

**PUBLIC UTILITY COMMISSION OF OREGON  
ADMINISTRATIVE HEARINGS DIVISION REPORT  
PUBLIC MEETING DATE: May 28, 2002**

REGULAR \_\_\_\_\_ CONSENT  x  EFFECTIVE DATE \_\_\_\_\_

**DATE:** May 14, 2002

**TO:** Commissioners Hemmingway, Smith, and Beyer

**FROM:** Tom Barkin, Chief Administrative Law Judge through Terry Lambeth

**SUBJECT:** AR 440: Initiate a Rulemaking to Amend OAR 860-012-0007 Relating to Staff Representation in Contested Cases Involving OTAP/TDAP.

**ADMINISTRATIVE LAW JUDGE RECOMMENDATION:**

I recommend the Commission adopt the proposed amendment to the administrative rule authorizing Commission Staff to represent the Commission in cases involving recovery of telecommunications assistive devices, or the value of the devices, and the cost to repair the devices, and cases on the termination of Oregon Telephone Assistance Program (OTAP) and Telecommunications Devices Access Program (TDAP) benefits.

**DISCUSSION:**

I recommend the Commission propose an administrative rule that will authorize Residential Service Protection Fund (RSPF) staff members to sign complaints and appear in a representative capacity at hearings in two types of cases. The first type of case involves the Commission program to lend assistive devices to Oregonians with disabilities. At times, some leasees fail to return these devices or to return the devices in proper working order as required by the terms of their leases. To recover these telecommunications devices, the value of the devices, or the cost to repair the devices, the Commission must file a complaint initiating a contested case.

Another type of case is the termination of Oregon Telephone Assistance Program benefits. These cases arise when the Commission receives notice that the recipients of the benefits have lost eligibility. After notice of intent to terminate benefits, a recipient may request a hearing.

Both of these types of cases may require a representative of the agency to sign complaints, present evidence, or cross-examine witnesses. The Commission's RSPF staff is quite capable of performing these functions.

ORS 183.452 allows an agency representative to present evidence, examine and cross-examine witnesses, and make arguments relating to:

- (a) Application of statutes and rules to the facts in the contested case;
- (b) Actions taken by the agency in the past in similar situations;
- (c) Literal meaning of the statutes or rules at issue in the contested case;
- (d) Admissibility of evidence; and
- (e) Proper procedures to be used in the contested case hearing.

The types of cases described above have these characteristics. In order for the Commission to allow staff to represent the agency, it must adopt a rule authorizing the staff person to represent the agency and the Attorney General's (AG's) office must consent to the representation. In the letter attached as Appendix A, the AG office has already consented to the representation.

What remains is for the Commission to adopt a rule authorizing staff to represent the agency in the matters described above. The attached proposed rule does that. I recommend the Commission propose an administrative rule that adds the following language to OAR 860-012-0007:

- (3) Public Utility Commission Staff may represent the agency in a contested case hearing in the following proceedings:
  - (a) Actions initiated by the Commission to recover telecommunications assistive devices, or the value of devices which the recipients fail to return, or the cost of repairing the equipment which the recipient returned in a damaged condition; and
  - (b) Denial or termination of Oregon Telephone Assistance Program benefits.

The proposed rule is found in Appendix B. Because this proposed rule does not raise issues of significant public interest, I recommend that the notice of proposed rulemaking state the Commission will only hold a hearing upon request.

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**PROPOSED COMMISSION MOTION:**

Docket AR 440 be opened to amend OAR 860-012-0007 authorizing Commission Staff to represent the Commission in cases involving recovery of telecommunications assistive devices, or the value of the devices, and the cost to repair the devices, and cases on the termination of OTAP/TDAP benefits, as proposed in Appendix B.

Open AR 440 -- public meeting memo for 5-28-02.doc



HARDY MYERS  
Attorney General

PETER D. SHEPHERD  
Deputy Attorney General

**DEPARTMENT OF JUSTICE**  
GENERAL COUNSEL DIVISION

April 22, 2002

Tom Barkin, Administrative Law Judge  
Administrative Hearings  
Public Utility Commission of Oregon  
550 Capitol St. NE – Ste 215  
Salem, OR 97301-2551

Re: Proposed OAR 860-012-0007

Dear Mr. Barkin;

I understand that the PUC is requesting approval of a proposed amendment to OAR 860-012-0007, which would authorize an agency representative to appear on behalf of the Commission in:

- (1) Actions initiated by the PUC to recover telecommunications assistive devices, the value of such devices or the cost to repair such devices; and
- (2) Actions initiated by the PUC to deny or terminate Oregon Telephone Assistance Program benefits.

I also understand that these cases involve issues of historical fact, as opposed to legal issues, that the cases are quite simple and that few of them go to hearing.

Because the cases covered by the proposed amendment appear to be routine, we consent to the representation of the PUC by an agency representative.

The statute under which consent is granted, ORS 183.452, allows:

“... the agency representative to present evidence, examine and cross-examine witnesses, and make arguments relating to the:

- (a) Application of statutes and rules to the facts in the contested case;
- (b) Actions taken by the agency in the past in similar situations;
- (c) Literal meaning of the statutes or rules at issue in the contested case;
- (d) Admissibility of evidence; and
- (e) Proper procedures to be used in the contested case hearing.”

*Appendix A*

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With the exception of the provisions set out in (a) through (e) of ORS 183.452(4), the agency representative may not present legal argument in the types of types of contested case hearings covered by the PUC's proposed amendment. ORS 183.452(3).

Please bring any legal issues that may arise in hearings to the attention of your assigned legal counsel.

Sincerely,

**/s/Donald C. Arnold**

Donald C. Arnold  
Chief Counsel  
General Counsel Division

DCA:na/GENB4775

*Appendix A*

(1) For purposes of this rule, the words listed below shall have the following meanings:

(a) "Authorized representative" means a member of a partnership; an authorized officer or regular employee of a corporation, association, or organized group; or an authorized officer or employee of a governmental authority other than a state agency.

(b) "Commission" means the Public Utility Commission of Oregon.

(c) "Contested case" means a proceeding before the Commission in which a person is provided the opportunity for a hearing which is substantially of the character described in ORS 183.310(2).

(d) "Legal argument" includes argument on:

(A) The jurisdiction of the agency to hear the contested case;

(B) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency; or

(C) The application of court precedent to the facts of the particular contested case proceeding.

(e) "Legal argument" does not include presentation of evidence, examination, and cross-examination of witnesses, presentation of factual arguments, or argument on:

(A) The application of the facts to the statutes or rules directly applicable to the issues in the contested case;

(B) Comparison of prior actions of the agency conducting the proceeding;

(C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case; or

(D) The admissibility of evidence or the correctness of procedures being followed.

(2) Except for the Commission's staff, a party or interested person participating in a contested case hearing before the Commission may be represented by an authorized representative, following a determination that the appearance by an authorized representative will not unreasonably broaden the issues, delay the proceeding, or otherwise hinder the orderly and timely development of the record:

(a) On or before the first appearance by an authorized representative, the Administrative Law Judge (ALJ) must be provided with a letter authorizing the named representative to appear on behalf of a party or interested person; and

(b) The ALJ shall have authority to limit an authorized representative's presentation of evidence, examination, and cross-examination of witnesses, or presentation of factual arguments to ensure the orderly and timely development of the hearing record. The ALJ shall not allow an authorized representative to present legal argument as defined in subsection (1)(d) of this rule.

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

Stats. Implemented: ORS 756.040 & 756.500 through 756.575

Hist.: PUC 10-1994, f. & ef. 7-21-94 (Order No. 94-1127); 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)

ALJ's Proposed Amendment to OAR 860-012-0007  
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**(3) Public Utility Commission Staff may represent the agency in a contested case hearing in the following proceedings:**

**(a) Actions initiated by the Commission to recover telecommunications assistive devices, or the value of devices which the recipients fail to return, or the cost of repairing the equipment which the recipient returned in a damaged condition; and**

**(b) Denial or termination of Oregon Telephone Assistance Program benefits.**

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

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

**Hist.: NEW**