PUBLIC UTILITY COMMISSION OF OREGON
INTEROFFICE CORRESPONDENCE

DATE: July 11, 2001

TO: Commissioners Roy Hemmingway, Joan Smith, and Roger Hamilton

FROM: Sam Petrillo

SUBJECT: Docket AR 395, Triennial review of procedural rules

SUMMARY RECOMMENDATION:

I recommend that the Commission open a docket to consider proposed changes to procedural rules relating to depositions, data requests, pleading deadlines, and prior conflicting rules (rules 860-013-0050, 860-014-0065, 860-014-0070, 860-014-0096). I recommend that the Commission decline to open a rulemaking to consider proposed changes to the agency's procedural rules regarding the numbering of testimony/exhibits, official notice, and issuance of proposed orders (rules 860-013-0040, 860-014-0050, and 860-014-0092).

DISCUSSION:

OAR 860-013-0040 (Format of Pleadings, Testimony, and Exhibits)

Subsection (3) states that, unless otherwise directed by the Presiding Administrative Law Judge, written testimony and exhibits shall include the party's name and exhibit number, and the witness's name and the page number at the top right corner of each page.

Qwest requests that the form of testimony be changed to more closely mirror the format Qwest uses in other states. Qwest requests that each page of testimony and exhibit include a header that states the name of the Commission, the docket number, the name of the company, the name of the witness, the page number, and the date. In the alternative, Qwest requests that prenumbering of testimony and exhibits be eliminated and documents be numbered at the hearing.

Qwest states that its proposal would simplify prenumbering of testimony and exhibits. That may be true for Qwest, but other parties may find it more cumbersome and time consuming to include six pieces of information on each page rather than the four now required. More significantly, Qwest's proposal deletes the requirement that each page identify the exhibit number, thereby making review of documents more difficult. A reader opening a lengthy exhibit somewhere in the middle frequently needs to know the exhibit number. If the page opened does not reveal that information, further investigation is required to identify the exhibit number.

The Commission’s current method of prenumbering testimony and exhibits has been very effective. It assists parties preparing for a hearing by allowing them to identify each document and page with specificity. It also permits transcripts to clearly identify the each document discussed during the hearing. In dockets where numerous documents are prefiled, our prenumbering system substantially reduces time at the hearing.

For these reasons, I recommend that the Commission decline to open a rulemaking to consider the changes to OAR 860-013-0040 proposed by Qwest.

OAR 860-013-0050 (Time for Filing Responses)

Rule 860-013-0050 specifies the time for filing answers, replies, or motions. Subsection (1)(a) requires that an answer to a complaint, application, or petition be filed within 20 days of service. Verizon Northwest Inc. points out that, pursuant to particular statutes, some rules provide different time deadlines for filing responses. Verizon recommends adding the phrase "Unless otherwise specified" to Subsection (1)(a). I agree with Verizon's recommendation. I also believe the Commission and Administrative Law Judges should have flexibility to change the time lines in individual cases, and have proposed language to that effect. I also recommend reducing the time for responding to petitions to intervene. The current rule allows 20 days to respond to complaints, applications, or petitions. It should not take a party that long to decide if it wants to object to a petition to intervene. Reducing the time to 10 days should expedite the resolution of disputes.

OAR 860-015-0050(1)(b) deals with to answers to consumer complaints filed under OAR 860-021-0015. I recommend deleting the word "consumer" to correspond with changes recommended elsewhere in these rules.

OAR 860-013-0050(2) provides that a reply to a motion or a responsive pleading must be filed within 15 days of service of the pleading against which the reply is directed. Verizon points out that subsection (3)(d) specifies that a response to a motion shall be filed within 15 days of service of the motion. The reference in subsection (2) to motions duplicates the specific language in subsection (3)(d). I recommend the Commission consider deleting the phrase "a motion or" from OAR 860-013-0050(2).

I recommend the Commission open a rulemaking to consider making the changes to OAR 860-013-0050 described above.

OAR 860-014-0050 (Official Notice)

This rule allows the Commission to take official notice of certain matters. They include matters of which judicial courts take judicial notice, rules and orders of the Commission, and scientific facts. Subsection (e) permits the Commission to take official notice of documents and records in the files of the Commission that have been made a part of the file in the regular course of performing the Commission's duties. When official notice is taken of a matter, the Commission or presiding officer notifies the parties either during the hearing or in the proposed or final order. A party objecting to the taking of official notice may then explain or rebut the noticed fact.

Qwest recommends that subsection (e) be deleted. It points out that a Commission file could contain letters or other unsubstantiated statements put in a file, and could unfairly prejudice a party. Qwest contends that finding out that official notice has been taken when the final order issues is too late to rebut it. Qwest made similar arguments during the last

triennial review of Commission rules and the Commission declined to investigate changes to the official notice rule.

The Commission's statutory obligations require it to consider many different types of proceedings, investigations, and procedures, and to issue orders establishing policies that significantly affect the utility industry. At the same time, the agency also issues numerous orders on routine matters where no hearing is held and the order is supported by reports and other documents that are filed as part of the Commission's duties. The Commission takes official notice of those documents and issues an order. Of course, every Commission order must be supported by substantial evidence. Qwest's proposal would not allow the Commission to use a practical and efficient method of processing some types of cases.

The current rule restricts official notice to documents that have been made a part of the file in the regular course of the Commission's business. Unreliable and questionable documents should not be put in Commission files. As emphasized above, parties always have the opportunity to explain or rebut any facts officially noticed. Qwest did not cite any instances of specific problems with official notice, and its concern seems to be speculative. I recommend that the Commission decline to open a rulemaking to delete OAR 860-014-0050(e).

OAR 860-014-0065 (Depositions)

Subsection (2) states that "A party proposing to take a deposition shall notify in writing every other party and the Commission or Administrative Law Judge." Some Administrative Law Judges note that the requirement to service the notice on the Commission or Administrative Law Judge is unnecessary and should be deleted. They point out that the notices simply cause extra work docketing and filing the notices.

Discovery matters, including depositions, do not normally require the involvement of the Commission or Administrative Law Judge. Therefore, notices of depositions sent to the Commission place an unneeded burden on the parties and Commission support Staff. Of course discovery disputes can still be brought to the attention of the Commission. I recommend that the Commission open a rulemaking to consider the proposed changes to OAR 860-014-0065.

OAR 860-014-0070 (Data Requests)

Subsections (2) and (4) of this rule address disputes among parties regarding data requests. Verizon suggests that the two subsections can be combined into one subsection addressing the subject. I agree that it is logical to combine the two related subsections into one subsection and recommend that the Commission open a rulemaking to consider the proposed changes to OAR 860-014-0070.

OAR 860-014-0092 (Proposed Orders)

OAR 860-014-0092 allows an Administrative Law Judge to issue a Proposed Order after a contested case hearing at the Commission's direction. Qwest believes that Administrative Law Judges should routinely issue a Proposed Order after a contested case hearing, rather than doing so only at the direction of the Commission. It is a matter of the default

practice — whether a Proposed Order or a Commission Order is usually the first document served on the parties after a contested case hearing. Qwest proposes that a Proposed Order be issued whenever any party requests it.

As stated above, this agency is currently engaged in a process of consulting with stakeholders about implementation of the recommendations of the HB 3615 Interim Task Force on the structure of the Public Utility Commission. The issue of Proposed Orders is among the subjects included in those discussions. Formulation of a rule relating to Proposed Orders should await Commission action on the recommendations that will be made at the completion of the stakeholder discussions. I recommend that the Commission decline to consider a rule on Proposed Orders as part of this proceeding.

OAR 860-014-0096 (Prior Conflicting Rules)

Rule 860-014-0096 states that "Any prior rules conflicting with these rules are superseded." Verizon points out that the "Rules that are effective are those approved by the Commission and set forth in the OAR pursuant to statutory requirements for notice and publication. Since 'prior conflicting rules' will not exist in the Rules finally approved, the meaning of this provision is unclear. Verizon, therefore, recommends that OAR 860–14-0096 be deleted."

Verizon's point seems logical. The reason OAR 860-014-0096 is included in our rules is unclear. I recommend that the Commission open a rulemaking to consider deleting OAR 860-014-0096.

STAFF RECOMMENDATIONS:

I recommend that an investigation be opened to determine if OAR 860-013-0050, OAR 860-014-0065, OAR 860-014-0070, or OAR 860-14-0096 should be amended. The Commission should decline to open a rulemaking to consider proposed changes to OAR 860-013-0040, OAR 860-014-0050, and OAR 860-014-0092.

860-013-0050
Time for Answer, Reply, or Motion

(1) **Unless otherwise specified or directed by the Commission or Administrative Law Judge, ~~A~~a**nswers shall be filed as follows:

(a) An answer to a complaint, application, or petition shall be filed within 20 days after service.

(b) An answer to a ~~**consumer**~~ complaint under OAR 860-021-0015 shall be filed within 15 days after service.

(c) An answer to a petition to intervene shall be filed within 10 days after service.

(2) A reply to ~~**a motion or**~~ a responsive pleading shall be filed within 15 days of service of the pleading against which the reply is directed.

(3) Motions shall be filed as follows:

(a) A motion against a complaint, application, or petition shall be filed within 20 days of service.

(b) A motion against an answer or protest shall be filed within 15 days of service.

(c) A motion against a reply shall be filed within ten days of service.

(d) Unless otherwise specified by these rules or the Administrative Law Judge, a written response to a motion shall be filed within 15 days of service of the motion.

(4) Objections to the Commission's jurisdiction or that a pleading does not state facts sufficient to constitute grounds for relief are never waived.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759

Stats. Implemented: ORS 756.040 & 756.500 through 756.575

Hist.: PUC 18, f. 1-21-55, ef. 9-1-54 (Order No. 33203); PUC 120, f. 10-26-62, ef. 11-15-62 (Order No. 38811); PUC 135, f. 5-9-66, ef. 5-15-66 (Order No. 42332); PUC 148, f. 7-29-68, ef. 9-1-68 (Order No. 44783); PUC 155, f. 7-3-73, ef. 7-15-73 (Order No. 73-436); Renumbered from 860-13-010; PUC 179, f. 3-18-77, ef. 4-1-77 (Order No. 77-163); PUC 1-1985, f. & ef. 2-1-85 (Order No. 85-075); PUC 10-1994, f. & ef. 7-21-94 (Order No. 94-1127); PUC 15-1997, f. & ef. 11-20-97 (Order No. 97-443); PUC 12-1999, f. & ef. 11-18-99 (Order No. 99-709)

860-014-0065
Depositions

(1) The testimony of any witness may be taken by deposition at any time before the hearing is closed.

(2) A party proposing to take a deposition shall notify in writing every other party ~~**and the Commission or Administrative Law Judge (ALJ)**~~. Unless notice is waived, a party shall provide ten days' notice to the parties of a deposition to be taken within the state and 15 days' notice for a deposition to be taken elsewhere. The notice shall state the witness's name and address, the subject matter on which the witness is expected to testify, the time and place of taking the deposition, the name and address of the officer before whom the deposition is to be taken, and the reason why the deposition is to be taken. Other parties in the proceeding may make any appropriate response to the notice of deposition.

(3) A party may take a deposition before a person designated in the notice or agreed upon by the parties. The Commission or **Administrative Law Judge (**ALJ**)** may impose such conditions on the taking of the deposition as may be necessary to ensure fairness in the proceeding.

(4) Every person whose testimony is taken by deposition shall swear or affirm concerning the matter about which s/he shall testify. The testimony shall be transcribed. The person before

whom the deposition was taken shall certify, under oath on the transcript, that the witness was sworn in the reporter's or transcriber's presence, and the transcript is a true record of the testimony or a correct transcription of the recording.

(5) The deposition shall conform to the requirements of OAR 860-013-0040.

(6) A party may examine a deponent on any matter not privileged which appears reasonably calculated to lead to the discovery of evidence relevant to the issues involved in the pending proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts.

(7) Unless received in evidence by the Commission or ALJ, no portion of a deposition shall constitute a part of the record in the proceeding. A party may object at the hearing in the proceeding to receiving in evidence any portion of the deposition. Upon request, the party examining the deponent shall provide the Commission or ALJ a transcribed copy of any deposition taken in the proceeding.

(8) The party requesting the deposition shall pay the deponents and the person taking the deposition the same fees as are paid for like services in the courts of record of the state in which the deposition is taken.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759

Stats. Implemented: ORS 756.040 & 756.500 through 756.575

Hist.: PUC 155, f. 7-3-73, ef. 7-15-73 (Order No. 73-436); PUC 1-1985, f. & ef. 2-1-85 (Order No. 85-075); PUC 15-1997, f. & ef. 11-20-97 (Order No. 97-443); PUC 12-1999, f. & ef. 11-18-99 (Order No. 99-709)

860-014-0070
Data Requests

(1) Subject to limitations imposed by the Commission or Administrative Law Judge (ALJ), the Commission, ALJ, or any party may submit data requests to any party. Data requests are written interrogatories or requests for production of documents. The data requests shall be answered within ten Commission business days from the date of service. Each data request shall be answered fully and separately in writing or by production of documents, unless objected to, in which event the objection shall be written in lieu of answer.

(2) If the party to whom the data requests are directed refuses to answer or objects to any data request, the Commission or ALJ shall rule upon the objection and may compel an answer or impose sanctions for refusal to answer. **Any motion regarding disputed data requests submitted to the Commission or ALJ, whether by motion or otherwise, shall contain a certification that the parties have conferred and been unable to resolve the dispute. The certification may be included in the body of the motion. Any motion which does not contain this certification will be denied.**

(3) Any party may offer into evidence data requests and the answers to the data requests. Upon request, the party answering the data request shall provide the Commission or ALJ a copy of the answer to any data request. Any objection to substance or form of any data requests or answers shall be attached to the submitted data requests with specific reference and grounds. The Commission or ALJ shall rule on objections before receiving the submitted data requests in evidence. Every remedy available to a party using deposition procedures shall be available to a party using data requests.

~~**(4) Any motion regarding disputed data requests submitted to the Commission or ALJ, whether by motion or otherwise, shall contain a certification that the parties have**~~

~~**conferred and been unable to resolve the dispute. The certification may be included in the body of the motion. Any motion which does not contain this certification will be denied.**~~

(~~**5**~~**4**) Parties are not required to file data requests or responses to data requests with the Commission, except when requesting resolution of a discovery dispute under these rules.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759

Stats. Implemented: ORS 756.040 & 756.500 through 756.575

Hist.: PUC 155, f. 7-3-73, ef. 7-15-73 (Order No. 73-436); PUC 1-1985, f. & ef. 2-1-85 (Order No. 85-075); PUC 10-1994, f. & ef. 7-21-94 (Order No. 94-1127); PUC 11-1995, f. & ef. 11-27-95 (Order No. 95-1217); PUC 13-1995, f. & ef. 12-12-95 (Order No. 95-1284); PUC 1-1996, f. & ef. 2-21-96 (Order No. 96-043); PUC 15-1997, f. & ef. 11-20-97 (Order No. 97-443); PUC 12-1999, f. & ef. 11-18-99 (Order No. 99-709)

860-014-0096

~~**Prior Rules**~~

~~**Any prior rules conflicting with these rules are superseded.**~~

~~**Stat. Auth.: ORS Ch. 183, 756, 757 & 759**~~

~~**Stats. Implemented: ORS 756.040 & 756.500 through 756.575**~~

Hist.: PUC 179, f. 3-18-77, ef. 4-1-77 (Order No. 77-163); PUC 1-1985, f. & ef. 2-1-85 (Order No. 85-075)**; Repealed**