

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **UM 1288**

4 PUBLIC UTILITY COMMISSION OF
5 OREGON,

6 Complainant,

7 v.

8 VCI COMPANY f/k/a STAN EFFERDING
9 and STANLEY JOHNSON, dba VILAIRE,
and VCI COMPANY, a Washington
corporation

10 Defendants.

PUBLIC UTILITY COMMISSION OF
OREGON'S RESPONSE TO MOTION FOR
LEAVE TO FILE REPLIES

11
12 The Public Utility Commission of Oregon (Commission) opposes Defendants' Motion
13 for Leave to File Replies in support of their Motion to Vacate the Default Order and the Motion
14 for Disclosure of *Ex Parte* Communications.

15 Defendants argue that the Commission should grant its request to file a reply because
16 Defendants' Motion to Vacate Default Order and Dismiss Claim "involves the most fundamental
17 question before the Commission, that being its subject matter." Motion at 2. The Commission's
18 subject matter jurisdiction was, of course, a fundamental question when Defendant's filed their
19 motion. Yet the Defendants' motion principally relied on a line of cases that are clearly
20 distinguishable, never addressed the Commission's substantive statutes governing
21 telecommunications utilities or the Commission's authority over telecommunications utilities
22 participating in OTAP and receiving RSPF funds, and ignored a line of Commission cases
23 involving damage actions the Commission hears under its complaint statute. Defendants offer no
24 explanation for their failure to address these matters in their motion. Defendants' failure to
25 address matters that could have and should have been included in their motion is not grounds for
26 them to granted leave to file a reply brief.

1 Defendants' Motion for Disclosure of *Ex Parte* Communications argued that the
2 communications between the Commission and its counsel regarding the 10-day period to answer
3 was an *ex parte* communication. Yet Defendants never address provisions of OAR 860-012-
4 0015(1) that are clearly implicated by Defendants' motion. For example, the Commission *ex*
5 *parte* rule provides that for a communication to be an *ex parte* communication it must "relate[] to
6 the merits of an issue in the pending contested case proceeding." See OAR 860-012-0015(2)(b).
7 Defendants never address this provision. The Commission's rule that excludes the *ex parte* rules
8 from communications that address procedural issues was also implicated. See OAR 860-012-
9 0015(8)(a). But Defendants never address this section of the *ex parte* rule.

10 Defendants argue that if the drafting and presentation of the Default Order was "not
11 performed by a 'judicial' employee, but was performed by someone engaged in the prosecution
12 of the claim, the presentation of the Order to the Commission again was an *ex parte*
13 communication. Defendants are certainly aware that the Commission found them in default
14 when it signed the Default Order. The Commission's default rule, OAR 860-013-0055(1),
15 provides that once a party is in default the Commission may dispose of the proceeding without
16 further notice to the defaulting party. But Defendants in their Motion for Disclosure of *Ex Parte*
17 Communication never address the Commission's default rule.

18 The Commission addressed the two instances that Defendants alleged that there had been
19 *ex parte* communications and showed why it does not believe the alleged communications are *ex*
20 *parte* communications under the Commission's rules. Defendants do not explain why they did
21 not address the Commission's rules in their motion. Defendants, having chosen not to address
22 Commission rules that are obviously relevant to their motion, should not be allowed to file a
23 reply regarding matters that Defendants should have addressed in their motion.

24 Defendants characterize the Commission position as "claimant [Commission] essentially
25 makes the argument that there are many circumstances within a contested case where the
26 prosecutor of the claim can communicate with the adjudicating authority and decide issues to the

1 extreme detriment of the defendants without the defendants being given any notice or
2 opportunity to respond.” Motion for Leave at 2. Defendants’ failure to support their argument
3 with citation is telling. The Commission never made the argument that Defendants attribute to it.
4 Nor is there any evidence to support Defendants’ implication that *ex parte* communications
5 occurred here.

6 The Commission *ex parte* rule requires that any person that has an *ex parte*
7 communication with a Commissioner must notify the presiding ALJ that such communication
8 has occurred. See OAR 860-012-0015(4). In addition, “upon notice of or receipt of an *ex parte*
9 communication, the presiding ALJ shall promptly notify the parties of record of the
10 communication and place in the record.” OAR 860-012-0015(5). No one has disclosed an *ex*
11 *parte* communication because no *ex parte* communication has occurred. Defendants have not
12 shown that they should be granted leave to file a reply regarding its Motion for Disclosure of *Ex*
13 *Parte* Communication.

14 DATED this 8th day of November 2007.

15 Respectfully submitted,

16 HARDY MYERS
17 Attorney General

18
19 s/David B. Hatton
20 David B. Hatton, #75151
21 Assistant Attorney General
22 Of Attorneys for the Public Utility Commission
23 of Oregon
24
25
26

1 **CERTIFICATE OF SERVICE**

2
3 I certify that on November 8, 2007, I served the foregoing upon all parties of record in
4 this proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid
5 first class mail to:

6 **SCHWABE WILLIAMSON & WYATT**
7 WILLIAM J. OHLE
8 SCHWABE WILLIAMSON WYATT PC
9 1211 SW 5TH AVE
10 SUITE 1500 - 1900
11 PORTLAND OR 97204
12 wohle@schwabe.com

11 

12 _____
13 Neoma Lane
14 Legal Secretary
15 Department of Justice
16 Regulated Utility & Business Section