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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 419

In the Matter of a Proposed Rulemaking Opened)
as a Result of AR 395 to Amend OAR 860-012-)
0010 and 860-013-0075 Regarding Former) ORDER
Utility Employees Working for the Commission)
and Clarification of the Requirement for Filing)
Work Papers in Commission Dockets.)

DISPOSITION: RULE AMENDMENTS ADOPTED

Under ORS 183.545, each agency must review its rules at least every three years. On November 21, 2000, the Commission initiated a rulemaking in docket AR 395 and issued its Notice of Periodic Review of Rules. The Commission invited comments regarding all its administrative rules. As part of the Commission’s triennial review, the Commission determined to amend OAR 860-012-0010 regarding former utility company employees working for the Commission and OAR 860-013-0075 clarifying the requirement for filing work papers in Commission dockets. Notice of the proposed amendments was published in the Oregon Secretary of State’s Bulletin and sent to the list of persons interested in such matters.

The proposed changes to the rules are set out below:

OAR 860-012-0010

Former Employees

(1) No former Commission employee may appear on behalf of other parties in a formal proceeding in which the former employee took an active part on the Commission’s behalf.

(2) Except with the Commission’s written permission, no former Commission employee shall appear as an expert witness on behalf of other parties in a formal proceeding in which the former employee took an active part on the Commission’s behalf.

(3) Except with the Commission’s written permission, no former utility employee shall appear as an expert witness on behalf of the Commission in a formal proceeding in which the former employee took an active part on the utility’s behalf.

OAR 860-013-0075

(1) Initial filing:

(a) Unless waived by the Commission or Administrative Law Judge (ALJ) for good cause, any utility filing new or revised tariff schedules which constitute a general rate revision shall include supporting testimony and exhibits, work papers, and trial briefs. A general rate revision is a filing by a utility which affects all or most of the utility's rate schedules. The term "general rate revision" does not include rate changes set forth in OAR 860-022-0017(1).

(b) As used in this rule, work papers shall consist of those documents which show the source, calculations, and details supporting the testimony and other exhibits submitted. ~~The Commission or ALJ may direct that the work papers of a party be provided to any other party.~~ When, subsequent to the initial filing made by the utility, a party files testimony and exhibits, it shall at the same time provide a copy of its work papers to any other party that has requested a copy.

(c) The trial brief shall contain an exhibit showing in summary form the following information:

- (A) The dollar amount of total revenues which would be collected under the proposed rates;
- (B) The dollar amount of revenue change requested, total revenues, and revenues net of any credits from federal agencies;
- (C) The percentage change in revenues requested, total revenues, and revenues net of any credits from federal agencies;
- (D) The test period;
- (E) The requested return on capital and return on equity;
- (F) The rate base proposed in the filing;
- (G) The results of operations before and after the proposed rate change; and
- (H) The proposed effect of the rate change on each class of customers.

The notice of rulemaking included the information that a public rulemaking hearing may be requested in writing by 10 or more people or by an association with 10 or more members within 21 days after publication of the notice in the Bulletin or 28 days from the date the notice was sent to people on the agency mailing list, whichever is later. Only Qwest Corporation (Qwest) requested a hearing. Because Qwest's was the only request for a hearing, no hearing will be held.

Portland General Electric Company (PGE), Verizon Northwest, Inc. (Verizon), and Qwest submitted comments on the proposed amendments. Staff submitted a memorandum at the July 24, 2001, public meeting (the AR 395, Triennial Review, agenda item) addressing the amendments proposed in this docket, and it submitted a response to PGE's, Verizon's, and Qwest's comments. Verizon submitted a proposal for alternative language to Staff's proposal on November 23, 2001. We address each set of remarks in turn below.

PGE. PGE suggests modifying proposed OAR 860-012-0010 as follows:

Except with the Commission's written permission, no former utility employee **now working for the Commission** shall appear as an expert witness on behalf of the Commission in a formal proceeding in which the former **utility** employee took an active part on the utility's behalf.

Verizon. OAR 860-012-0010(3). Verizon argues that under subsection (2) of the rule, the Commission controls whether its former employees testify on behalf of other parties. Proposed section (3), however, based on the existing provisions of subsection (2), puts the Commission in the position of affecting companies' confidences with no provision for input by the companies. To protect its confidential information, the affected company should have a meaningful opportunity to give the Commission input before a decision is made. Therefore, Verizon contends, the company should receive notice.

Verizon notes that the proposed subsection appropriately includes not only former utility employees who might testify on behalf of the Commission but also consultants or other third parties. However, Verizon argues that the rule as proposed is too narrow. First, the rule is limited to former utility employees whereas it should cover any company that might appear before the Commission, and the affiliates of any such company.

Second, Verizon contends that the draft rule, instead of being limited to those who appear as "expert witnesses," should cover testimony of any sort, expert or otherwise. Subsection (1) of the existing rule gives the Commission this sort of protection with regard to its former employees. The companies should obtain similar consideration. Verizon argues that a witness testifying merely as to observed facts is not giving expert testimony. In the context of the issue being addressed by this rule, Verizon contends that a former company employee could offer lay testimony about what he observed that Telco X (for instance) did or planned to do. Such testimony could involve confidential information.

Third, Verizon initially maintained that the rule should address more than testimony; the companies' confidences should be protected in all situations. However, Verizon dropped its language proposed to implement this objective in view of Staff's administrative concerns, set out below. Verizon proposes the following rule language:

No former employee of a company subject to the jurisdiction of the Commission or appearing before it in a proceeding, or of an affiliate of such company, shall appear as a witness on behalf of the Commission, except with the Commission's written permission, given after notice to the affected companies and an opportunity to object.

Verizon notes that its language puts the onus on the companies to speak up if they think confidential information may be compromised.

OAR 860-013-0075. To clarify that the rule change applies only to parties other than the utility, which has filed its work papers with its initial testimony and exhibits, Verizon

proposes to leave existing (b) unchanged and renumber it (c), to renumber existing (c) as (d), and to insert a new subsection (b), which reads:

When, subsequent to the initial filing made by the utility, a party files testimony and exhibits, it shall at the same time provide a copy of its work papers to any other party that has requested a copy.

Qwest. Like Verizon, Qwest believes that the scope of OAR 860-012-0010 should be broadened to address more than appearing as an expert witness in a formal proceeding in which the former employee took an active part. Commission business is sometimes accomplished in informal proceedings, Qwest asserts, and there is a potential for the appearance of undue influence and the use of confidential or proprietary information in those informal settings as well as in formal proceedings. Accordingly, Qwest suggests that former employees of the Commission should be prohibited from having any contact with Commission Staff on behalf of another party, with respect to matters on which they worked while employed by the Commission. Similarly, former employees of utilities should be prohibited from working on the same specific matters that the former utility employee worked on while employed by the utility.

In the alternative, Qwest suggests that the Commission guard against the appearance of impropriety by enacting a prohibition against disclosure of confidential, trade secret, or proprietary information by a former employee, whether of a utility or the Commission, that the former employee gained in the course of his or her former employment. Attorneys are subject to a similar prohibition, which prevents them from using confidences and secrets against their former client in subsequent proceedings. Such a prohibition provides protection for regulated entities while maintaining flexibility for the Commission. Regulated entities would be provided some comfort that their former employee will not use confidential information in his or her new position, even if he or she is not acting as an expert witness in a formal proceeding. The Commission would be able to have former utility employees work on matters involving their former employer as long as the former employee does not disclose certain limited information.

Staff. In response to PGE, Staff states that it believes the language of the proposed change to OAR 860-012-0010 is clear. If the Commission disagrees, however, Staff does not object to PGE's language.

In response to Verizon, Staff has three comments on proposed changes to OAR 860-012-0010. First, Staff believes that broadening its proposed language to cover former employees of any company subject to the Commission's jurisdiction is reasonable. Second, Staff is puzzled by Verizon's comments about expert testimony. Staff does not believe that the Commission receives testimony from its Staff that is not expert testimony.

Third, Staff opposes broadening the rule as Verizon suggests, to cover the disclosure of confidential information by former company employees. Staff believes that such language is unworkable because it would require the employee to know specifically what information is confidential, so they would know what not to disclose. Staff maintains that ascertaining what is confidential would take a great deal of work in many instances and could involve frequent discussions with companies about what is confidential. Staff anticipates that legal disputes would ensue.

Staff understands that companies routinely have agreements with former employees not to disclose confidential information. According to Staff, this is a more direct and practical way of dealing with Verizon's and Qwest's concerns.

In response to Qwest's comments, Staff notes that many of its comments overlap with Verizon's. Qwest is also concerned about disclosure of confidential information by former Commission employees now working for regulated companies. Staff argues that a Commission rule dealing with this concern is impractical. A more practical solution would be to have former Commission employees sign a nondisclosure agreement if they go to work for a company regulated by the Commission, to the extent such agreements are lawful. If a Commission nondisclosure agreement is unlawful, Staff does not believe that a rule designed for the same purpose would be lawful. Finally, Staff notes that Commission employees rarely go to work for companies, so the problem Qwest raises is more theoretical than real.

Discussion and Decision. *OAR 860-012-0010(3)*. We believe that PGE's proposed addition "now working for the Commission" to the language of section (3) clarifies the intent of the rule, and we adopt it. The second proposed addition does not, in our view, add clarity to the rule and we do not adopt it.

Qwest (and initially, Verizon) wish to extend the rules to cover informal contacts between former Commission employees now working for utilities and Commission Staff members. We do not support this request. In its public meeting memorandum regarding AR 395, dated July 13, 2001, Staff notes that contacts between Commission Staff members and former Staff members now working for other parties are rare. They have generally occurred when the former Staff member possessed important information not elsewhere available to Commission Staff. Current Staff members have initiated such contacts. We find Staff's reasoning on this issue sound. Consequently, we will not include language in the rule to prohibit this sort of informal contact.

We also decline to draft a rule prohibiting the disclosure of confidential, trade secret, or proprietary information by a former employee, because we believe with Staff that this is not a common problem and that it would be better handled by nondisclosure agreements between the company and the former employee. We agree that administering a rule on this issue would be difficult and time consuming.

Verizon asks us to include not only utilities but all companies subject to Commission jurisdiction and their affiliates in the rule language. Staff does not oppose this addition, and we adopt it. Verizon further asks that the rule cover all testimony, not only expert testimony. Although we believe that it would be a rare situation in which a witness gave other than expert testimony, we will eliminate the word "expert" from the rule language. This will eliminate debate over whether testimony is expert or not.

Finally, Verizon asks that companies receive notice and an opportunity to be heard before the Commission decides whether to permit former employees to testify. We find Verizon's argument on this point persuasive and adopt Verizon's proposed language to give companies a chance to address the Commission on whether their former employees should be allowed to testify. We note, however, that granting Verizon's request on this issue should not

protract Commission proceedings. We assume company input will usually be limited to written comments submitted to the Administrative Law Judge (ALJ) assigned to the case, with responsive comments by other parties. The ALJ will then rule on whether the witness may testify.

We adopt the following language for section (3):

Except with the Commission's written permission, no person now working for the Commission, who was formerly employed by a company subject to the jurisdiction of the Commission, or a company appearing before the Commission in a proceeding, or an affiliate of such company, shall appear as a witness on behalf of the Commission in a formal proceeding in which the person took an active part on the company's behalf as an employee of the company. Prior to giving its written permission to the person, the Commission shall notify the affected company and the other parties to the formal proceeding. The Commission shall allow the affected company an opportunity to object to the Commission granting permission to the person. The Commission will also allow the other parties to the formal proceeding an opportunity to respond to the affected company's objection, if any.

OAR 860-013-0075. Verizon's language clarifies the work papers in question. We adopt Verizon's language but rather than renumbering the rule subsections, we add the language to subsection (b), removing the language that Staff's proposed rule had stricken. Subsection (b), as amended, now reads:

(b) As used in this rule, work papers shall consist of those documents which show the source, calculations, and details supporting the testimony and other exhibits submitted. When, subsequent to the initial filing made by the utility, a party files testimony and exhibits, it shall at the same time provide a copy of its work papers to any other party that has requested a copy.

At its regular public meeting of January 8, 2002, the Commission voted to adopt the rules as set out in Appendix A.

ORDER

IT IS ORDERED that:

1. The rules attached as Appendix A and made part of this order are adopted.
2. The rules shall become effective upon filing with the Secretary of State.

Made, entered, and effective _____.

BY THE COMMISSION:

Becky Beier
Commission Secretary

A party may petition the Commission for the amendment or repeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.