

**PUBLIC UTILITY COMMISSION OF OREGON
ADMINISTRATIVE HEARINGS DIVISION REPORT
PUBLIC MEETING DATE: October 5, 2004**

REGULAR _____ **CONSENT** X **EFFECTIVE DATE** _____ **N/A** _____

DATE: September 16, 2004

TO: Commissioners Beyer, Baum, and Savage

FROM: Michael Grant, Administrative Law Judge

REVIEWED BY: Terry Lambeth, Rules Project Leader

SUBJECT: AR 489: Initiate a rulemaking to amend rules governing ex parte communications.

ADMINISTRATIVE LAW JUDGE RECOMMENDATION:

Pursuant to ORS 756.060, I recommend the Commission open a rulemaking proceeding to amend rules governing ex parte communications.

DISCUSSION:

Earlier this year, several stakeholders expressed uncertainty as to the application of the Commission's ex parte rule, set forth in OAR 860-012-0015. Specifically, stakeholders noted that the existing rule lacked sufficient information to apprise parties as to who makes an ex parte contact, when the disclosure requirements of the rule take effect, what type of proceedings the rule applies to, and what is required to remedy a violation.

To address these concerns, I held a series of workshops with representatives from energy utilities (PacifiCorp, Portland General Electric, NW Natural), telecommunications carriers (Verizon, Sprint, Covad, AT&T), customer groups (Industrial Customers of Northwest Utilities, Citizens' Utility Board, Associated Oregon Industries), and the Attorney General's office. After numerous drafts and revisions, we have developed a new rule that satisfies the concerns raised during the workshops.

A draft of the new proposed rule is attached. The new rule was kept as simple as possible, and any order adopting the rule will provide further discussion as to the purpose of the changes and guidance to the rule's intended application.

The first significant change is clarifying the scope of “ex parte communications.” Among other things, the new definition clarifies that the rule generally applies to direct communications from all persons made on the merits of an issue in a contested case proceeding without the opportunity for rebuttal by all parties of record. The communications not subject to the rule are set out in Section (8), and include communications to address procedural matters or with Staff members and Assistant Attorneys General who are not appearing in the proceeding.

The second significant change is explaining when the ex parte rules take effect. Section (3) clarifies that the rules are effective: (1) upon the filing of any action between named parties; (2) upon the filing of any action initiating a “major proceeding” as defined in OAR 860-014-0023; or (3) after the Commission or Administrative Law Judge initiates a contested case proceeding.

Other rules changes include establishing an affirmative duty on any person who makes or received an ex parte communication to notify the presiding ALJ (Section (4)) and detailing how the communication must be noticed and disclosed.

As noted above, a broad range of industry representatives and customer groups support the proposed rule. A rulemaking hearing will be scheduled to allow additional comment on the rulemaking prior to adoption.

PROPOSED COMMISSION MOTION:

A rulemaking proceeding be opened to amend rules governing ex parte communications.

860-012-0015

Ex Parte ~~Contacts~~ Communications

(1) Ex parte communications are discouraged and, if made, must be disclosed to ensure a fair and impartial decision-making process.

(2) Except as provided in this rule, an ex parte communication is any oral or written communication that:

(a) Is made by any person directly to a Commissioner or presiding Administrative Law Judge (ALJ) outside the presence of any or all parties of record in a contested case proceeding, as defined in ORS 183.310(2), without notice to, or opportunity for rebuttal by, all such parties; and

(b) Relates to the merits of an issue in the pending contested case proceeding.

(3) For purposes of this rule, a contested case proceeding is pending:

(a) When any filing is made that initiates a proceeding between identified parties or a "major proceeding" as defined in OAR 860-014-0023; or

(b) After the Commission or presiding ALJ initiates a process similar to that described in OAR Chapter 860, Division 014, including but not limited to, an order suspending a tariff for investigation or a notice of a prehearing conference.

(4) A person who makes or receives an ex parte communication is obligated to promptly notify the presiding ALJ that such communication has occurred.

(5) Upon notice of an ex parte communication, the presiding ALJ shall promptly notify the parties of record of the communication and place in the record:

(a) The name of each person who made the communication and that person's relationship, if any, to a party in the case;

(b) The date and time of the communication;

(c) The circumstances under which the communication was made;

(d) A summary of the matters discussed;

(e) A copy of any written communication; and

(f) Any other relevant information concerning the communication.

(6) The presiding ALJ may require the person responsible for the ex parte communication to provide the disclosure and notice of the communication required by this rule.

(7) Within 10 days of receiving notice, a party may file a written rebuttal of any facts or contentions contained in the ex parte communication, with service on the parties of record in the proceeding.

(8) The provisions of this rule do not apply to communications that:

(a) Address procedural issues, such as scheduling or status inquiries, or requests for information having no bearing on the merits of the case;

(b) Are made to a Commissioner or presiding ALJ by a member of the Commission staff who is not a witness in the proceeding;

(c) Are made to a Commissioner or presiding ALJ by an Assistant Attorney General who is not representing the Commission staff in the proceeding;

(d) Are made in a rulemaking proceedings conducted pursuant to ORS 183.325 through 183.410; or

(e) The presiding ALJ determines should not be subject to this rule, including but not limited to communications from members of the public that are made part of the administrative file or communications that are the subject of *in camera* proceedings.

~~(1) The Administrative Law Judge (ALJ) shall place on the record a statement of the substance of any written or oral ex parte communication on the merits of an issue made to the ALJ by a party while a contested case is pending. The ALJ shall notify the parties of the communication and of their right to rebut the communication on the record.~~

~~(2) The Commission shall place on the record a statement of the substance of any written or oral ex parte communication on the merits of an issue made to the Commission by a party while a contested case is pending. The Commission shall notify all parties of the communication and of their right to rebut the communication on the record.~~

~~(3) For the purposes of this rule, staff is not a party.~~

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

Stats. Implemented: ORS 183.462, 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 1-1985, f. & ef. 2-1-85 (Order No. 85-
075); PUC 10-1994, f. & ef. 7-21-94 (Order No. 94-1127);
PUC 12-1999, f. & ef. 11-18-99 (Order No. 99-709)