

ORDER NO. 14 358

ENTERED OCT 17 2014

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1709

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Internal Operating Guidelines.

ORDER

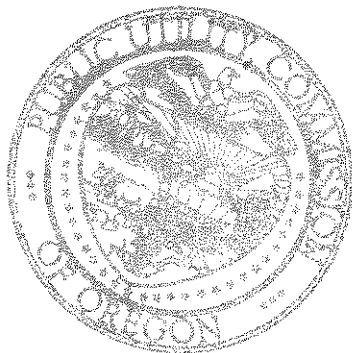
DISPOSITION: UPDATED GUIDELINES ADOPTED

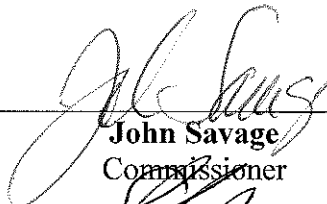
At the October 14, 2014 Administrative Issues Meeting, we adopted revised Internal Operating Guidelines. The revised guidelines are attached as Appendix A.


Made, entered, and effective OCT 17 2014.

COMMISSIONER ACKERMAN WAS
UNAVAILABLE FOR SIGNATURE

Susan K. Ackerman
Chair




John Savage
Commissioner


Stephen M. Bloom
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.

INTERNAL OPERATING GUIDELINES*October 14, 2014*

In this document, the Commission updates its Internal Operating Guidelines.¹ These guidelines are intended to inform the public of the Commission's decision-making practices, and to describe the responsibilities of agency employees and the attorneys representing the Commission. These guidelines are part of the Commission's on-going efforts to promote transparency, fairness, and public confidence in its decision-making.

The guidelines start with the three decision-making processes used by the Commission: (1) open meetings; (2) rulemakings; and (3) contested cases. A fourth section addresses the unique process used to review matters related to utility resource planning. Each section describes the relevant laws governing the particular decision-making process, summarizes the Commission's processes and procedures for each, and explains the respective responsibilities of the Utility Program Staff, Assistant Attorneys General assigned to the Commission, and Administrative Law Judges. A summary of how these various laws apply to the Commission's decision-making processes are included in a chart on page 18.

In adopting internal policies and practices consistent with the various laws governing its decision-making processes, the Commission considered the goals of fairness, openness, flexibility, and effectiveness.

- Fairness in regulatory proceedings is a fundamental principle of Oregon law. In short, it means that all parties have the opportunity to express their views and to respond to the views of others. Because of the importance of fairness in Commission cases, the Commission has implemented a number of procedures that go well beyond the minimum requirements of Oregon law.
- Openness reflects the obligation to make and explain decisions in a visible manner so that the public can have trust that Commission decisions are arrived at in a principled way.
- Flexibility recognizes the need to adapt to changing conditions and to use Commission personnel in a variety of different roles consistent with their knowledge, skills, and abilities.
- Effectiveness refers to the need for the Commission to make well-reasoned, timely, forward-looking, technically and factually accurate, and legally sufficient decisions, in a cost-effective manner.

The Commission recognizes that, under certain circumstances, these goals may be inconsistent with one another. A policy that emphasizes fairness may reduce flexibility and effectiveness.

¹ The Commission first memorialized its Internal Operating Guidelines in Order No. 01-253.

These guidelines reflect the Commission's best effort to balance these sometimes conflicting goals.

I. OPEN MEETINGS

The Commission conducts much of its business in open meetings, such as its Regular Public Meetings generally held every other Tuesday at the Commission's offices in Salem, Oregon. The Commission uses open meetings to address items that are less contentious or do not require formal trial-like proceedings to resolve. These items include utility requests to make minor revisions to its tariffs, affiliated interest filings, security issuances, or other matters relating to rates and service.²

In open meetings, the Commission uses an informal decision-making process. Decisions are based on information received through written and oral comments provided by Commission Staff, utilities, and interested persons. Although the Commissioners seek to clarify facts for the basis of Commission action, their decisions need not be based solely on an official evidentiary record. Unlike contested case proceedings discussed below, the Commission makes decisions based on informal comment and argument, as opposed to evidence developed through a formal trial-like process where sworn testimony and evidence is offered and subject to cross-examination.

A. Applicable Law

The Commission conducts open meetings under the Public Meetings Law codified at ORS 192.610 *et seq.* This law establishes Oregon's policy that decisions of governing bodies be made through an open process. The law generally requires that (1) the meetings and decisions of public bodies be open to the public; (2) the public has notice of the meetings; and (3) the meetings are accessible to persons wishing to attend.

The Public Meetings Law defines a meeting as the convening of a governing body "for which a quorum is required to make a decision or to deliberate toward a decision in any manner."³ Essentially, the public meeting requirements must be observed when two or more Commissioners are present and the purpose of the meeting is to decide matters that must be determined by a quorum or to gather information to serve as the basis for a subsequent decision.⁴ "Meetings" include informal gatherings and correspondence via electronic mail. "Decision" is any determination related to agency business that requires a quorum.

The Commission may hold closed meetings to address certain matters in an executive session. These include meetings to discuss personnel matters, to consult with counsel concerning pending

² The Commission also takes final action on proposed rulemakings during open meetings. Given the unique and extensive requirements applicable to rulemakings, those proceedings are addressed separately below.

³ ORS 192.610(5).

⁴ ORS 192.630.

or likely litigation, or to consider exempt public records.⁵ Although the Commission may exclude the public from executive sessions, it must allow the news media to attend but may require that specific discussions not be reported.

The authority to hold executive sessions does not exempt the Commission from complying with other requirements of the Public Meetings Law, such as providing notice. Furthermore, executive sessions are for discussion only; decisions must be made in a public meeting. It is not considered improper, however, for a quorum to reach a consensus during the executive session, as long as the decision is made in public.

One type of Commission meeting is statutorily exempt from the Public Meetings Law. As further discussed below, Commissioners may meet privately in decision meetings to deliberate in contested case proceedings.⁶

B. Open Meeting Process

The Commission Secretary is responsible for giving notice of public meetings. The notice is sent to persons who have requested to receive such notice, as well as to the news media. The notice is also posted on the Commission's website, which is linked to the State of Oregon's transparency website. The Commission also makes efforts to notify persons with a special interest in particular actions, such as parties to a prior docket that addressed related issues. The notice must be specific enough to allow members of the public to recognize matters in which they are interested.

The Commission Staff develops the agenda for each public meeting, and the agenda is finalized by the Commission. The agenda is divided into two parts: (1) a Consent Agenda, which includes routine items of business that are not contested; and (2) a Regular Agenda, which addresses contested items or matters requiring individual consideration. There is also an open public comment period held at the beginning and end of each public meeting.

Prior to each public meeting, Staff prepares a report for each agenda item. The reports contain information about the requested Commission action and Staff's recommended disposition. The Staff Reports are generally published the Thursday prior to the public meeting and posted on the agency's website on Friday.

The Commission Chair opens the public meeting. After soliciting comments from members of the public on items not contained on the agenda, the Commission considers the Consent Agenda as a single action item. The Commission then considers each item on the Regular Agenda. As each item is called, a Staff member presents his or her recommendation and responds to Commissioners' questions. Representatives of utilities, customer groups, or members of the

⁵ ORS 192.660(2).

⁶ ORS 192.690(1).

public may also request permission to speak, but the extent of participation is at the Commission's discretion.

At the conclusion of the discussion of each item, the Commissioners make a decision and, where appropriate, an order is later prepared to memorialize the decision. The Commission will assign a docket number to any item that requires an order. The Commission may also choose to postpone a decision until a later public meeting or may choose to refer an item to the Administrative Hearings Division for a contested case proceeding.

The Commission prepares minutes of all decisions made at the public meeting, and posts audio files for each item on the agency's website. Minutes or audio recordings of executive sessions need not always be disclosed. All minutes are subject to the public record laws and must be retained under appropriate retention schedules.

C. Roles of Commission Employees and Assistant Attorneys General

1. *Utility Program Staff*

The Utility Program Staff provides independent analyses and expert recommendations on items addressed by the Commission at open meetings. When developing recommendations, Staff solicits input from other persons who have expressed interest in the item, must balance any factual and policy considerations, and makes recommendations that further the public interest. Staff is usually represented at the public meetings by an Assistant Attorney General (AAG).

The Staff Report provides the Commissioners and the public with information necessary to understand the issue to be addressed and the legal basis to support Commission action. The report includes a concise and accurate description of the requested action, a summary of the law or Commission precedent governing the request, a statement of any support or opposition to the request, Staff's analysis and recommendation, and an explanation of why Staff's recommendation serves the public interest. When possible, Staff should provide a range of other legally supportable recommendations so that the Commission has options when making a final decision.

Staff may discuss any issue to be addressed at a public meeting with any Commission employee or member of the public, subject to any restrictions related to the protection of confidential information. Staff may also discuss any public meeting matter with Commissioners, but must do so privately with each Commissioner individually due to requirements of the Public Meetings Law. To avoid an inadvertent violation of the Public Meetings Law, Staff must send electronic mail messages to Commissioners individually.

2. *Chief Administrative Law Judge and Commission Counsel*

The Chief Administrative Law Judge (ALJ) and an AAG who serves as Commission Counsel attend public meetings to assist the Commissioners with legal and procedural issues. The

Commission Counsel provides legal advice and responds to legal questions relating to individual agenda items. The Chief ALJ provides advice on procedural issues and assists the Commission Counsel in addressing legal questions. The Chief ALJ also makes assignments to ensure the Commission's public meeting decisions are implemented and made effective.

II. RULEMAKINGS

The Commission acts in a quasi-legislative capacity when it conducts rulemakings to implement or interpret a statute, or prescribe law or policy on matters of general applicability. The Commission has authority to adopt rules relative to all statutes it administers.⁷

A. Applicable Law

The Commission conducts rulemakings under the Administrative Procedures Act (ORS 183.325 through 183.410), and rules adopted in OAR 860-001-0200, *et seq.* These provisions impose two primary procedural requirements when the Commission proposes to adopt, amend, or repeal a rule. The Commission must (1) give proper notice of the proposed rulemaking; and (2) allow interested persons an opportunity to comment or request a hearing on the rulemaking.

Although an agency is required to maintain a record of any comments it receives during a rulemaking proceeding, the Commission's adoption, amendment, or repeal of a rule does not need to be based on an evidentiary record. Like a legislator, a Commissioner may talk to any person about the rulemaking prior to the deadline set for comments. The Commissioners, however, may not consider comments received after that deadline unless it extends the deadline for others.⁸ Moreover, the Public Meetings Law requires any discussion between Commissioners regarding the rulemaking to be made in public.

B. Rulemaking Process

The Commission's rules coordinator is responsible for coordinating all agency rulemaking proceedings. Although rulemakings are generally initiated internally by Staff, a person may petition the Commission to promulgate, amend, or repeal a rule.⁹

The Commission gives notice of a proposed rulemaking by publishing notice in the Secretary of State's Oregon Bulletin, and delivering a copy of the proposed rule and notice to persons on the Commission's mailing lists and legislators specified in ORS 183.335(15). Any person may request to be placed on industry-specific mailing lists to receive notices of agency rulemaking.

The notice of proposed permanent rulemaking must include:

⁷ ORS 756.060.

⁸ ORS 183.355(14).

⁹ OAR 137-001-0070.

- A summary of the subject matter, purpose, and need for the rulemaking
- The last date for comment on the proposed rulemaking
- The date of or ability to request a hearing, and
- A statement of fiscal impact quantifying the economic effect of the proposed rulemaking

Any person may file written comments on the proposed rule by the date identified in the rulemaking notice. If applicable, the person should also provide alternative language for the proposed rule to address any concern. Persons may also file a request for the Commission to hold a rulemaking hearing if not already scheduled, or object to the fiscal impact statement.

The Commission may take action only on rules covered by the notice of proposed rulemaking. Although the Commission is not required to make a decision based solely on the comments received, it must fully consider all comments. The Commission will take final action on a proposed rulemaking at a public meeting. Any rulemaking action is effective when filed with the Secretary of State, unless a different effective date is specified in the rule.

Under certain circumstances, the Commission may also temporarily adopt, amend, or suspend a rule without prior notice of hearing or on abbreviated notice of hearing.¹⁰ Any rule temporarily adopted is effective for 180 days.

C. Roles of Commission Employees and Assistant Attorneys General

1. Utility Program Staff

The Utility Program Staff, with assistance from AAGs and in consultation with the agency rules coordinator, generally develops proposed rule language and other documents to support agency rulemaking. Unless addressing housekeeping changes, Staff routinely seeks input from interested persons in developing rule language and drafting the statement of fiscal impact. During this process, Staff attempts to determine the interests of affected persons and reach consensus on proposed rule language.

Once the proposed rulemaking is officially noticed, Staff participates in any rulemaking hearing and may file further comments in support of the proposed rules or to respond to comments by others. Staff may discuss any rulemaking issue with any member of the public, other Staff members, or the ALJ. Staff may also discuss any rulemaking matter with the Commissioners, but must do so privately with each Commissioner individually due to requirements of the Public Meetings Law.

¹⁰ ORS 183.335(1).

2. *Administrative Law Judge*

An ALJ presides over rulemaking hearings. Any person may provide unsworn comments during the hearing. The ALJ has discretion to determine the extent of participation and may question any person commenting at the hearing. All written and oral comments are placed in the record of the proceeding, which must be maintained by the Commission's rules coordinator. At the conclusion of the hearing or after the last date for submitting comments, the ALJ prepares an order addressing the proposed rulemaking, and presents the order to the Commission for adoption at a public meeting.

In a complex rulemaking, the Commissioners may attend the rulemaking hearing and participate in the discussion of the issues. Where the proposed rules themselves are subsequently modified in response to comments filed early in the proceeding, the ALJ may direct participants to submit additional comments to clarify final positions on the revised rules.

Prior to the deadline for filing comments, the ALJ may consult with any Commission employee or member of the public. Once the deadline for comments has passed, the ALJ may still consult with Commission employees. The ALJ may also discuss any rulemaking matter with the Commissioners at any time during the rulemaking, but must do so privately with each Commissioner individually due to requirements of the Public Meetings Law.

3. *Assistant Attorneys General*

An AAG is assigned to all rulemaking proceedings to assist Staff, the ALJ, and Commissioners. Unlike contested case proceedings discussed below, one AAG may provide legal services to all Commission employees during all phases of a rulemaking proceeding.

In rulemaking proceedings, AAGs are responsible for identifying the scope of permissible rulemaking and assisting with crafting proposed rule language to ensure the rules are consistent with the Commission's delegated authority. AAGs also work with Staff and the agency's rules coordinator to ensure that all documents supporting the rulemaking meet requirements imposed by statute. AAGs attend pre-rulemaking workshops and rulemaking hearings, counsel ALJs and Commissioners, and issue legal opinions on statutory interpretation and constitutional issues.

III. CONTESTED CASES

The Commission acts in a quasi-judicial capacity when it determines the rights of individual parties, or where the Commission has determined to use trial-like procedures to investigate a particular matter.¹¹ In these cases, the Commission must base its decisions exclusively on an evidentiary record developed in a trial-like proceeding. Contested case proceedings are subject to the most procedural requirements of any decision-making process used by the Commission.

¹¹ ORS 183.310(2)(a). The Commission uses contested case proceedings to address declaratory rulings filed under ORS 756.450.

A. Applicable Law

The Commission conducts contested cases under provisions contained in ORS 756.500 through 756.558, the Administrative Procedures Act (APA) set forth in ORS 183.310 *et seq.*, as well as rules adopted in OAR 860-001-0300 *et seq.* The Commission uses contested case procedures to address a wide variety of issues. These cases range from trial-like proceedings to resolve individual consumer complaints and general rate case proceedings to workshop and comment proceedings for generic policy investigations.

The APA and related laws provide the Commission this flexibility to meet its needs in providing effective and efficient regulation, but require that fundamental rules be followed to ensure government accountability and fairness. These provisions are generally designed to ensure that persons affected by agency action (1) are given prior notice of the case; (2) have a fair opportunity to present evidence and argument on the issues raised; and (3) are able to respond to all evidence and argument offered by other parties.

To ensure that decisions made in contested cases are based solely on the formal record developed in the proceeding, ORS 183.462 and OAR 860-001-0340 require the Commission to place on the record the substance of any private, off-record written or oral communication made to a Commissioner or presiding ALJ that relates to the merits of any pending contested case. As further discussed below, this includes communications between a Commissioner or presiding ALJ and Staff witnesses or AAG representing Staff in the proceeding. Any *ex parte* communication made outside the presence of other parties must be noticed to all parties with the opportunity to rebut the substance of the communication.

In addition to the statutes and rules governing contested case proceedings, the Commission has adopted these Internal Operating Guidelines to address proper separation of functions. Regulatory agencies by their very nature perform a combination of functions. They investigate, prosecute, and adjudicate. Because the Commission has one Staff to assist in all of these functions, the Commission has adopted internal procedures to separate incompatible functions to promote fairness and enhance confidence in agency decision-making. As further discussed below, the Commission has separated the advocacy functions of the agency from the adjudicative functions.

Finally, it is important to note that ORS 756.026 (prohibiting Commissioner pecuniary interests) and 756.028 (requiring Commission employees to disclose interests), as well as the Oregon Government Ethics Laws codified in ORS Chapter 244, eliminate conflicts of interest and help ensure Commission cases are decided impartially and fairly.

B. Contested Case Process

The Administrative Hearings Division is responsible for the processing of contested case proceedings. Under delegated authority from the Commission, ALJs preside over contested case

hearings in a fair and impartial manner. ALJs regulate all aspects of the case, including ruling on procedural and evidentiary matters. Under Oregon law the Commission provides parties to a contested case notice of contested case rights and procedures.¹²

1. *Prehearing Conference*

A contested case proceeding officially commences when the Commission or ALJ issues a notice of prehearing conference (PHC). A person may request to receive notice of all contested case proceedings that concern particular regulated industries.¹³ At the PHC, the ALJ will identify parties and issues, adopt a procedural schedule, and discuss other preliminary matters.

Many cases involve trade secrets and other commercially sensitive information. The Commission uses protective orders to allow parties the ability to review confidential information while ensuring that it is not disclosed publically. The rules governing the use of protective orders are set forth in OAR 860-001-0080.

Any person may petition to intervene as a party in any contested case.¹⁴ The ALJ must grant the petition if the petitioner has sufficient interest in the proceeding and petitioner's participation will not unreasonably broaden the issues, burden the record, or delay the proceedings.¹⁵ Certain entities are parties as of right in Commission cases. For example, those initiating the action or named in the filing, such as a utility company, are deemed original parties and need not intervene. Staff has party status in cases in which it chooses to appear. Under ORS 774.180, the Citizens' Utility Board of Oregon has a right to intervene in any docket by filing a notice.

Party status confers certain rights in the case, such as the ability to present testimony, cross-examine other parties, file briefs, receive filings from other parties, and become qualified to review information that is designated as confidential. A person who does not want the rights and responsibilities of a party may participate in a docket as an interested person. These individuals do not have the right to actively participate in the docket, but will receive copies of any public documents that are generated by the Commission, such as notices, rulings, and orders.

2. *Procedural Schedule*

Contested cases often require an extended procedural schedule that includes formal discovery, settlement conferences, multiple rounds of pre-filed testimony, evidentiary hearings, and legal briefs. The Commission may also hold workshops to learn more about technical issues in an informal setting, or hold oral arguments in major proceedings.

In general rate proceedings or high-profile cases, the Commission may, at its discretion, travel to areas affected by the case for evening public meetings to provide information about the request

¹² ORS 183.413.

¹³ OAR 860-001-0030.

¹⁴ ORS 756.525.

¹⁵ OAR 860-001-0300(7).

and regulatory processes and to solicit public comment. Oral and written comments are given the same consideration. The Commission also invites comments in major proceedings through a link on its webpage. These comments are initially reviewed by Staff, who may investigate them and, if necessary, address them in testimony. All comments are eventually placed in the administrative record of the proceeding, but are not made part of the evidentiary record because they are not subject to cross-examination. Any party to the proceeding may view the public comments.

3. *Settlements and Stipulations*

In contested case proceedings, parties may meet informally to explore informal resolution of some or all issues. Settlements are governed by OAR 860-001-0350. Any settlement must be memorialized in a written stipulation for Commission review, and be accompanied by an explanatory brief or written testimony in support. A stipulation is not binding on the Commission, which may adopt or reject it, or propose it be modified and schedule additional proceedings.

4. *Evidentiary Hearings and Oral Arguments*

ALJs preside over evidentiary hearings, and are frequently joined by Commissioners on the bench. The ALJ has a duty to ensure a full and fair inquiry into the facts necessary for consideration of all issues properly before the Commission. To ensure a complete record or in response to a request from the Commission, an ALJ may issue a bench request seeking clarification of evidence or additional testimony on a matter not addressed by the parties. Where possible, the ALJ will issue the bench request prior to the close of the record.

At hearings, the parties formally introduce into the record pre-filed testimony, and witnesses are sworn in and made available for examination by Commissioners and the ALJ, and cross-examination by other parties. After hearing, parties file legal briefs. In most cases, a court reporter records the hearing and prepares a transcript for the Commission and parties.

Parties may request the opportunity to present oral arguments to the Commission in certain cases. The criteria for determining which contested case proceedings give rise to the right to oral argument are set forth in OAR 860-001-0650 and 860-001-0660. The Commission may, on its own motion, request the parties to provide oral argument in any case and has discretion to determine the extent of participation of parties during oral argument hearings.

5. *Post-Hearing Activities and Decision Meetings*

At the end of the hearing and submission of all evidence, the ALJ will close the record. Parties generally file briefs, and the ALJ will begin writing a draft order for Commission consideration. In cases where one party carries the burden of proof, such as rate cases, the Commission generally requires the parties to file sequential briefs, so that the party with the burden has the last opportunity to present argument.

The Commission frequently schedules decision meetings to discuss and arrive at a decision on the outcome of a contested case. In addition to the Commissioners, decision meetings are attended by the presiding ALJ, the Chief ALJ, the Utility Program Director, a Utility Division Administrator, and Commission Counsel.

Because contested cases are quasi-judicial in nature, the Public Meetings Law allows Commissioners to meet in private to deliberate towards a decision.¹⁶ Private meetings allow a full and candid discussion about the evidence presented without influence from those presenting the evidence and without exposing sensitive legal considerations to those who may appeal a decision. This exemption to the Public Meetings Law does not apply to any meetings to gather information upon which the Commission will deliberate and decide. Moreover, to deliberate means more than to consider. General discussions incidental to chance or social meetings are not considered deliberations.

Once a final Commission decision has been reached, the ALJ will finalize a Commission order for signature. The order is reviewed by Staff and Commission Counsel for technical and legal accuracy.

C. Roles of Commission Employees and Assistant Attorneys General

1. Utility Program Staff

The Utility Program Staff provides independent, expert testimony and recommendations in contested case proceedings. Staff's role is particularly important because, in most cases, Staff is the only participant that does not have a financial stake in the outcome. Staff considers the positions of other parties to the proceeding, balances the facts and policy considerations, and makes recommendations that further the public interest. Staff is also responsible for ensuring that the record includes a range of legally supportable positions so that the Commission has options when making a final decision. The rationale for each outcome should be described on the record so the parties have an opportunity to address Staff's analysis.

Staff must discharge its duties consistent with the Commission's obligation to protect customers and set utility rates that are fair, just, and reasonable. This requires an appreciation of customers' short-term interests—having low and reasonable rates—and long-term interests—and ensuring that utilities are able to conduct their operations as financially sound enterprises.

Staff serves two roles in contested case proceedings. First, Staff serves as an advocate for the public interest. It participates in the proceeding as a party and engages in discovery, attends settlement conferences, sponsors testimony, participates in hearings, and submits legal briefs. Second, Staff serves as an advisor to the Commissioners and ALJs. This helps ensure that the decision-makers have adequate policy and technical advice in the making of the decision

¹⁶ ORS 192.690(1).

The Commission recognizes that Staff's dual roles may create a perception that Staff involved in the decision-making process would attempt to persuade the Commissioners to adopt a position recommended by Staff. For this reason, the Commission limits Staff's involvement in the decision-making process, as described below. The basic Commission policy regarding separation of functions is outlined in an Attorney General opinion of January 21, 1987. The basic principle is that "Judging should be separated from functions which are incompatible with judging. An individual who tries to win for one side should not participate in the judging."

a. Staff Witnesses

Any Staff member who sponsored testimony in a contested case proceeding is subject to *ex parte* rules governing communications with Commissioners and presiding ALJs.¹⁷ Thus, any private communication that relates to the merits of an issue in the case between a Staff witness and a Commissioner or presiding ALJ must be disclosed to other parties and placed on the record. The Commission does not allow a Staff witness to attend a Commission decision meeting to deliberate on the case or to review draft decisions.

Restrictions governing the communications of Staff members who appeared as witnesses in a contested case also apply to AAGs. As further discussed below, the AAGs representing Staff in the hearing process must follow the same procedures as apply to Staff witnesses, and are similarly excluded from the decision-making process.

Ex parte rules do not apply to communication between Staff and other parties in a contested case proceeding.

b. Utility Program Director and Administrators

Ex parte restrictions governing Staff apply to particular individuals, rather than the entire Staff. Thus, while it would not be permissible for a Staff witness to participate in the deliberation of a decision, it is permissible for the person's supervisor to do so.

Accordingly, the Utility Program Director and Division Administrators attend decision-meetings and discuss contested case matters with Commissioners and the presiding ALJ. Allowing these Staff members to fully participate in the decision-making process assures that the Commission and ALJs, under the current agency structure, will have adequate policy and technical advice.

The Commission recognizes, however, that the Utility Program Director and Division Administrators may have participated in the development of Staff's position in the case. They may have discussed case strategy, attended settlement conferences, and taken part in the drafting or review of Staff testimony. Due to this overlap in roles, it is the Commission's expectation that any Staff members who participate in decision meetings refrain from party advocacy.

¹⁷ OAR 860-001-0340.

Neither the Utility Program Director nor Division Administrators may attempt to persuade Commissioners to adopt a particular position. Their responsibilities in decision meetings and Commissioner briefings are to serve as a resource and provide guidance on contested case matters to ensure effective, fair, and efficient agency decision-making.

The Utility Program Director and Division Administrators must also make certain that their advice to Commissioners and ALJs address only matters contained in testimony and exhibits to the case. If the Utility Program Director or Division Administrator played an active role in settlement conferences, he or she should disclose the extent of that participation to the decision meeting participants prior to deliberations. Any information about matters outside the record gained through their management of Staff or attendance at settlement conferences may not be discussed and, if raised, will be noticed to the parties and handled on a case-by-case basis.

2. *Administrative Law Judges*

ALJs are responsible for conducting fair and impartial hearings and ensuring that all parties have an opportunity during the course of the proceeding to present their positions and to respond to the views of other parties. ALJs must also make certain that a full inquiry is made on all issues to provide an adequate factual basis for Commission decision making. ALJs are also responsible for making independent recommendations, which will aid the Commission in arriving at a proper final disposition of the case.

ALJs submit draft orders to the Commission that reflect the ALJs proposed resolution of the case. The draft orders must be legally sufficient, accurate, and timely. In addition, the orders must address the relevant positions of each party and resolve all necessary legal and factual issues necessary to the decision. The ALJ is also responsible for providing the Commissioners with background materials and briefings so that they can participate effectively in hearings and meetings.

At the decision meeting, it is the responsibility of the ALJ to summarize the case and any draft of the final order. The ALJ also outlines the outstanding issues. After the Commission reaches a final decision after deliberations, the ALJ then prepares an order consistent with the Commission's directions for final review and signatures.

Throughout the contested case process, the ALJs may discuss procedural issues with any party, member of Staff, or AAG assigned to represent Staff. ALJs may only discuss matters relating to merits of the case with Commissioners, the Chief ALJ, the Utility Program Director, and Division Administrators.

3. *Assistant Attorneys General*

The Department of Justice has assigned AAGs to provide legal services to the Commission for all aspects of contested case proceedings. Like Staff, AAGs serve dual roles. First, they

represent Staff as an advocate for the public interest. AAGs work as a partner with Staff in all matters relating to Staff's participation in the proceedings. Second, AAGs serve as counsel to the Commission with respect to legal issues. They provide interpretation of laws, rules, and other sources of authority, and ensure that decisions are legally supportable.

Consistent with its policies to separate incompatible functions performed by Staff, the Commission has also adopted procedures to separate the AAG's advocacy functions from its advisory functions. As described below, the Commission and its Staff are represented by different AAGs in contested case proceedings. Although this separation of roles is not required by law,¹⁸ the Commission has adopted this practice to foster good government.

a. Staff Counsel

An AAG is assigned to all contested case proceedings in which Staff participates. AAGs partner with Staff and provide opinions, advice, and assistance on case strategy, preparation, and execution. AAGs analyze filings, attend internal Staff meetings, identify legal issues, help Staff identify issues to address, assist with discovery, participate in or lead settlement discussions, help Staff draft testimony and prepare for hearing, and write legal briefs.

Like Staff witnesses, any AAG who represented Staff in a contested case proceeding is subject to *ex parte* rules governing communications with Commissioners and presiding ALJs.

b. Commission Counsel

An AAG is assigned as the Commission Counsel in every contested case proceeding. The Commission Counsel must be a different AAG than the AAG representing Staff in the case. The Commission Counsel generally works with Commissioners, the presiding ALJ, and Chief ALJ about any matter relating to the conduct of the hearing or the agency's decision in the matter.

The Commission Counsel is responsible for providing timely and accurate legal advice to ensure that the Commission's actions and decisions are consistent with its delegated authority and constitutional constraints. Where applicable, the advice should clearly set for the range of discretion the Commission may exercise within the legal framework.

The Commission Counsel, working together with the presiding and Chief ALJ, also ensures that no *ex parte* communications occur during decision meetings and Commissioner briefings, and that the separation of functions are not violated. The AAG representing the Commission is independent of the agency.

¹⁸ The Oregon Attorney General's Administrative Law Manual, Jan 1, 2008, at 64, makes clear that due process does not require such a formal separation.

IV. UTILITY RESOURCE PLANNING

The Commission uses unique processes to review matters related to utility resource planning. These filings are the review and acknowledgement of (1) an integrated resource plan (IRP); and (2) a request for proposal (RFP) for a major resource acquisition. These cases fall under the Commission's Open Meetings decision-making process, but contain some unique features that warrant a separate discussion in our guidelines.

A. Applicable Law

1. *Integrated Resource Plans*

Since 1989, the Commission has required energy utilities to develop and file IRPs to help ensure the utilities acquire an adequate and reliable supply of energy at the least cost and risk to ratepayers.¹⁹ The Commission's IRP Guidelines are intended to provide public input in utility resource planning, and require utilities to meet specified procedural and substantive requirements.²⁰

A utility must generally prepare an IRP every two years and allow public review and input prior to submitting it for Commission acknowledgment. In reviewing an IRP, the Commission generally does not address the need for specific resources, but rather determines whether the utility has proposed a portfolio of resources to meet its energy demand that presents the best combination of cost and risk.

Commission acknowledgement of an IRP means only that the Commission finds that the utility's preferred portfolio is reasonable at the time of acknowledgment. The Commission has emphasized, however, that acknowledgement does not constitute ratemaking. Rather, the Commission views the IRP process as a means to inform a subsequent review of a utility request to include new resources in rates:

Consistency of resource investments with least-cost planning principles will be an additional factor that the Commission will consider in judging prudence. When a plan is acknowledged by the Commission, it will become a working document for use by the utility, the Commission, and any other interested party in a rate case or other proceeding before the Commission[.] Consistency with the plan may be evidence in support of favorable rate-making treatment of the action, although it is not a guarantee of favorable treatment. Similarly, inconsistency with the plan will not necessarily lead to unfavorable rate-making treatment, although the utility will need to explain and justify why it took an action inconsistent with the plan.²¹

¹⁹ See Order No. 89-507.

²⁰ See Order No. 07-002.

²¹ Order No. 89-507 at 7.

Because the Commission does not finally determine the individual rights, duties, or privileges of any party during the IRP process and, as addressed below, does not use contested case procedures, IRP dockets are not considered contested cases under the APA.²² An acknowledgment order is not a final order subject to judicial review because it does not “preclude further agency consideration of the subject matter” of the order.²³

For this reason, a person need not intervene as a party to participate in the proceeding. Participation includes the ability to attend Staff workshops, submit written comments, and provide oral comments to the Commissioner at a public meeting. The Commission, however, will grant persons party status for the limited purposes of obtaining access to confidential information pursuant to the terms of a protective order.

2. *Request for Proposal*

To help promote the acquisition of least-cost resources, the Commission generally requires utilities to issue an RFP for all major resource acquisitions identified in its IRP.²⁴ Major resources are those resources with a duration of over five years with an output of more than 100 megawatts.

The Commission’s competitive bidding guidelines²⁵ require a utility to prepare a draft RFP and provide it for public comment through bidder and stakeholder workshops. Once an RFP is finalized, the utility must submit it for Commission approval. In its review, the Commission focuses on three criteria: (1) whether the utility’s RFP is consistent with its acknowledged IRP; (2) whether the RFP satisfies the competitive bidding guidelines; and (3) whether the utility’s proposed bidding process is fair.

Once the RFP is approved, the utility selects a short-list of bids based on price and non-price factors, as well as other criteria. The utility must seek Commission acknowledgment of the final short list. The Commission does not become directly involved in bid evaluation and selection; that remains the responsibility of the soliciting utility.

The Commission’s acknowledgment of short-list has the same meaning as that used in the IRP process—that is, a conclusion that the final short-list seems reasonable, based on the information provided to the Commission at that time. Any ratemaking determinations would occur at a later time. Similarly, RFP dockets are not considered contested cases under the APA, and an acknowledgment order is not a final order subject to judicial review.

²² ORS 183.310(2)(a)(A).

²³ ORS 183.310(6)(a)(B).

²⁴ See Order No. 06-446.

²⁵ See Order No. 14-149 at Appendix A.

B. Utility Planning Process

The Commission Staff is primarily responsible for the processing of IRP and RFP filings. Although these matters are not contested cases, an ALJ is assigned to monitor the proceedings and to approve a procedural schedule. The ALJ also grants petitions to intervene for procedural purposes only. The designation of parties is necessary so persons can be placed on the service list and be eligible to sign a protective order to obtain access to confidential information related to the utility filings. The ALJ grants petitions to intervene in IRP and RFP dockets for these limited purposes, even though party status does not confer the general rights and duties to individuals who participate in contested case proceedings.

The procedural schedules for these filings are intended to educate the Commission and interested persons about the utility's proposed actions and to allow comment or objection. The schedules generally include utility presentations before the Commission at a public meeting, and rounds of opening and reply comments from interested persons, Staff, and utilities.

The Commission takes final action on IRP and RFP dockets at a public meeting. Prior to the meeting, Staff generally publishes a report containing its analysis and final recommendation.

C. Roles of Commission Employees and Assistant Attorneys General

The roles of Staff, ALJs, and AAGs in IRP and RFP dockets are similar to those listed above under Open Meetings. Staff provides independent analysis and expert recommendations on the utility's request, and is assisted and represented by an AAG. All Staff Reports provide the Commissioners and the public with information necessary to understand the issues to be addressed, describe the requested action, and provide Staff's analysis and recommendation.

Staff may discuss any issue related to an IRP or RFP docket with any Commission employee or member of the public, subject to any restrictions related to the protection of confidential information. Staff may also discuss these matters with Commissioners, but must do so individually with each Commissioner due to requirements of the Public Meetings Law. This includes sending e-mail messages to Commissioners individually to avoid an inadvertent violation of the Public Meetings Law.

Once the Commission has taken final action on the filing, the presiding ALJ will prepare an order consistent with the Commission's decision for final review and signatures.

**Internal Operating Guidelines
Applicability of Law Summary**

	Contested Cases	Rulemakings	Open Meetings	Resource Planning
<i>Ex Parte</i> Restrictions Apply?	Yes	No, but ALJ and Commissioners may not consider comments made after deadline unless the deadline is extended for all	No	No
Public Meeting Law Apply?	Yes, but Commissioners may deliberate in private	Yes	Yes	Yes
Decision based on sworn testimony and evidence subject to cross-examination?	Yes	No	No	No
Persons Given Party Status?	Yes	No	No	Yes, but only for purposes of service and protective orders
Action Results in Appealable Order?	Yes, to Court of Appeals	Yes, to Court of Appeals	Maybe – if so to Circuit Court	No