

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

AR 489

In the Matter of a Rulemaking to )  
Amend Rules Governing Ex Parte ) ORDER  
Communications )

**DISPOSITION: RULE AMENDED**

Earlier this year, several agency stakeholders expressed uncertainty as to the application of the Commission’s ex parte rule, set forth in OAR 860-012-0015. Specifically, stakeholders noted that the existing rule lacked sufficient information to apprise parties as to who makes an ex parte contact, when the disclosure requirements of the rule take effect, what type of proceeding the rule applies to, and what is required to remedy a violation.

To address these concerns, the Commission held a series of workshops with representatives from energy utilities (PacifiCorp, Portland General Electric, NW Natural), telecommunications carriers (Verizon, Sprint, Covad, AT&T), customer groups (Industrial Customers of Northwest Utilities (ICNU), Citizens’ Utility Board, Associated Oregon Industries), and the Attorney General’s office.

Based on comments provided from the workshops, the Commission proposed amending OAR 860-012-0015. The Commission published the proposed rulemaking in the November 2004 Oregon Bulletin and provided notice to all persons on the agency’s rulemaking lists. A rulemaking hearing was held on November 22, 2004.

The proposed rule has broad support from the rulemaking participants. Only Verizon filed comments in opposition, seeking a limited number of proposed changes.

At its December 21, 2004 public meeting, the Commission considered this matter and adopted the rule as set forth in Appendix A.

**DISCUSSION**

In response to concerns raised by Commission stakeholders, this amended rule clarifies the scope and application of the rule governing ex parte communications. At the outset, Section (1) notes that ex parte communications, while not prohibited, are discouraged in the interest of open and impartial proceedings. Moreover, if made, such communications must be disclosed to all parties.

Section (2) defines *ex parte* communications. Among other things, the new definition clarifies that the rule generally applies to direct communications from all persons made on the merits of an issue in a contested case proceeding without the opportunity for rebuttal by all parties of record. The communications not subject to the rule are set out in Section (8).

Section (3) clarifies when the rules take effect. The new language states that the rules are effective: (1) upon the filing of any action between named parties; (2) upon the filing of any action initiating a “major proceeding” as defined in OAR 860-014-0023; or (3) after the Commission takes action to initiate a contested case proceeding, such as issuing an order suspending a tariff for investigation or holding of a prehearing conference. In addition to these rule provisions, the ALJs will also discuss the application of *ex parte* rules with the parties to clearly establish whether the proceeding is subject to *ex parte* rules.

Section (4) creates an affirmative duty on any person who makes or receives an *ex parte* communication to promptly notify the presiding ALJ of the communication. In its comments, Verizon requested that this provision be limited to communications made to a Commissioner, as it would be unnecessary to “notify” the ALJ of a contact with the ALJ. Verizon’s comments are well taken and the provision is modified accordingly.

Section (5) details how the *ex parte* communication must be noticed and disclosed to other parties. In an effort to minimize the number of *ex parte* communications, Section (6) authorizes the ALJ to require the person responsible for the *ex parte* communication to provide the disclosure and notice to other parties.

Once an *ex parte* communication is disclosed, Section (7) allows other parties the opportunity to file a written rebuttal within 10 days of receiving notice. Parties may rebut any fact or contention contained in the *ex parte* communication, and must provide service of any rebuttal to all parties.

Finally, Section (8) identifies those communications not subject to the rule. These include procedural questions (not relating to the merits of an issue), and rulemaking matters (not contested case proceedings). This section also makes the rule consistent with the Commission’s internal operating guidelines adopted in Order No. 01-253. While the *ex parte* provisions apply to communications between agency decision-makers (Commissioners or presiding ALJs) and advocacy Staff (Staff witnesses and Assistant Attorneys General), Sections (8)(b) and (c) exclude communications made to an agency decision-maker by a member of Staff who is not a witness, or an Assistant Attorney General who is not representing Staff, in the proceeding.

Verizon contends that the purpose of the *ex parte* rule is undermined if Staff and Assistant Attorneys General are permitted to make undisclosed contacts. Verizon requests that all Staff and Attorney General contacts be disclosed. The Commission fully examined the issue of communications between agency decision-makers and Staff/Assistant Attorney Generals during the HB 3615 Task Force review. As a result of that review, the Commission adopted the internal operating guidelines addressed above. For the reasons

articulated in Order No. 01-253, the Commission concludes that the ex parte rules should be consistent with those guidelines and does not adopt Verizon's recommendation.

Section (8) concludes with a provision giving the presiding ALJ the ability to exempt certain communications from the notice and disclosure requirements of the rule. The ALJ has the duty to conduct a fair and impartial proceeding. *See, e.g.*, OAR 860-012-0035(2). Consequently, in determining whether a questionable communication should be disclosed, the presiding ALJ will err on the side of disclosure. However, the Commissioners or presiding ALJ may receive certain communications that, while technically ex parte communications, need not or should not be formally noticed and disclosed. For example, the agency solicits and receives numerous comments from members of the public about pending cases. While the Commission maintains a file of these public comments that are available for viewing by any party or the public, rulemaking participants confirmed that there is generally no need for official notice and disclosure of these numerous comments. Similarly, the presiding ALJ may need to conduct *in camera* proceedings to resolve disputes over highly confidential information. The public notice and disclosure requirements of these communications contradict the essence of *in camera* review.

The Commission disagrees with Verizon's argument that allowing an ALJ to exempt certain communications is too broad and should be deleted. This new rule greatly expands the scope of ex parte communications. Ex parte rules governing other state agencies only require notice and disclosure of communications regarding "a fact in issue." *See* Office of Administrative Hearing Rule 137-003-0660. In contrast, the Commission's ex parte rule applies to communications that "relate to the merits of an issue," which includes not only factual, but also legal and policy matters. Similarly, unlike other ex parte rules, this proposed rule applies to communications from all persons, not just parties. Given this extremely broad scope of the rule, an exception is required to allow the ALJ the ability to consider the significance of a specific communication and, based on its origin, content, and context, determine whether the communication should be disclosed. As noted above, the ALJ, in making such a decision, will always err on the side of disclosure.

**ORDER**

IT IS ORDERED that:

1. The amendments to OAR 860-012-0015, as set forth in Appendix A, are adopted.
2. The amended rule shall become effective upon filing with the Secretary of State.

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

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**Lee Beyer**  
Chairman

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**John Savage**  
Commissioner

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**Ray Baum**  
Commissioner

A person 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.

860-012-0015

**Ex Parte ~~Contacts~~ Communications**

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

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

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

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

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

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

**(b) After the Commission initiates a process similar to that described in OAR Chapter 860, Division 014, including but not limited to, an order suspending a tariff for investigation or the holding of a prehearing conference.**

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

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

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

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

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

**(d) A summary of the matters discussed;**

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

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

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

**(b) Are made to a Commissioner or presiding ALJ by a member of the Commission staff who is not a witness in the proceeding;**

**(c) Are made to a Commissioner or presiding ALJ by an Assistant Attorney General who is not representing the Commission staff in the proceeding;**

**(d) Are made in a rulemaking proceedings conducted pursuant to ORS 183.325 through 183.410; or**

**(e) The presiding ALJ determines should not be subject to this rule, including but not limited to communications from members of the public that are made part of the administrative file or communications that are the subject of *in camera* proceedings.**

~~———— (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 the purposes of this rule, staff is not a party.~~

Stat. Auth.: ORS Ch. 183, 756, 757 & 759

Stats. Implemented: ORS 183.462, 756.040 & 756.500 through 756.575

Hist.: PUC 18, f. 1-21-55, ef. 9-1-54 (Order No. 33203); PUC 120, f. 10-26-62, ef. 11-15-62 (Order No. 38811); PUC 135, f. 5-9-66, ef. 5-15-66 (Order No. 42332); PUC 148, f. 7-29-68, ef. 9-1-68 (Order No. 44783); PUC 1-1985, f. & ef. 2-1-85 (Order No. 85-075); PUC 10-1994, f. & ef. 7-21-94 (Order No. 94-1127); PUC 12-1999, f. & ef. 11-18-99 (Order No. 99-709)