ORDER NO. 09-046

ENTERED 02/05/09

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 196

In the Matter of	)	
	)	
PORTLAND GENERAL ELECTRIC COMPANY	)	ORDER
	)	
Application to Amortize the Boardman Deferral.	)	

DISPOSITION: APPLICATION FOR RECONSIDERATION DENIED

On December 8, 2008, Administrative Law Judge (ALJ) Sarah Wallace issued a Bench Request to Portland General Electric Company (PGE) in the above-captioned docket. The Bench Request included eight questions, all related to PGE's installation and maintenance of the LP1 turbine at its Boardman generating facility. As part of the Bench Request, ALJ Wallace also reopened the record in this docket to allow PGE to submit testimony responding to the questions and to allow other parties to submit testimony in response.

The Industrial Customers of Northwest Utilities (ICNU) and the Citizens' Utility Board of Oregon (CUB) filed a Joint Application for Reconsideration (Application) of the decision to reopen the record on January 15, 2009. PGE submitted its Response in Opposition to Motion for Reconsideration (Response) on January 30, 2009. In this order, we deny the Application and affirm the ALJ's decision to reopen the record.

I. BACKGROUND

In docket UM 1234, PGE requested to defer the full costs of replacement power during an unexpected and prolonged outage at its Boardman generating plant caused by a crack in the LP1 turbine rotor. The Commission authorized deferral of $26.439 million in replacement power costs, which was approximately 58 percent of PGE's request. In this docket, PGE seeks authorization to amortize the $26.439 million in customer rates.

PGE filed its amortization request on October 9, 2007. Commission Staff, ICNU, and CUB participated as parties in the proceeding. After five rounds of pre-filed written testimony, a hearing was held on July 23, 2008. The record was closed by ALJ ruling issued August 19, 2008.

After determining that further information was needed to reach a decision in this docket, the Commission directed the ALJ to issue the December 8, 2008 Bench Request. The ALJ held a prehearing conference on December 10, 2008, to establish a schedule for further proceedings. At the conference, the ALJ adopted the schedule proposed by the parties, which includes three rounds of testimony and a hearing.[1]

II. PROCEDURAL ISSUES

ICNU and CUB's Application presents a preliminary procedural issue for our resolution. The Application was filed under ORS 756.561 and OAR 860-014-0095, which govern reconsideration of a Commission order and do not apply to ALJ rulings. To request Commission review of an ALJ ruling, a party must file a motion to certify the ruling to the Commission within 10 days of service of the ruling.[2]

Although issued at the request of the Commission, the Bench Request was technically an ALJ ruling, and ICNU and CUB should have filed a motion to certify within the 10-day deadline. ICNU and CUB did not file their Application until 36 days after service of the December 8, 2008 Bench Request. In addition, ICNU and CUB apply the legal standards applicable to a motion for reconsideration, rather than the standards for granting certification of an ALJ ruling.[3] Although we could deny ICNU and CUB's Application solely on these grounds, there was confusion during the prehearing conference regarding the applicable procedure, and the prehearing conference report specifically permitted ICNU and CUB to file a "motion for reconsideration."[4] Given this confusion, we will consider the substance of ICNU and CUB's Application.

III. DISCUSSION

The Commission may grant reconsideration if the applicant shows, among other things, an error of law in the order or good cause for further examination of a matter that is essential to the decision.[5] In their Application, ICNU and CUB contend that both grounds have been satisfied and raise three primary arguments. First, ICNU and CUB argue that the ALJ exceeded her authority by receiving further evidence in this docket without an express order of the Commission. Second, ICNU and CUB contend that the decision to reopen the record violates their procedural due process rights. Third, ICNU

[1] *See* Prehearing Conference Report at 1 (Dec 11, 2008).
[2] OAR 860-014-0091.
[3] *Compare* OAR 860-014-0095 (reconsideration of Commission orders) *with* OAR 860-014-0091 (certification of ALJ rulings).
[4] Prehearing Conference Report at 1.
[5] ORS 756.561; OAR 860-014-0095(3).

and CUB argue that the decision was imprudent and inconsistent with sound public policy.[6] We address each argument in turn.

A. Scope of ALJ Authority

1. Parties' Positions

In their Application, ICNU and CUB argue that the ALJ exceeded her authority by "allowing additional evidence to be received without an express order from the OPUC."[7] ICNU and CUB rely on ORS 756.558(1), which provides:

> At the conclusion of the taking of evidence, the Public Utility Commission shall declare the taking of evidence concluded. Thereafter no additional evidence shall be received except upon the order of the commission and a reasonable opportunity of the parties to examine any witnesses with reference to the additional evidence and otherwise rebut and meet such additional evidence.

ICNU and CUB read this statute to mean that the record may only be opened or closed by an express order of the Commission, not by an ALJ ruling.

PGE responds that opening and closing the evidentiary record is well within the scope of an ALJ's delegated authority under OAR 860-012-0035. PGE also points out that if ICNU and CUB are correct that a record may only be opened or closed by Commission order, then the record in this docket has never been properly closed and there is nothing preventing the submission of further evidence.

2. Resolution

We find that the ALJ did not exceed her delegated authority by reopening the record in this docket. Given ICNU's and CUB's lengthy experience practicing before the Commission, their argument that an ALJ does not have the authority to open and close evidentiary records is surprising. An ALJ's authority to act arises from the delegation of statutory authority by the Commission under ORS 756.055(1), which

[6] ICNU and CUB also argue that reopening the record violates OAR 860-011-0000(5), which requires "just, speedy, and inexpensive determination of the issues presented." ICNU and CUB do nothing more than assert, without support and without explanation, that further delay and further proceedings in this docket "greatly increases the costs" of participation. We do not address this argument because ICNU and CUB fail to explain *how* the decision to reopen increases costs or *why* the decision renders these proceedings unjust. Without such an explanation, this Commission cannot determine whether OAR 860-011-0000(5) has been violated.

[7] Application at 5.

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 employees."[8] Any act by an employee exercising delegated authority is "considered to be an official act of the commission."[9] The Commission has delegated to ALJs its authority decide procedural matters, including issuing rulings to open or close the record under ORS 756.558(1).[10] It has long been standard practice for the presiding ALJ to close the record at the conclusion of the taking of evidence. ALJs have also reopened proceedings after the record had been closed.[11]

As PGE points out, ICNU and CUB's argument is also contrary to their own interests. If they are correct that only the Commission may issue an order closing or reopening the record, then the ALJ's August 19, 2008 ruling closing the record was not effective, and the record has never officially been closed in this docket, which would eliminate any barrier to the submission of further evidence.

B. Procedural Due Process

1. Parties' Positions

As discussed above, this Commission has specific statutory authority to reopen proceedings to take further evidence.[12] ICNU and CUB acknowledge this statutory authority, but argue that the Commission's exercise of this authority is limited by the federal and state constitutions. Specifically, ICNU and CUB assert that constitutional guarantees of procedural due process limit the Commission's ability to reopen the record to receive evidence that existed before the record was closed and could have been submitted by PGE during the original proceedings.

ICNU and CUB believe that any deficiencies in the record were caused by PGE's tactical decision to withhold information or by PGE's neglect. Citing to precedent from civil and criminal court proceedings, ICNU and CUB argue that due process prohibits giving PGE another opportunity to present its case when it already had the opportunity to fully litigate the issues and did not submit evidence that it could have and should have submitted for tactical reasons. ICNU and CUB insist that the very fact that the Commission has requested further information from PGE proves that PGE has failed to meet its burden of proof, and the Commission should not give PGE a second opportunity to prove its case.

[8] ORS 756.055. The Commission can delegate any of its duties or powers except the authority to: sign an interim or final order after hearing; sign any order upon a Commission-initiated investigation; sign an order adopting a rule; enter orders on reconsideration or rehearing; or grant immunity from prosecution, forfeiture, or penalty. ORS 756.055(2). These exceptions do not apply to the decision to reopen the record.
[9] *Id*.
[10] OAR 860-012-0035 (1)(g).
[11] *See* Conference Report, Docket Nos. DR 10, UE 88, and UM 989 (Dec 21, 2007).
[12] ORS 756.558(1).

In its Response, PGE argues that ICNU and CUB have failed to cite relevant precedent or engage in the proper analysis. PGE notes that a "specialized body of law has developed around the application of the Due Process Clause in administrative proceedings," which ICNU and CUB seemingly ignore.[13] PGE further states that ICNU and CUB do not cite to any case where a party was denied due process because an administrative agency reopened a record for submission of additional evidence. PGE also denies that it withheld evidence for tactical reasons or due to neglect.

2. Resolution

We are not persuaded by ICNU and CUB's procedural due process arguments. "Due process requires the opportunity to be heard at a meaningful time and in a meaningful manner."[14] In this case, ICNU and CUB do not argue that they have not been given a meaningful opportunity to be heard. Rather, ICNU and CUB argue that this Commission is giving the parties *too many* opportunities to be heard. ICNU and CUB misunderstand the purpose of procedural due process requirements, which is to ensure that a person has a meaningful opportunity to be heard before being deprived of life, liberty, or property. The purpose of due process requirements it to provide a "safeguard against mistake."[15]

ICNU and CUB's reliance on precedent from civil and criminal court proceedings to support their arguments is misplaced. Procedural due process "'is not a technical conception with a fixed content unrelated to time, place and circumstances.'"[16] The procedural safeguards required in proceedings before an administrative agency are often far less stringent than those required court proceedings. PGE is correct that, in relying exclusively on precedent involving court proceedings, ICNU and CUB ignore a large body of precedent applicable to procedural due process requirements in administrative proceedings.

The Oregon and United States supreme courts have repeatedly held that three factors must be considered to determine the procedural due process requirements in any given case. "The process required by the Due Process Clause depends on the nature of the individual's interest that is at stake, the risk of an erroneous deprivation of that interest given the procedures used by the state, and the state's interest."[17] ICNU and CUB do not even mention these factors in their Application, much less attempt to use these factors to show how the cases they cite are analogous to this case.

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[13] Response at 6.
[14] *Cole v. Dept. of Motor Vehicles*, 336 Or 565, 588, 87 P3d 1120 (2004), citing *Mathews v. Eldridge*, 424 US 319, 333, 96 S Ct 893, 47 L Ed 2d 18 (1976).
[15] *Mathews*, 424 US at 345.
[16] *Maddox v. Clackamas County School Dist. No. 25*, 293 Or 27, 37, 643 P2d 1253 (1982), quoting *Cafeteria Workers v. McElroy*, 367 US 886, 895, 81 S Ct 1743, 6 L Ed 2d 1230 (1961).
[17] *Barrett v. Belleque*, 344 Or 91, 106, 176 P2d 1272 (2008), citing *Wilkinson v. Austin*, 545 US 209, 224-25, 125 S Ct 2384, 162 L Ed 2d 174 (2005). *See also Mathews*, 424 US at 335.

Furthermore, ICNU and CUB skip the essential first step in any procedural due process analysis—determination of the private interest at stake. The due process clause applies to state action that "deprives a person of a protected property interest."[18] ICNU and CUB do not identify any private property interest at stake in this proceeding, and it is questionable whether they could. In *G.A.S.P. v. Environmental Qual. Comm'n*, the Oregon Court of Appeals held that non-profit environmental advocacy groups and concerned citizens did not have a protected property interest implicating the Due Process Clause in a case involving approval of a chemical incinerator.[19] The court stated:

> [Petitioners] are not seeking a governmental benefit, nor are they threatened with governmental action against them. The interests that petitioners assert, and the issues that ORS 466.130 requires EQC to resolve, involve the public interest, not the private rights of any person. Although those issues may affect some members of the public more than others, nothing in ORS 466.005 to 466.385 creates a private interest in their correct resolution.[20]

This Commission is charged with representing utility customers "and the public generally" in "all controversies respecting rates."[21] Based on the court's conclusion in *G.A.S.P.*, it is unclear whether customer advocacy groups such as ICNU and CUB have a protected property interest that is implicated in rate proceedings.

Finally, the statute authorizing the Commission to reopen the record includes provisions designed to protect parties' due process rights: [I]f the Commission reopens the record and allows further evidence, the Commission must give parties a "reasonable opportunity" to "examine any witnesses with reference to the additional evidence and otherwise rebut and meet such additional evidence."[22] As discussed above, the schedule established in this docket gives ICNU and CUB the opportunity to submit testimony in response to any additional evidence submitted by PGE and the ability to cross-examine PGE's witnesses at a hearing. ICNU and CUB will also be able to file opening and reply briefs presenting argument about the additional evidence.

C. Policy Concerns

1. Parties' Positions

ICNU and CUB argue that there are strong policy reasons to refrain from "'reopening a case where there has been a lack of due diligence in producing all available evidence.'"[23] ICNU and CUB believe that PGE has failed to meet its burden of proof,

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[18] *Koskela v. Willamette Ind.*, 331 Or 362, 369, 15 P3d 548 (2000), citing *Cleveland Bd. of Educ. v. Loudermill*, 470 US 532, 538, 105 S Ct 1487, 84 L Ed 2d 494 (1985).
[19] 198 Or App 182, 108 P3d 95 (2005).
[20] *Id* at 193.
[21] ORS 756.040(1).
[22] ORS 756.558(1).
[23] Application at 8, quoting *Miller v. Miller*, 228 Or 301, 305 (1961).

and therefore this Commission should deny PGE's request for amortization rather than give PGE another opportunity to prove its case. ICNU and CUB claim that such a result is consistent with past Commission decisions, and the Commission should discourage a lack of diligence or tactical restraint.

ICNU and CUB further assert that the ALJ erred by only considering two options—reopening the record or dismissing without prejudice—and failing to consider the third option of dismissing with prejudice for failure to meet its burden of proof. ICNU and CUB claim that the Commission "*concedes*" that PGE has failed to meet its burden of proof by stating in the Bench Request that there is insufficient information to determine whether PGE was prudent in the installation and maintenance of the LP1 turbine rotor.[24] Given this "concession," ICNU and CUB argue that the only fair result is for the Commission to dismiss PGE's amortization application with prejudice.

PGE again asserts that it did not fail to submit evidence due to lack of diligence or tactical restraint. Instead, PGE states that it believed that it had provided sufficient evidence to support its case. PGE did not specifically respond to ICNU and CUB's assertions regarding failure to meet the burden of proof, but PGE states that it was appropriate for the Commission to exercise its statutory authority to reopen the record in this docket to receive further information.

2. Resolution

ICNU and CUB's arguments depend on one fundamental assumption—that PGE failed to meet its burden of proof in this case. This assumption is based upon ICNU and CUB's belief that the fact that the Commission needs further information is conclusive proof that PGE has not met its burden of proof. But ICNU and CUB's approach would effectively nullify ORS 756.558, because any Commission decision to reopen the record to receive further evidence would effectively and conclusively be a decision that the party bearing the burden of proof had failed to meet the burden.

Furthermore, contrary to ICNU and CUB's assertions, this Commission has not yet determined whether PGE has met its burden of proof. ICNU and CUB read too much into the statement in the Bench Request that "there is insufficient information" to make a determination about the prudence of PGE's actions in installing and maintaining the LP1 turbine rotor.

Although we reject ICNU and CUB's argument that PGE has failed to meet its burden of proof, and therefore it is unfair and against sound public policy to reopen the record, we clarify that ICNU and CUB are correct that PGE bears the burden of proof in this docket. There are two aspects to burden of proof: the burden of persuasion and the burden of production. The burden of persuasion in a deferral amortization case is always with the utility. The ultimate burden of producing enough evidence to support its claims is also with the utility. Other parties in the case, however,

[24] Application at 7, n 3 (emphasis in original).

have the burden of producing evidence to support their argument in opposition to the utility's position.

In this case, ICNU raised legitimate questions about PGE's actions in the installation and maintenance of the LP1 turbine. These questions were enough to make us want to investigate further to determine whether ICNU's claims were sufficient to overcome those presented by PGE. We found that the parties had not created a sufficient record to adequately investigate the question. In order to make a reasoned and well-supported decision, we chose to reopen the record and request further information.

We agree with ICNU and CUB that it is inappropriate for the party bearing the burden of proof to omit relevant information from the record due to lack of diligence or tactical restraint. There is no evidence, however, to support the contention that PGE purposefully omitted the information requested in the Bench Requests from the record. Although CUB indicated in testimony that it had difficulty getting information from PGE during discovery, PGE disputes these claims, and CUB's testimony is insufficient to determine whether PGE actually was withholding information. If CUB believed that PGE was withholding information, it should have filed a motion to compel. We do not monitor discovery requests, and do not know if a party is having difficulty obtaining information unless that party files a motion to compel with the Commission. We emphasize that we expect utilities to error on the side of producing too much information in response to data requests rather than too little.

We disagree with ICNU and CUB's assertion that the ALJ erred in apparently considering only two options (dismissing without prejudice or reopening the record) and failing to consider a third option—dismissing the amortization application with prejudice. As the ALJ made clear in the prehearing conference, this Commission considered *all* options before deciding that more information was necessary to proceed. Given our conclusion that more information was necessary, there were two options available to obtain that information.

Finally, PGE notes in its Response that we have not yet ruled on Staff's motion to abate these proceedings. We have taken the motion under advisement. We ask that Staff indicate whether it would still like to pursue its motion after the close of evidence in the reopened proceedings.

We conclude that ICNU and CUB have failed to establish an error of law or good cause for further examination of the decision to reopen the record in this proceeding. ICNU and CUB's Application must therefore be denied.

IV. ORDER

IT IS ORDERED that the Joint Application for Reconsideration of the Industrial Customers of Northwest Utilities and the Citizens' Utility Board of Oregon is denied. The decision to reopen the record as set forth in the Bench Request issued December 8, 2008, is affirmed.

Made, entered, and effective FEB 0 5 2009.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.