

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
DEFENDANTS' REPLY IN
SUPPORT OF ITS MOTION FOR
DISCLOSURE OF *EX PARTE*
COMMUNICATIONS

12 Contrary to Defendants' assertions there have been no *ex parte* communications
13 between Commission counsel and the Public Utility Commission of Oregon (Commission) or
14 the presiding Administrative Law Judge (ALJ). As discussed in my Affidavit, while I was
15 preparing to file a complaint against the Defendants, Commission employee Rick Willis
16 contacted me. Mr. Willis indicated that the Commission learned that the Federal
17 Communications Commission (FCC) issued a NOTICE OF APPARENT LIABILITY FOR
18 FORFEITURE AND ORDER (FCC 07-148 Order). In that order the FCC found that VCI
19 Company had apparently repeatedly and willfully violated rules governing federal universal
20 service fund support mechanisms and found that VCI is apparently liable for a total forfeiture
21 of \$1,047,500. Mr. Willis indicated that the FCC proposed forfeiture and its ongoing
22 investigation of VCI practices in other states raised serious questions regarding the
23 Commission's ability to recover any overpayment resulting from this administrative action.
24 Mr. Willis indicated that the Commission wanted the Defendants to receive the minimum
25 amount of time allowed by statute to respond to the complaint to expedite the completion of
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1 the case. I never made any communications to the Commission or the presiding ALJ
2 regarding the Commission's instructions.

3 Regarding the default order, the Commission argued in its prior memorandum that
4 Defendants were not entitled to notice of the default order under OAR 860-013-0055(1),
5 which permits the Commission to dispose of the proceeding without further notice to the
6 defaulting parties. *See* Commission Response at 3-4. Based on that legal argument,
7 Defendants assume that the default order was drafted and presented to the Commission by
8 someone engaged in the prosecution of the claim. *See* Defendants' Reply at 6. Defendants'
9 assumption is erroneous. I did contact Chief Administrative Law Judge Michael Grant to
10 discuss procedures the Commission follows in default proceedings. At his request I did
11 prepare a draft default order in the event of a default. I sent the draft default order to ALJ
12 Grant on September 21, 2007, after the Defendants had defaulted. Whoever drafted the
13 default order that was presented to the Commission made changes to the draft order that I
14 sent to ALJ Grant. I did not present the default order to the Commission. Nor did I have any
15 communications with any of the Commissioners or the presiding ALJ regarding the default
16 order. No *ex parte* communications occurred regarding the default order.

17 ARGUMENT

18 **A. The Commission's decision to allow the Defendants ten days to respond to the** 19 **Complaint did not involve an *ex parte* communication**

20 Commission counsel received instructions to give the Defendants 10 days within
21 which to respond to the complaint. Defendants argue that this involved an *ex parte*
22 communication under OAR 860-012-0015(1). Defendants' Reply at 2. Defendants'
23 argument is without merit.

24 The Commission is authorized under ORS 756.512(1) to serve a copy of the
25 complaint upon the Defendants and fix the time to respond by giving the defendant at least
26 10 days within which to respond. Defendants assume that there must have been a request

1 before the Commission to shorten the time for Defendants to respond. Defendants do not
2 explain why there must have been a request. In any event, that assumption is erroneous. As
3 explained above, the Commission, through a Commission employee, instructed me that
4 Defendants were to be given 10 days to answer the Complaint after it learned that the FCC
5 had issued a NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER to
6 VCI.

7 That Commission communication to me is not an *ex parte* communication. An *ex*
8 *parte* communication is “any oral or written communication that *** [i]s made by any person
9 directly to a Commissioner or presiding Administrative Law Judge (ALJ) outside the
10 presence of any or all parties of record in a contested case proceeding, as defined in
11 ORS 183.310(2), without notice to, or opportunity for rebuttal by, all such parties.” OAR
12 860-012-0015.

13 The Commission’s instructions to me that Defendants were to be given 10 days to
14 answer the complaint are not *ex parte* communications. Rather the Commission was
15 instructing me on how to carry out the Commission powers delegated to counsel under OAR
16 860-013-0065.

17 **B. There were no *ex parte* communications regarding the default order**

18 Defendants argue that they were entitled to receive a notice and copy of the default
19 order in advance of issuance and claim there must have been some *ex parte* communications
20 by the Commission counsel regarding the default order. Defendants argue that because the
21 Commission is acting in the dual roles of prosecutor and adjudicator, Defendants’ are entitled
22 to notice of the default order in advance of issuance under the Commission default rule.
23 Defendants’ Reply at 5. Defendants’ arguments are without merit.

24 Under the template for statutory construction described in *PGE v. Bureau of Labor and*
25 *Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), the goal is to ascertain and give effect
26 to the intent of the legislature that enacted the statute or statutes in question. *PGE*, 317 Or at

1 610; *see also* ORS 174.020 (“In the construction of a statute, a court shall pursue the
2 intention of the legislature if possible”). The *PGE* methodology is also followed in
3 interpreting administrative rules. *Osborn v. PSRB*, 325 Or 135, 145-46, 934 P2d 391 (1997).
4 However, the objective in construing an administrative rule is to "ascertain the intent of the
5 body that promulgated it." *Id.* at 145. The first step in the *PGE* method is to examine the text
6 of the [rule] in context. *PGE*, 317 Or at 610. Oregon courts also consider rules of
7 construction that bear directly on how to read the text, including statutory rules. *PGE*, 317
8 Or at 610. One such statutory rule provides that the “specific” controls over the “general.”
9 *See* ORS 174.020(2) (“When a general and particular provision are inconsistent, the latter is
10 paramount to the former so that a particular intent controls a general intent that is
11 inconsistent with the particular intent.”) A second rule is to “not to insert what has been
12 omitted or to omit what has been inserted.” *PGE*, at 611; ORS 174.010. If a [rule’s] text and
13 context unambiguously disclose the promulgating agency’s intent, the inquiry ends there.
14 *PGE*, at 610-11. Only if the promulgating agency’s intent is not clear from the text and
15 context are we to take account of legislative history to attempt to discern the intent. *PGE*, at
16 611-12.

17 OAR 860-013-0055, the Commission rule governing default orders, in relevant part,
18 provides:

19 (1) If a party fails to plead or otherwise appear within the time
20 specified in OAR 860-013-0050, the party shall be in default. All material
21 allegations of the complaint shall be deemed admitted and hearing waived.
The proceeding may be disposed of without further notice to the defaulting
party.

22 Thus, under this rule if the Defendants fail to plead or otherwise appear within the time
23 specified in OAR 860-013-0050, they are in default and the proceeding may be disposed of
24 without further notice to the defaulting party. The times specified in OAR 860-013-0050
25 include times “otherwise specified or directed by the Commission.” Here, the Defendants
26 failed to plead or otherwise appear within the time specified by the Commission under OAR

1 860-013-0050 and ORS 756.512(1). Defendants offer no construction of the default rule
2 supporting their position that the Commission is required to give a notice of default in a
3 complaint proceeding. When a party is in default, OAR 860-013-0055(1) permits the
4 Commission to dispose of the proceeding without further notice to the defaulting party.

5 Defendants contend that the Commission default rule does not conflict, modify or
6 provide an exception to the Commission's *ex parte* rule and that they were entitled to receive
7 a receive a copy and a notice of a default order under the *ex parte* rule. Defendants' Reply
8 at 6. Defendants' contention is without merit.

9 As discussed above, when a party is in default, OAR 860-013-0055(1) permits the
10 Commission to proceed with a default order without providing notice to the Defendants.
11 Thus, contrary to Defendants' argument the default rule and the *ex parte* rule are in conflict
12 with respect to defaults. A rule of statutory construction is to harmonize to avoid internal
13 inconsistencies and to give effect to both if possible. *See* ORS 174.010. OAR 860-013-
14 0055(1) is a specific rule that permits the Commission to dispose of matters before it through
15 a default order without giving notice of the default order. OAR 860-012-0015(1) is a general
16 rule that generally defines *ex parte* communications. Under ORS 174.020(2) "[w]hen a
17 general and particular provision are inconsistent, the latter is paramount to the former so that
18 a particular intent controls a general intent that is inconsistent with the particular intent."
19 Accordingly, because OAR 860-013-0055(1) is a specific rule that does not require notice
20 when a default order is to be issued, it controls over OAR 860-012-0015(1). Defendants
21 were not entitled to notice and a copy of the default order under the *ex parte* rule.

22 Defendants also argue that the Commission is confusing its dual roles and that "[j]ust
23 because the complainant is also the Commission in this particular case, it does not mean that
24 the complainant has special privileges in the proceeding. The complainant must still comply
25 with the rules that would apply to any party appearing before the Commission in a contested
26 case." Defendants' Reply at 5. Defendants' argument conflates two separate issues: (1) what

1 the Commission’s default rule requires; and (2) procedural due process requirements in
2 complaint cases because of the Commission’s prosecutorial and adjudicative roles. The
3 Commission will address those issues in turn.

4 With respect to its default rule, the Commission agrees that it must comply with its
5 rules, but it disputes that it did not do so here. OAR 860-013-0055 does not require that
6 Defendants receive notice of the default; once the Defendants were in default “the
7 proceeding may be disposed of without further notice to the defaulting party.” Defendants
8 offer no construction of the default rule supporting their position that the Commission is
9 required to give a notice of default in a complaint proceeding. Defendants’ argument would
10 have the Commission read an exception into its default rule for complaint cases and require
11 that the Commission give notice of the default order to Defendants. The rule of construction
12 “not to insert what has been omitted or to omit what has been inserted” forbids the
13 Commission from reading such language into the Commission default rule. *See PGE*, at 611;
14 ORS 174.010.

15 Defendants provide no analysis or citation to authority supporting their position.
16 Rather they simply refer back to their earlier motion and state that failure to separate these
17 two functions is a violation of due process. Defendants’ Reply at 2. Defendants in their
18 current motion or the earlier motion, have cited not cited any cases that remotely support
19 their position that the Commission “dual role” requires the kind of separation demanded by
20 Defendants.

21 Defendants cite *Palm Gardens, Inc. v. Oregon Liquor Control Commission*, 15 Or
22 App 20, 514 P2d 888 (1973) for the proposition that while the Commission’s dual role of
23 prosecutor and adjudicator is theoretically possible, the proper degree of separation between
24 the two functions must be maintained in order for the proceeding to comply with due process.
25 Defendant’s Motion at 2.

1 According to the Oregon Attorney General’s Administrative Law Manual and
2 Uniform and Model Rules of Procedure under the Administrative Procedures Act (January 1,
3 2006):

4 “[d]ue process of law does not require formal separation of the
5 investigative functions from the adjudicative or decision-making functions
6 from the adjudicative or decision-making functions of an agency.¹ In other
7 words, the same administrator may initiate, review the progress of, or
8 participate in an investigation leading to a contested case proceeding, and
9 make or participate in making the final order in that case provided the
10 administrator or decision maker is impartial. *Id.* at 64.

11 Moreover, a review of the *Palm Gardens* decision reveals that an agency acting as a
12 prosecutor and adjudicator is certainly more than just a theoretical possibility. The court in
13 *Palm Gardens*, in addressing due process issues involving the same agency both prosecuting
14 and adjudicating claims, stated:

15 “The law in this area has been aptly stated in 2 Davis, Administrative
16 Law Treatise 175, section 13.02 (1958)

17 The case law, both federal and state, generally rejects the idea that the
18 combination with judging and prosecuting or investigating functions is a
19 denial of due process, although a few exceptions can be found.

20 Similarly, it is stated in I Cooper, State Administrative Law 339 (1965):

21 “*** [t]he combination of prosecutory and adjudicatory functions in a
22 single agency is not considered to be a violation of due process guarantees.
23 However, a court may find a deprivation of procedural due process if the
24 circumstances of a particular case indicate that an excess of prosecutory zeal
25 made it impossible for an agency to act impartially in judging the case it was
26 prosecuting.”

27 *Palm Gardens, Inc. v. OLCC*, 15 Or App at 34.

28 Here, Defendants were required to file an answer within 10 days of the date the
29 complaint was mailed to them, but failed to do so. The Commission was entitled to enter a
30 default order against Defendants under its default rule. The default procedures following

31 ¹ *Withrow v. Larkin*, 421 US 35, 95 St Ct 1456, 43 L Ed 2d 712 (1975); *Fritz v. OSP*, 30 Or App 1117, 569 P2d
32 654 (1977); *Becklin v. Board of Examiners for Engineering*, 195 OR App 186, 208, 97 P3d 1216 (2004), *rev*
33 *den* 338 Or 16 (2005).

1 here do not “indicate[] that an excess of prosecutory zeal made it impossible for an agency to
2 act impartially in judging the case it was prosecuting.”

3 The only other Oregon case cited by Defendants is a concurring opinion by Judge
4 Van Hoomissen in *Reguero v. Teacher Standards and Practices Commission*, 312 Or 402,
5 822 P2d 1171 (1991). Judge Van Homissen, in that opinion, agreed with the majority’s
6 opinion, analysis, conclusions, and disposition in the case, *id.* at 423, but expressed concern
7 regarding whether the agency hearing violated due process because the agency’s counsel, an
8 assistant attorney general, may have combined prosecutorial and adjudicative functions. *Id.*
9 Judge Van Hoomissen never specifically describes what occurred in that case, but does
10 indicate that the “dual role of the Attorney General as prosecutor and as legal advisor to the
11 agency on evidentiary and procedural matters is troublesome to me.” *Id.* Here, Commission
12 counsel did not act as a legal advisor to the Commission on evidentiary or procedural matters
13 with respect to the default order or for anything else in this case.

14 Defendants also cite two federal administrative cases, *Grolier Incorporated v. FTC*,
15 615 F3d 1215, 1218 (9th Cir. 1980) and *Elliott v. SEC*, 36 F3d 86, 87 (11th Cir. 1994). Both
16 *Grolier* and *Elliott* involved a specific provisions in the federal APA, 5 USC sec 554(d), that
17 prohibited an “employee or agent” from performing “investigative and prosecuting function”
18 and also participating or advising in the decision. *Grolier*, 615 F.2d at 1221; *Elliott*, 36 F3d
19 at 87. Both case are inapposite for two reasons: (1) the Oregon APA has does not contain a
20 provision similar to 5 USC sec 554(d); and (2) Commission counsel did not advise the
21 Commission regarding its decision.

22 Commission counsel had no contact or communications with any of the
23 Commissioners or the presiding ALJ regarding the default order. Commission counsel did
24 have discussions with ALJ Grant regarding agency protocol on issuing default orders.
25 Those discussions are not *ex parte* communications under the Commission *ex parte* rule; ALJ
26

1 Grant was not the presiding ALJ for this case. No *ex parte* communication occurred here.
2 Defendants' motion for *ex parte* communications disclosure should be denied.

3 DATED this 10th day of December 2007.

4 Respectfully submitted,

5 HARDY MYERS
6 Attorney General

7 s/David B. Hatton
8 David B. Hatton, #75151
9 Assistant Attorney General
10 Of Attorneys for the Public Utility
11 Commission of Oregon
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16 contacted me. Mr. Willis indicated that the Commission learned that the Federal
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17 ARGUMENT

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21 which to respond to the complaint. Defendants argue that this involved an *ex parte*
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17 **B. There were no *ex parte* communications regarding the default order**

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21 Defendants cite *Palm Gardens, Inc. v. Oregon Liquor Control Commission*, 15 Or
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5 investigative functions from the adjudicative or decision-making functions
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7 words, the same administrator may initiate, review the progress of, or
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12 prosecutor and adjudicator is certainly more than just a theoretical possibility. The court in
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8 assistant attorney general, may have combined prosecutorial and adjudicative functions. *Id.*
9 Judge Van Hoomissen never specifically describes what occurred in that case, but does
10 indicate that the “dual role of the Attorney General as prosecutor and as legal advisor to the
11 agency on evidentiary and procedural matters is troublesome to me.” *Id.* Here, Commission
12 counsel did not act as a legal advisor to the Commission on evidentiary or procedural matters
13 with respect to the default order or for anything else in this case.

14 Defendants also cite two federal administrative cases, *Grolier Incorporated v. FTC*,
15 615 F3d 1215, 1218 (9th Cir. 1980) and *Elliott v. SEC*, 36 F3d 86, 87 (11th Cir. 1994). Both
16 *Grolier* and *Elliott* involved a specific provisions in the federal APA, 5 USC sec 554(d), that
17 prohibited an “employee or agent” from performing “investigative and prosecuting function”
18 and also participating or advising in the decision. *Grolier*, 615 F.2d at 1221; *Elliott*, 36 F3d
19 at 87. Both case are inapposite for two reasons: (1) the Oregon APA has does not contain a
20 provision similar to 5 USC sec 554(d); and (2) Commission counsel did not advise the
21 Commission regarding its decision.

22 Commission counsel had no contact or communications with any of the
23 Commissioners or the presiding ALJ regarding the default order. Commission counsel did
24 have discussions with ALJ Grant regarding agency protocol on issuing default orders.
25 Those discussions are not *ex parte* communications under the Commission *ex parte* rule; ALJ
26

1 Grant was not the presiding ALJ for this case. No *ex parte* communication occurred here.
2 Defendants' motion for *ex parte* communications disclosure should be denied.

3 DATED this 10th day of December 2007.

4 Respectfully submitted,

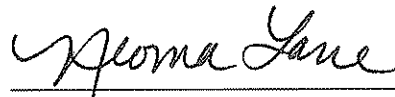
5 HARDY MYERS
6 Attorney General

7 s/David B. Hatton
8 David B. Hatton, #75151
9 Assistant Attorney General
10 Of Attorneys for the Public Utility
11 Commission of Oregon
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1 **CERTIFICATE OF SERVICE**

2
3 I certify that on December 10, 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
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11 

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