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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UE 115 and UE 116

In the Matter of Portland General Electric	)	
Company's Proposal to Restructure and Reprice its	)	
Services in Accordance With the Provisions of	)	
SB 1149 (UE 115).	)	ORDER
	)	
In the Matter of PacifiCorp's Proposal to	)	
Restructure and Reprice its Services in Accordance	)	
With the Provisions of SB 1149 (UE 116).	)	

**DISPOSITION: INTERNAL OPERATING GUIDELINES LAWFUL;  
MOTIONS TO ADOPT TASK FORCE  
RECOMMENDATIONS DENIED;  
UE 115/116 DECISION PROCESS MODIFIED.**

In these two rate proceedings, Portland General Electric Company (PGE) and PacifiCorp challenge the Commission's Internal Operating Guidelines that govern post-hearing procedures. They contend that the policies are unlawful and seek immediate adoption of more stringent procedures recommended in the *Report to the Oregon Legislature from the HB 3615 Interim Task Force* (Task Force Report).

The presiding Administrative Law Judges (ALJs) denied PGE and PacifiCorp's requests for adoption of new procedures in the respective dockets. Following motions for reconsideration filed by both utilities, the ALJs certified this issue to the Commission for resolution pursuant to OAR 860-014-0091.

Based on the pleadings in this matter, including replies to the motions filed by the Citizens' Utility Board (CUB), the Industrial Customers of Northwest Utilities (ICNU) and the Commission Staff (Staff), we agree with the ALJs' prior determinations and deny PGE and PacifiCorp's motions for the reasons set forth below.

**INTRODUCTION**

Statement of Issues

- (1) Does current agency practice, which allows Staff members to assist the Commission in its evaluation of the evidence, violate state statutes and constitutional requirements governing contested case proceedings?

- (2) Should the Commission adopt, in part, the Task Force recommendations to govern the post-hearing review of these dockets?

Background

In Order No. 01-253, we recently adopted guidelines to formally codify our internal operating procedures and policies. To help promote fairness in our decision-making process, these guidelines generally prohibit any Staff member that actively promoted a particular position at hearing from participating in deliberations. Our guidelines prohibit any participating Staff member from discussing facts not contained in the record, and also prohibit Staff from advocating a particular position during the deliberations. The guidelines provide, in pertinent part:

It is Commission policy that, as a general rule, a Staff member who appeared as a witness in a particular proceeding shall not attend Commission meetings where the issues in the case are being decided. If a technical question arises at a decision meeting that can only be answered by a Staff witness, the staff member may attend for the limited purpose of explaining the technical matter. In no case should the staff witness advocate a position. Any such instance would be an ex-parte contact and would require disclosure.<sup>1</sup>

Position of the Parties

PGE and PacifiCorp acknowledge the Commissioners’ need for adequate policy and technical advice in the deliberation of contested case issues. They contend, however, that the Commission’s guidelines are unlawful because they allow Commissioners to communicate with Staff members who participated in the creation of testimony or in settlement discussions. PGE and PacifiCorp argue that by allowing Staff to answer technical questions or provide advice, the Commission is violating statutory provisions and constitutional due process standards.

For these reasons, PGE and PacifiCorp contend that our adoption of and reliance on the guidelines is insufficient. They argue that to comply with statutory and constitutional requirements, we must immediately adopt Task Force recommendations that restrict “Party Staff” from contested case deliberations.<sup>2</sup>

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<sup>1</sup>Order No. 01-253 at 8.

<sup>2</sup>The Task Force defines “Party Staff” as Staff members who “participate as witnesses, staff members who actively participate in the development or review of witnesses’ testimony and provide substantive direction on the positions advocated by those witnesses, staff members who actively participate in settlement discussions advocating the staff’s position, the staff case manager, and the AAGs representing the staff in the case[.]” *Task Force Report* at 9.

## COMMISSION RESOLUTION

### Issue 1: Internal Operating Guidelines

We first address PGE and PacifiCorp's contention that our current practices, as codified in the guidelines, violate statutory requirements and due process standards. We address each argument separately.

#### *Statutory Requirements*

PGE and PacifiCorp contend that the Commissioners violate *ex parte* standards when they communicate with Staff members who participated in the creation of testimony or in settlement discussions. In addition, they argue that by allowing Staff to answer technical questions or provide advice, the Commission also violates provisions of ORS Chapters 756 and 757 by accepting evidence after the record is closed.<sup>3</sup> In essence, PGE and PacifiCorp do not want the Commissioners or ALJs to communicate with Staff involved in a contested case unless such communication is disclosed or all parties are present.

The utilities' reliance on these statutory provisions is misplaced. ORS 183.462 requires an agency to place on the record:

[A] statement of the substance of any written or oral *ex parte* communications on a fact in issue made to the agency during its review of a contested case. The agency shall notify all parties of such communications and of their right to rebut the substance of the *ex parte* communications on the record.

Under this statute, an agency decision maker must disclose all new facts that were not previously made part of the record. However, as clarified by the Attorney General, the decision-maker need not disclose a communication with agency staff about facts that are already in the record. It is the discussion of new facts not contained in the record that, without disclosure, is unlawful.<sup>4</sup>

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<sup>3</sup>ORS 756.558(2) requires the Commission to decide contested cases based "upon evidence received in the matter," and ORS 757.210(5) requires that the decisions on rate filing "shall be based on the record made at hearing."

<sup>4</sup>See Oregon Attorney General's *Administrative Law Manual* (2000) at 143-144; 40 Op Atty Gen 321 (1980).

The Commission adopted similar language in OAR 860-012-0015.<sup>5</sup> In this rule, the Commission replaced the words "a fact in issue" with "the merits of an issue." This phrase includes legal and policy matters. Further, the Commission added that it is communications made by "a party" that must be disclosed, and that Staff is not a party for purposes of this rule.<sup>6</sup>

The effect of this Commission rule is that we will disclose more information than required by statute. Not only will we disclose any *ex parte* communication on a fact in issue made by any person, we will also disclose any *ex parte* communication regarding the *merits* of an issue by a *party*. Our rule provides greater protection in contested case proceedings as to the types of communications we must disclose.

Accordingly, our practice of allowing Staff to provide technical or policy assistance during decision meetings, or any other time, does not violate our rules and statutes. As noted above, we are extremely careful to make certain that Staff does not provide new evidence, and that any advice be based on facts contained in the record. We understand our responsibilities to stay within the record, and, more importantly, to follow the law. We also understand that if by some chance our discussion should stray, we are obligated to notify the parties.

#### *Due Process Standards*

PacifiCorp and PGE argue their constitutional due process rights are violated when we allow Staff to provide assistance during decision meetings. The utilities' arguments are based on the premise that new evidence is submitted. We agree that an agency might violate due process if, during the decision meeting, agency staff relates factual matters not contained in the record. In *Ohio Bell Telephone v. Public Utilities Commission of Ohio*, 301 US 292 (1937) and *Turnquist v. Employment Division*, 72 Or App 101 (1985), the courts found the respective agencies had improperly relied on articles or letters that had not been made part of the record.

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<sup>5</sup>OAR 860-012-0015 provides:

- (1) The Administrative Law Judge (ALJ) shall place on the record a statement of the substance of any written or oral *ex parte* communication on the merits of an issue made to the ALJ by a party while a contested case is pending. The ALJ shall notify the parties of the communication and of their right to rebut the communication on the record.
- (2) The Commission shall place on the record a statement of the substance of any written or oral *ex parte* communication on the merits of an issue made to the Commission by a party while a contested case is pending. The Commission shall notify all parties of the communication and of their right to rebut the communication on the record.
- (3) For purposes of this rule, staff is not a party.

<sup>6</sup>This is consistent with the definition of "party" set forth in ORS 183.310(7), which specifically excludes agencies from the definition of "person." An agency is not a party to its own proceedings, but of course has the right to present evidence and testimony. See *Administrative Law Manual, supra*, at 111.

Our current practice, however, forbids such misconduct.<sup>7</sup> Contrary to PGE and PacifiCorp's assertion, Staff does not provide additional evidentiary material during these deliberations. Their responsibilities are to assist the Commission in its evaluation of the facts in the record during the decision-making process. Because we do not allow the presentation of new evidence during these meetings, the utilities' due process rights are not violated.<sup>8</sup>

Accordingly, we conclude that our current practice as codified in the guidelines, which allow Staff to provide technical assistance at decision meetings, does not violate the *ex parte* rules, our governing statutes, or the United States Constitution.<sup>9</sup> It is clear that the Commission is allowed to consult with Staff without violating due process or statutory standards, so long as the decisions are based on the evidence in the record.<sup>10</sup>

## Issue 2: Task Force Recommendations

Having concluded that our guidelines are lawful, the question remains whether we should, nevertheless adopt the Task Force recommendations to govern our post-hearing review of these cases. We preliminarily note that administrative agencies are charged with broad general powers and are statutorily required to perform a variety of functions, including investigation, prosecution, legislation, and adjudication. To meet these obligations, agency administrators are authorized to hire expert staff to assist in the operation of the agency.<sup>11</sup> Due to the need for technical and policy advice, the same agency staff that helped present the case in the first instance often assist agency administrators in the evaluation of evidence during deliberations.<sup>12</sup>

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<sup>7</sup>Indeed, the Task Force specifically concluded that there is no indication that the Commission or its Staff engaged in misconduct. As a preface to its recommendations regarding the issue of Staff's dual role of party and advisor, the Task Force stated: "The Task Force does not believe, and has not been furnished with any information that demonstrates or implies that there has been any improper behavior by any Commissioner, ALJ, [Assistant Attorney General], or staff member." *Task Force Report* at 8.

<sup>8</sup>Moreover, due process does not require a formal separation of the investigative functions from the decision-making functions in administrative agencies. *See, e.g., Fritz v. Oregon State Penitentiary*, 30 Or App 1117 (1977); 39 Op Atty Gen 431 (1978).

<sup>9</sup>We note that, while the Task Force did not believe our guidelines went far enough to address the perception of fairness in our decision making process, it expressly stated that it did not believe our current processes and policies have resulted in a pattern of unfair treatment. *Task Force Report* at 7. Moreover, the Task Force report contains no finding that the guidelines violated any statutory or constitutional provision.

<sup>10</sup>*See Administrative Law Manual, supra*, at 136.

<sup>11</sup>*See, e.g.,* ORS 756.036(3)(a).

<sup>12</sup>*See, e.g.,* ORS 183.450, which permits agency decision-makers to utilize "the agency's experience, technical competence and specialized knowledge in the evaluation of the evidence presented."

We acknowledge PGE and PacifiCorp's concerns about Staff's role in our decision-making process. We understand the utilities' desire for more transparency in the process and their concerns about perceptions of fairness. The Commission considers this to be a serious issue and, as further addressed below, will be carefully examining this matter during our upcoming review of the Task Force Report.

We are hesitant, however, to implement permanent procedural changes now. These two rate cases are significant. In addition to seeking substantial rate increases, both utilities propose fundamental changes to their operations and services in accordance to SB 1149. The parties acknowledge the Commission's need for adequate technical and policy advice in resolving these cases. However, due to the number of issues raised and the limited size of our Staff, most—if not all—Staff members with expertise relevant to these dockets have attended settlement discussions or assisted in the preparation of testimony. Unlike some state regulatory commissions, this Commission does not have separate staff, completely independent of the chain-of-command of rate case staff, to provide advice to the Commissioners on technical issues. Moreover, there is so little time left before the expiration of the suspension periods that the Commission would have difficulty obtaining technical advice from all parties through bench requests or conferences. Had the Task Force recommendations been in place at the outset of these cases, Staff would have been able to designate which members would serve as "party Staff" and advisory Staff, and the procedural schedules could have allowed additional time after hearings for Commission deliberations.

We also believe that it would be improper to adopt these Task Force recommendations before we have the opportunity to review and evaluate the entire Task Force report with stakeholders. The proposed post-hearing procedures are but one part of the Task Force's comprehensive review of our internal structure and current operating processes and policies. As CUB notes, while some portions of the Task Force Report may tend to favor the utilities, such as those at issue here, other recommendations such as intervenor funding are designed to improve the ability of all parties to fairly participate in agency proceedings. Because any changes to internal Commission practices will have numerous impacts on the contested case process and its participants, we have established a process to review and respond to the Task Force's recommendations. This process includes stakeholder interviews and a report to the Commission by September 1, 2001. We believe that it is reasonable to allow that process to be completed, so that we can make an informed determination on the Task Force's comprehensive recommendation.

We are willing, however, to make some specific changes to the decision-making process in these dockets that address, in part, the utilities' concerns while ensuring that the Commission has the information necessary to make a well-informed and reasoned decision that serves the public's interest. For these rate cases, we agree that Staff members who appeared as witnesses or sponsored testimony will not attend any decision meeting for any purpose. Additionally, for any deliberations involving Rate of Return issues, only Staff members who are not "party Staff," as that term is defined by the Task Force, shall

participate in deliberations. We may, however, discuss facts contained in the record with non-witness Party Staff on other contested issues, pursuant to our Internal Operating Guidelines. We emphasize that these modifications apply only to these two dockets, and are made possible only due to the particular circumstances presented.

**ORDER**

IT IS ORDERED that the motions to adopt post-hearing procedures recommended by the HB 3615 Interim Task Force, filed by Portland General Electric Company and PacifiCorp, are denied. The Commission’s post-hearing review of these two dockets shall be governed by procedures discussed above.

Made, entered, and effective \_\_\_\_\_.

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**Roy Hemmingway**  
Chairman

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**Roger Hamilton**  
Commissioner

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**Joan H. Smith**  
Commissioner

A party may request rehearing or reconsideration of this order pursuant to 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 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.