUMMARY**

In this order, we grant the motion to strike filed by Portland General Electric Company (PGE) on October 14, 2024. We determine, as described below, that the testimony submitted by Save Stafford Road (SSR), can no longer be properly tested or developed through the contested case process and must therefore be excluded. We further find deficiencies in the testimony as filed, including not complying with the requirements of OAR 860-001-0480(10). Although we are sympathetic to SSR's challenges and recognize that its members seek to continue participation in other ways, due process and the rules for contested cases require that parties be able and willing to defend the written evidentiary testimony they file. A sound record, incorporating testimony that has been tested and is thus reliable, is essential for the careful decision-making required in a request for a Certificate of Public Convenience and Necessity (CPCN). Due to extenuating circumstances related to the significant investment by the Stafford Road community, however, we will allow the filing to remain in the docket as public comments from Ed Wagner.

**II. PROCEDURAL HISTORY AND MOTION TO STRIKE**

On October 14, 2024, Portland General Electric Company filed a motion to strike the testimony and exhibits filed on September 26, 2024, by SSR. PGE requests expedited consideration for its motion due to the October 30, 2024 deadline for its reply testimony. PGE states that it conferred with the Willamette Water Supply System (WWSS)

Commission and Staff. PGE represents that the WWSS Commission does not oppose the motion or request for expedited consideration and Staff takes no position.

PGE asserts that the testimony filed by SSR on September 26, 2024, was signed by Ed Wagner, a representative of SSR and appeared to be a mixture of factual information and legal arguments. PGE states that the company served data requests on SSR asking SSR to provide information as to the representative's qualifications to present the testimony in the filing, and that SSR did not respond to the data requests, but one week later withdrew from the proceeding. PGE argues that intervenor status carries certain responsibilities, including following the requirements for testimony set forth in Commission rules. PGE contends that because SSR is no longer a party to the case, SSR no longer has the right to file testimony or to swear to evidence at the hearing. PGE claims that, thus, the testimony filed by SSR on September 26, 2024, is unsworn testimony from an unqualified witness, offered by a sponsor who is no longer a party to the case. PGE concludes that this filing is not admissible as evidence because it is not the type of information that would be commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. PGE requests to strike the filing, arguing that by withdrawing SSR has relieved itself of the obligation to defend that testimony through either providing qualifications or making itself subject to cross-examination. PGE also opposes allowing the filing to remain on the record as public comments, arguing that this would create confusion about how the Commission would consider the content, and uncertainty for the parties about how to address it in their responsive filings.

On October 14, 2024, Kelly Bartholomew filed a petition to intervene in this docket as an individual, not represented by counsel. Ms. Bartholomew submitted an email to the Filing Center on October 14, 2024, noting her pending petition to intervene, opposing PGE's motion. While Ms. Bartholomew has not sought to intervene on behalf of SSR, she states that SSR ran out of funding to continue its participation and expresses concern with losing "the considerable information learned through SSR's hiring counsel and technical expertise." Ms. Bartholomew represents that there is "a strong possibility SSR will obtain funding to help continue as an intervenor." Numerous individuals submitted comments objecting to the motion to strike, raising concerns about transparency, fairness, and public participation.

### **III. RESOLUTION**

#### **A. Rights and Obligations of Parties to Contested Cases**

This docket is a contested case. Contested case processes are governed by laws and rules designed to ensure, among other things, that the validity of facts asserted can be tested in

the manner the legal system requires.<sup>1</sup> In a contested case, we must base our decisions on an evidentiary record developed in a trial-like proceeding. The integrity of contested case proceedings requires that parties develop this record by offering and testing the evidence presented through testimony, data requests, and the cross-examination of witnesses at hearings.

Becoming an intervenor in a contested case grants certain rights and requires acceptance of certain responsibilities. Rights granted include presenting evidentiary testimony,

cross-examining witnesses, and filing briefs. The corresponding responsibilities require intervenors to participate in discovery by answering written questions about the basis of their submitted testimony and to be subject to cross examination by other parties at the evidentiary hearing. A person who does not want the rights and responsibilities of full intervenor status as a party may monitor the docket and may submit public comments rather than intervene.

### **B. SSR Did Not Meet its Obligation to Support its Testimony**

SSR petitioned to intervene in this docket on May 2, 2024, and was granted intervenor status on May 14, 2024. SSR was represented by counsel throughout its participation in this proceeding, including the filing of testimony on September 26, 2024. On October 10, 2024, SSR's counsel filed to withdraw SSR as an intervenor from this proceeding. Due to its withdrawal, SSR is no longer a party to this proceeding. As a result, SSR will not be able to participate in the evidentiary hearing to allow for cross-examination on the testimony previously filed. This alone raises significant due process concerns necessitating exclusion of this testimony from the record.

In addition, there appear to be deficiencies with the testimony that call into question its admissibility. The witness whose name appears on the testimony is Ed Wagner, one of SSR's named representatives. This testimony, however, includes the work product of "SSR's technical consultant" (Wagner/17-30). This work product from the technical consultant was not provided as testimony from that individual. While Mr. Wagner could have been cross examined on his own contributions to the testimony, it appears that much of its content was not his own testimony. It is unclear why SSR's counsel submitted this material as testimony from the party representative, rather than as testimony by SSR's technical consultant, which would have allowed for that consultant to be cross examined

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<sup>1</sup> Contested case proceedings are subject to the most procedural requirements of any decision-making process used by the Commission, including the Administrative Procedures Act. The APA requires that final orders in contested cases be based upon the evidentiary record.

at the hearing.<sup>2</sup> Additionally, OAR 860-001-0480(10) requires that testimony includes a statement of the qualifications of the witness. In this case, no statement of the qualifications of the witness was provided.

We acknowledge that SSR and Ms. Bartholomew are seeking to resume or initiate intervenor status, but we are not persuaded that they can overcome our concerns with retaining the testimony. To gain intervenor status, SSR or any of its members would need to demonstrate that their “appearance and participation will not unreasonably broaden the issues, burden the record, or delay the proceedings.” In her October 18, 2024 filing regarding funding, Ms. Bartholomew asserts that SSR would not seek to delay the proceeding but rather would be “picking up where we left off and resuming the regular schedule.” We appreciate Ms. Bartholomew’s consideration of timing issues, but we find that maintaining SSR’s opening testimony within the current schedule will not be possible.

We are concerned with PGE’s assertion that SSR did not timely respond to data requests, and instead withdrew from the docket. SSR had an obligation to timely respond to the data requests of other parties,<sup>3</sup> as well as to correct deficiencies in its filed testimony. PGE’s reply testimony is due October 30, and it has not had the opportunity to test SSR’s testimony through discovery. Late intervention by Ms. Bartholomew as an individual or a new application for intervention by SSR simply cannot resolve the fairness concerns caused by failure to timely respond to discovery.

Ms. Bartholomew filed to intervene as an individual, and the ALJ granted her request subject to conditions in a ruling issued today. Ms. Bartholomew may be able to resolve some concerns about losing the information from the legal and technical experts SSR had hired by filing cross-answering and rebuttal testimony; to do so she will need to address the deficiencies in the testimony explained above, as well as accepting the responsibility to respond to discovery questions from other parties and making her witness subject to cross-examination at the hearing. She will also need to ensure that the portions submitted are within the scope of responding to issues raised by other parties in their opening and reply testimonies, as required for cross-answering and rebuttal testimony.

### **C. Treatment of SSR’s Testimony as Public Comment**

We received numerous comments objecting to PGE’s motion to strike, including from Ed Wagner and other members of the Stafford Road community. They oppose striking

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<sup>2</sup> OAR 860-001-0480(10) (“written testimony, when sworn to orally or in writing by the witness under oath to be true, will be received in the same manner as an exhibit. The written testimony must \* \* \* contain a statement of the qualifications of the witness.”)

<sup>3</sup> Under the Commission’s rules, the deadline to respond to data requests is 14 days. OAR 860-001-0540(1).

SSR's testimony from the record because they expended funds to obtain the legal and technical advice included in the testimony. We recognize that significant community resources have been expended and are unsure whether SSR's members understood the significance of SSR's withdrawal from the case; in response to those extenuating circumstances, we will consider retaining SSR's testimony as a written public comment from Ed Wagner.

The PUC has a process through which written and oral public comments are summarized and made part of Staff's written testimony. While the individual members of the public who submit these comments are not subject to cross examination, and thus their comments are not considered evidence upon which we can rely to determine factual issues in the docket, these exhibits demonstrate the public's areas of concern and highlight issues for possible inquiry by Staff and other parties. In its testimony, Staff summarizes the comments and may investigate and address specific issues raised in comments. Staff's testimony is then subject to cross-examination and Staff will seek to move its testimony into evidence when the record closes.

In addition to the oral public comments provided to all three Commissioners and an ALJ at the two public comment hearings held on July 23 and July 30, 2024, we have received many written public comments in this docket. Several are detailed, containing literature reviews, maps, permits, and other attachments. Public comments received on or before November 4, 2024, will be included as part of Staff's rebuttal testimony in this case.<sup>4</sup> Comments received after November 4, 2024, will be posted to the comment section of the docket and reviewed but will not become part of the record.

In considering treatment of SSR's testimony as a written public comment, we are faced with the unusual circumstance that much of the material contained in SSR's testimony appears to have been developed by a technical expert. To be treated as expert testimony and included in the record as a basis on which we can make our decision, as discussed above, it must be subject to discovery and cross examination. However, because we are sympathetic to concerns about the challenge of participating in contested case proceedings, we frequently attempt to make our processes more accessible by showing flexibility in our process where appropriate.

Therefore, with the express recognition that SSR's material will not be treated as expert testimony unless it is made part of the record in a manner consistent with our rules, we find that the opening testimony of Stafford Road may remain in the docket as public comments from Ed Wagner. Consistent with the memorandum issued June 27, 2024, the comments will be included with Staff's rebuttal testimony and Staff is free to further investigate the issues raised in them. However, as comments, these materials will not

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<sup>4</sup> Memorandum on Public Comments (June 27, 2024).

carry the weight of testimony and as a result the use of these comments by the parties and the Commission will be limited. As comments, rather than sworn testimony, these materials cannot be considered record evidence of the facts contained within the document. This is because, as we discussed above, there is no opportunity for discovery or cross-examination on the assertions in the document.

**IV. ORDER**

For the above reasons, PGE’s motion to strike is granted. The opening testimony of SSR will be allowed to remain in the docket as Ed Wagner’s public comments.

Made, entered, and effective Oct 22, 2024.

*Megan W. Decker*

**Megan W. Decker**  
Chair

*Letha Tawney*

**Letha Tawney**  
Commissioner

*Les Perkins*

**Les Perkins**  
Commissioner

