

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' MOTION FOR
DISCLOSURE OF *EX PARTE*
COMMUNICATIONS

11
12 **INTRODUCTION**

13 Defendants, citing OAR 860-012-0015(1), have requested a broad order requiring
14 complainant to disclose all ex parte communications complainant has had with the
15 adjudicating authority in this case and for an identification of those agency employees
16 involved in the "prosecution" of the case and those involved in the "adjudication" of the
17 claim. To justify this broad order Defendants baldly characterize communications as ex parte
18 communications even though they are clearly not. No ex parte communications have been
19 declared because there have been no ex parte communications. The Defendants' motion
20 should be denied.

21 **ARGUMENT**

22 OAR 860-012-0015, the Commission's rule regarding ex parte communications,
23 provides:

24 (1) Ex parte communications are discouraged and, if made, must be disclosed to
25 ensure an open and impartial decision-making process.

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

2 (a) Is made by any person directly to a Commissioner or presiding
3 Administrative Law Judge (ALJ) outside the presence of any or all parties
4 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

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

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

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

10 (b) After the Commission initiates a process similar to that described in
11 OAR chapter 860, division 014, including but not limited to, an order
12 suspending a tariff for investigation or the holding of a prehearing
13 conference.

14 (4) A person who has an ex parte communication with a Commissioner must
15 promptly notify the presiding ALJ that such communication has occurred.

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

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

20 (b) The date and time of the communication;

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

22 (d) A summary of the matters discussed;

23 (e) A copy of any written communication; and

24 (f) Any other relevant information concerning the communication.

25 (6) The presiding ALJ may require the person responsible for the ex parte
26 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;

- 1 (b) Are made to a Commissioner or presiding ALJ by a member of the
Commission staff who is not a witness in the proceeding;
- 2 (c) Are made to a Commissioner or presiding ALJ by an Assistant Attorney
3 General who is not representing the Commission staff in the proceeding;
- 4 (d) Are made in a rulemaking proceeding conducted pursuant to ORS
183.325 through 183.410; or
- 5 (e) The presiding ALJ determines should not be subject to this rule,
6 including but not limited to communications from members of the public
7 that are made part of the administrative file or communications that are the
subject of *in camera* proceedings.

8 Defendants contend that the Commission’s decision to direct the Defendants to file an
9 answer within 10 days of service of the Complaint under ORS 756.512(1) must have been
10 communicated to the Commission’s attorney who is prosecuting the claim, constituting *ex*
11 *parte* communications that must be disclosed. Defendants’ Motion to 4.

12 Counsel for the Commission certainly did receive directions from the Commission
13 that Defendants were to be given 10 days to answer the Complaint. However, that
14 communication is not an *ex parte* communication. For a communication to be *ex parte* it
15 must “[r]elate[] to the merits of an issue in the pending contested case proceeding.” *See* OAR
16 860-012-0015(2)(b). In addition, the Commission’s *ex parte* rules do not apply to
17 “communications that * * * [a]ddress procedural issues.” *See* OAR 860-012-0015(8)(a).
18 Any communications between the Commission and its counsel regarding the Commission’s
19 decision to require the Defendants to file an answer within 10 days of service of the
20 Complaint are procedural and not related to the merits. Accordingly, they are not an *ex parte*
21 communication.

22 Defendants’ second argument focuses on who drafted and presented the Default
23 Order to the Commission on September 26, 2007. Defendants contend that if the drafting
24 and presentation of the Default order “was not performed by a ‘judicial’ employee, but was
25 performed by someone engaged in the prosecution of the claim, the presentation of the Order
26 to the Commission again was an *ex parte* communication.” Defendants’ Motion at 3. The

1 Commission does not agree that Defendants' argument is a correct statement of the law
2 where a party is in default. Under the Commission's default rule, OAR 860-013-0055(1),
3 once a party is in default, the Commission may dispose of the proceeding without further
4 notice to the defaulting party. The Defendants had been in default for six days when the
5 Default Order was presented to the Commission on September 26, 2007. No ex parte
6 communications have been declared because there have no ex parte communications.
7 Defendants' motion should be denied.

8 DATED this 2nd day of November 2007.

9 Respectfully submitted,

10 HARDY MYERS
11 Attorney General

12 s/David B. Hatton
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14 Assistant Attorney General
15 Of Attorneys for the Public Utility
16 Commission of Oregon
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