

1  
2  
3  
4  
5 BEFORE THE OREGON PUBLIC UTILITY COMMISSION

6 PUBLIC UTILITY COMMISSION OF  
7 OREGON,

8 Complainant,

9 v.

10 VCI COMPANY f/k/a STAN EFFERDING  
11 and STANLEY JOHNSON d/b/a VILAIRE,  
12 and VCI COMPANY, a Washington  
corporation,

Defendants.

Docket No. UM1288

DEFENDANTS' MOTION FOR  
DISCLOSURE OF *EX PARTE*  
COMMUNICATIONS

(ORAL ARGUMENT REQUESTED)

13 **1. Motion**

14 Pursuant to OAR 860-012-0015(1), defendants move for an order requiring complainant  
15 to disclose all *ex parte* communications complainant has had with the adjudicating authority in  
16 this case and for an identification of those agency employees involved in the "prosecution" of the  
17 claim and those involved in the "adjudication" of the claim.

18 **2. Points and Authorities**

19 This is an action for monetary damages brought by the Public Utility Commission of  
20 Oregon as "complainant" against defendants, VCI Company *et al.* The Complaint was filed by  
21 an Assistant Attorney General before the Commission, on behalf of the Commission.<sup>1</sup> Thus, the  
22

23 <sup>1</sup> Defendants have filed separately a Motion to Vacate Default Order and Motion to  
24 Dismiss for lack of subject-matter jurisdiction. The Commission has no jurisdiction to award  
25 monetary damages. *Schaefer v. Centurytel of Oregon*, UC 569, Order No. 01-157 (OPUC, Feb.  
26 8, 2001). Nothing in this Motion is intended to waive, nor could it waive, defendants' challenge  
to the Commission's jurisdiction. See OAR 860-013-0050(4) ("Objections to the Commission's  
jurisdiction or that a pleading does not state facts sufficient to constitute grounds for relief are  
never waived.").

1 Commission has undertaken dual roles, that of prosecutor of its claim as the “complainant” and  
2 as the “adjudicator” of the same claim.<sup>2</sup> Such a dual role is theoretically permissible; however,  
3 the proper degree of separation between the two functions must be maintained in order for the  
4 proceeding to comply with due process. *See Palm Gardens, Inc. v. Oregon Liquor Control*  
5 *Commission*, 15 Or. App. 20, 34, 514 P.2d 888 (1973).

6 For instance, the same person cannot act simultaneously as the prosecutor of a claim and  
7 the adjudicator of the same claim. In *In re Murchison*, 349 U.S. 133, 136 (1955), the United  
8 States Supreme Court found that it was a violation of due process for a judge to act as both the  
9 prosecutor of contempt claims and as the adjudicator of those same claims. *Id.*; *see also Grolier*  
10 *Incorporated v. FTC*, 615 F.2d 1215, 1218 (9<sup>th</sup> Cir. 1980) (“In an effort to minimize any  
11 unfairness caused by this consolidation of responsibilities, the APA mandates an internal  
12 separation of the investigatory-prosecutorial functions from adjudicative responsibilities.”);  
13 *Elliott v. SEC*, 36 F.3d 86, 87 (11<sup>th</sup> Cir. 1994) (“An agency may combine investigative,  
14 adversarial, and adjudicative functions, as long as no employees serve in dual roles.”).

15 In Oregon, Justice Van Hoomissen noted similar concerns in his concurring opinion in  
16 *Regero v. Teacher Standards and Practices Commission*, 312 Or. 402, 822 P.2d 1171 (1991):

17 [The] issue is whether the agency hearing violated due process because the  
18 agency’s counsel, and assistant attorney general, may have combined  
19 prosecutorial and adjudicative functions....

20 In the context of an APA contested case hearing, ORS 183.413 et seq., the dual  
21 role of the attorney general as prosecutor and as legal advisor to the agency on  
22 evidentiary and procedural matters is troublesome to me. Assuming that such a  
23 dual assignment is permissible in the abstract, the issue remains whether, in this  
24 and other cases, the requisite degree of separation of functions is being  
25 maintained within the Department of Justice.

26 *Id.*

In the present case, the complainant contends that the same attorney who is representing

---

<sup>2</sup> For the purposes of this Motion, the term “complainant” refers to the Commission as the plaintiff in the action for monetary damages, and the term “Commission” refers to the Commission in its capacity as the adjudicator of the claim.

1 the Commission in its capacity as the “complainant” has also been granted the “adjudicative”  
2 authority by the Commission to shorten the time period for defendants to file their Answer. In  
3 complainant’s *Response to Motion to Set Aside Default Order*, complainant contends that the  
4 Commission shortened the time period to file the Answer by including an “order”<sup>3</sup> in the prayer  
5 of the Complaint that the Answer was to be filed within ten days. *Response* at p. 4. The  
6 complainant argues that the order in the Complaint complies with the requirement in OAR 860-  
7 013-0050(1) that the time period for filing of an Answer was “otherwise specified or directed by  
8 the Commission or Administrative Law Judge.” *Id.* The Complaint, however, was signed only  
9 by the attorney prosecuting the claim, thus putting the attorney in the questionable position of  
10 both prosecuting the claim and issuing the scheduling order shortening the time to answer.<sup>4</sup> In  
11 addition to raising questions about the validity of the scheduling order itself, the dual role raises  
12 serious concerns regarding *ex parte* communications between the prosecutor and the adjudicator  
13 of the claim.

14 First, it is unclear how the Commission granted the authority to issue the scheduling  
15 order to the assistant attorney general. Under ORS 756.055, it is to be done by rule or order:

16 **Delegation of Authority.** (1) Except as provided in subsection (2) of this section,  
17 the Public Utility Commission may designate by order or rule any commissioner  
18 or any named employee or category of employees who shall have authority to  
19 exercise any of the duties and powers imposed upon the Commission by law. The  
official act of any commissioner or employee so exercising any such duties or  
powers is considered to be an official act of the Commission.

---

20 <sup>3</sup> Complainant also contends that OAR 860-013-0050(1) does not require an “order” of  
21 the Commission to be effective, but that any reasonable notice of the Commission’s wishes is  
adequate. By any other name, however, it is an “order.” ORS 183.310(6)(a) defines an agency  
22 “order” as “any agency action expressed orally or in writing directed to a named person or  
named persons, other than employees, officers or members of any agency. ‘Order’ includes any  
23 agency determination or decision issued in connection with a contested case proceeding.”

24 <sup>4</sup> There can be no question that issuing a scheduling “order” is the function of a judge, not  
a party to an action. It is the function of the judge to set the schedule in a contested case. *See*  
25 *e.g., Phan v. Morrow*, 185 Or. App. 628, 632, 60 P.3d 1111 (2003)(“a trial court is authorized to  
provide for the orderly conduct of proceedings before it and to compel obedience to its orders.  
26 ORS 1.010. The trial court’s scheduling order in this case was consistent with that authority.”).

1  
2 *Id.* There is no public record of a rule or order in this case granting the authority to issue the  
3 scheduling order to the attorney. Thus, the communication must have been delivered to only one  
4 party, the complainant's attorney who is prosecuting the claim, constituting *ex parte*  
5 communication that must be disclosed.

6 Second, someone, not yet identified, drafted and presented the Default Order of  
7 September 26, 2007, to the Commissioners for their signatures. If this was not performed by a  
8 "judicial" employee, but was performed by someone engaged in the prosecution of the claim, the  
9 presentation of the Order to the Commission again was *ex parte* communication. Counsel for the  
10 defendants has been on the official service list of this docket for some nine months and should  
11 have been served with all communications between the prosecutors of the claim and the  
12 adjudicators of the claim.

13 Defendants' concerns regarding *ex parte* communications extend not just to the  
14 communications with the complainant's attorney, but also to the role taken by staff in this case.  
15 This is essentially the same issue that was addressed by the HB 3615 Interim Task Force Report  
16 of January 2001. The HB 3615 Interim Task Force was set up by the legislature to investigate  
17 concerns about perceived unfairness in contested cases before the Oregon Public Utility  
18 Commission. The Report noted:

19 b. Separation of staff's dual role; application of *ex parte* rules.

20 Issue: There is the perception among stake holders and parties that the contested  
21 proceedings process is unfair because there is inadequate distinction between staff  
22 that presents testimony and staff that advises the Commissioners. This is true  
23 though the Assistant Attorney General, who is counsel to the Commissioners, has  
24 the legal responsibility to insure that "ex parte" rules are not violated. The task  
25 force does not believe, and has not been furnished with any information that  
26 demonstrates or implies that there has been any improper behavior by any  
Commissioner, ALJ, AEG or staff member.

\* \* \* \* \*

[T]he Task Force remains concerned that the staff involved in promoting a  
position in the case can also be called upon to provide technical or policy input to

1 the ALJ or the Commissioners in the same case. These advisory communications  
2 can occur throughout contested cases but most often in decision meetings, and are  
“off the record” and that other parties are not privy to the communications.

3 This gives the perception that staff may have undue influence over the  
4 Commissioners, and that other parties may be disadvantaged, or not in an equal  
5 position to have their views considered. With limited resources do deal with  
6 highly complex contested cases, the question is, how can the ALJ and the  
Commissioners obtain adequate technical advice while assuring the parties that  
the staff does not have undue influence in the decision-making process, or abuse  
its advisory role to tilt the decision in the case towards its own recommendations?

### 7 **RECOMMENDATIONS:**

8 Even if the PUC staff is able to perform a dual role of “party” and “advisor”  
9 without disadvantage to other parties, the task force is concerned with whether  
10 and how it should perform this dual role. The Task Force understands the PUC’s  
11 concerns in having limited staff resources yet needing technical assistance and  
12 advice during a case and in the final decision-making process. However, the Task  
13 Force believes it is important to the integrity and confidence of the decision-  
14 making process to draw a brighter line between the staff involved in promoting its  
15 side of the case and the staff assisting the Commission in deciding the case. The  
16 Task Force urges the legislature to approve adequate funding for the PUC as may  
17 be necessary to enable the PUC to implement the Task Force’s recommendations.

18 *Id.* at P.8.

19 In the present case, some form of *ex parte* communications must have taken place  
20 between the Commission, staff and the Office of the Attorney General which resulted in the  
21 shortening of the time to file the Answer and in the execution of the Default Order. Pursuant to  
22 OAR 860-012-0015(1), those communications “must be disclosed to ensure an open and  
23 impartial decision-making process.”

24 It is this apparent commingling of duties in the issuance of the “order” shortening the  
25 time to file the answer and the presentation of the *ex parte* Default Order of September 26, 2007,  
26 signed by the Commissioners that form the basis of the defendants’ due process challenge to the  
Default Order and this Motion to disclose the *ex parte* communications.

Further, it is impossible for defendants to monitor whether communications are proper  
and whether the process is “open and impartial” without knowing who within the agency is  
operating in the prosecution of the claim and who is adjudicating the claim. Therefore,

1 defendants request an order requiring complainant to disclose which employees are operating in  
2 which capacity.

3 **3. Conclusion**

4 Proceedings before the Commission should be "open and impartial." The roles of  
5 prosecutor and adjudicator in this case, however, appear to have been commingled, caused by  
6 and resulting in questionable *ex parte* communications that "must be disclosed" under OAR 860-  
7 012-0015(1). Therefore, defendants' motion to disclose the *ex parte* communications should be  
8 granted along with their request that the employees functioning as prosecutors and those serving  
9 as adjudicators be identified.

10 Dated this 22<sup>nd</sup> day of October, 2007.

11 SCHWABE, WILLIAMSON & WYATT, P.C.

12  
13 By: 

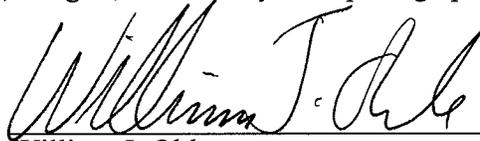
14 William J. Ohle, OSB #913866  
15 wohle@schwabe.com  
16 Facsimile: 503.796.2900  
17 Of Attorneys for VCI COMPANY f/k/a  
18 STAN EFFERDING and STANLEY  
19 JOHNSON d/b/a VILAIRE, and VCI  
20 COMPANY, a Washington corporation  
21  
22  
23  
24  
25  
26

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 22<sup>nd</sup> day of October 2007, I served the foregoing  
3 DEFENDANTS' MOTION FOR DISCLOSURE OF *EX PARTE* COMMUNICATIONS on the  
4 following party at the following address:

5 David B. Hatton  
6 Assistant Attorney General  
7 1162 Court Street NE  
8 Salem, OR 97301-4096  
9 David.Hatton@state.or.us

10 by electronic filing, emailing and mailing to him a true and correct copy thereof, certified by me  
11 as such, placed in a sealed envelope addressed to him at the address set forth above, and  
12 deposited in the U.S. Post Office at Portland, Oregon, on said day with postage prepaid.

13   
14 \_\_\_\_\_  
15 William J. Ohle  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26