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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1016

In The Matter of Internal Operating)
Guidelines for the Public Utility) ORDER
Commission of Oregon.)

DISPOSITION: INTERNAL OPERATING GUIDELINES ADOPTED

At its public meeting on February 20, 2001, the Commission approved Staff's recommendation to officially adopt Internal Operating Guidelines for the Public Utility Commission of Oregon. Staff's recommendation is attached, as Appendixes A, B, and C, and is incorporated by reference.

ORDER

IT IS ORDERED THAT Internal Operating Guidelines, identical to those submitted to the HB 3615 Interim Task Force, as described in Appendixes A, B, and C, are adopted.

Made, entered and effective
_____.

BY THE COMMISSION:

Vikie Bailey-Goggins
Commission Secretary

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A party may appeal this order to a court pursuant to ORS 756.580.

INTEROFFICE MEMORANDUM

DATE: February 13, 2001

TO: Commissioners Eachus, Hamilton, and Smith

FROM: Tom Barkin and Bill Warren

SUBJECT: Internal Operating Guidelines

RECOMMENDATION: We recommend the Commission adopt the Internal Operating Guidelines attached to the memorandum as Commission policy. These are the same Internal Operating Guidelines submitted to the HB 3615 Interim Task Force on November 6, 2000.

DISCUSSION: In the 1999 session, the Oregon Legislature enacted House Bill 3615, which among other things, created a Task Force to "... study the structure of the Public Utility Commission and determine whether changes to the structure of the Commission are necessary or advisable." Beginning in August 2000, the Task Force gathered information from the Commission and the public. In the course of that process, some members of the Task Force observed that the Commission had not formally codified its internal operating procedures and policies.

In response, the Commission developed draft Internal Operating Guidelines. The draft Guidelines were provided to the Task Force on November 6, 2000. In its final report dated February 1, 2000, the Task Force acknowledged the Commission's work and recommended that the Commission continue its effort "to collect together and codify its internal operating guidelines and policies." The Task Force also stated:

The Task Force concludes that the current overall structure of the PUC (Public Utility Commission) is working well. Although the Task Force considered sound arguments for some structural changes, the Task Force concludes that fundamental structural changes are not needed. The Task Force identified a number of concerns involving the PUC's processes and the role of the PUC staff, which were reflected in public testimony. The Task Force does not believe that the current processes and policies have resulted in a pattern of unfair treatment. However, after extensive

discussion and consideration, the Task Force concludes that a number of changes should be made to improve the transparency, perception of fairness, and confidence level in the decision-making processes at the PUC.

Furthermore, the Task Force believes the PUC should continue its effort, started during the Task Force's inquiry, to collect together and codify its internal operating policies and guidelines. Many of the following recommendations specifically apply to contested case proceedings, but the thrust of the Task Force's recommendations could be applied in other types of proceedings as well.

Adopting the attached Guidelines represents the Commission's first step in response to the Task Force Report. In the second step, senior staff members will meet with affected parties, including regulated companies, competitive providers, customer groups, and others. Commission staff will also be consulted. The purpose of the meetings will be to discuss improvements in "the transparency, perception of fairness, and confidence level in the decision-making processes at the PUC." During that process participants will explore stakeholder and agency needs and interests along with the practical issues surrounding changes in internal procedures. We expect this step to be completed after the conclusion of the legislative session.

The results of these meetings will be presented to the Commission at a public meeting by September 1, 2001. Senior staff will recommend whether modifications in the procedures are necessary and suggest the steps to implement changes the Commission might adopt.

The third step in the process will be to implement changes in the Guidelines, administrative rules, and Commission policies and procedures, as the Commission deems appropriate.

RECOMMENDATION: We recommend the Commission adopt the Internal Operating Guidelines attached to the memorandum as Commission policy.

PUBLIC UTILITY COMMISSION OF OREGON

INTERNAL OPERATING POLICY GUIDELINES

November 6, 2000

Introduction:

The purpose of this document is to describe the Commission's internal operating policies and the principles underlying those policies. These policies apply to contested case and public meeting proceedings in which the Commission makes its decisions. The policies also describe the responsibilities of Commission employees and the attorneys representing the Commission. They are based on state law, Commission rules, and adopted guidelines and are intended to inform the public and the Commission staff of the principles underlying the day-to-day operating practice.

Mission Statement:

The following is the Mission statement of the Oregon Public Utility Commission. It is based on the Commission's statutory responsibilities. It was modified in 2000 to reflect an increased emphasis on competition in the statutes and Commission proceedings.

“Ensure that safe and reliable utility services are provided to consumers at just and reasonable rates while fostering the use of competitive markets to achieve these objectives”

General Goals:

The proceedings of the Public Utility Commission shall be organized and conducted to achieve the goals of fairness, openness, flexibility, and effectiveness:

- Fairness in regulatory proceedings is a fundamental principle of Oregon law. In short, it means that all parties have the opportunity to express their views and to respond to the views of others.
- Openness reflects the obligation to make decisions in a visible manner so that the public can have trust that Commission decisions are arrived at in a principled way.

- Flexibility recognizes the need to adapt to changing conditions and to use personnel in a variety of different roles consistent with their knowledge, skills, and abilities.
- Effectiveness refers the need for the Commission to make timely, forward-looking, technically accurate, and legally sufficient decisions, in a cost effective manner.

The Commission recognizes that, under certain circumstances, these goals may be inconsistent with one another. A policy that emphasizes fairness may reduce flexibility and effectiveness. At other times, a policy that promotes openness could reduce the fairness of a proceeding. The policies described below reflect the Commission's best effort to balance these sometimes conflicting goals.

Decision Meeting Processes:

Oregon law prescribes procedures for two types of decision making processes: 1) contested cases, provided for under the Commission's substantive statutes, ORS 756.500 et seq. and the State Administrative Procedures Act (ORS 183.310 et seq.); and 2) open meetings, as required under the Public Meetings Law (ORS 192.610 et seq.). The principal difference between the two is that contested cases are decided exclusively on a record developed in a trial-like proceeding, after which Commissioners may deliberate in private when deciding the outcome of the contested case.¹ Public meetings are more freewheeling in that Commissioners can make decisions on information derived from interested persons outside the public process, as well as from information received through public proceedings. In these types of proceedings, Commission decisions must be made in public.

When the electorate adopted the ballot measure creating a three-person commission in 1986, it made the Commission subject to the public meetings law. At the same time, the law left in place the existing statute providing for the contested case exemption when a hearing was required. Where the record is fixed and known to all participants through the contested case, the Commission may meet in private to avoid any further influence by the parties to a case. Where the record is not fixed and information can be provided to individual Commissioners without knowledge of other parties, accountability is provided through the requirement for public deliberations. Together the open meetings

¹ The public meetings law provides an exception for deliberations of state agencies in contested cases. ORS 192.690.

requirement and the contested case exception assure the public and participants of a right and an opportunity for a hearing on issues before the Commission.

Contested Case Proceedings:

Contested cases are matters in which the Commission employs trial-like procedures, including an opportunity for a hearing, cross-examination, and the production of evidence.² These are cases where the law requires a hearing, where the Commission is determining the rights of individual parties, or cases where the Commission has determined to use trial-like procedures to investigate a particular matter. In these proceedings the Commission acts like a judge in that the Commission is finding facts and applying the law or policy to the facts. The decisions may be appealed to the courts which determine whether the decision was consistent with the law and based on the evidence in the administrative record. Like a judge, the Commission must support any finding of fact with substantial evidence from that record. There must also be a logical nexus between any finding of fact the PUC makes and any conclusion of law it reaches.

The Commission follows the Administrative Procedures Act exemption for contested cases for the following reasons:

1. The record in the case is fixed and the requirement that decisions be based on the record insures that Commission decisions will be made on the merits of the case.
2. In these proceedings, the Commission acts like a judge in that the Commission is finding facts and applying the law (or policy) to the facts
3. The Commission is able to conduct full and candid discussions weighing the evidence presented without influence from those presenting the evidence and without exposing sensitive legal considerations to those who may end up appealing the decision.
4. The Commission is able to discuss confidential information that may have been presented as evidence in the case. In some cases, the amount of confidential material is voluminous. Disclosure of this information could be highly prejudicial to a party. Disputes over whether material designated as

² Generally speaking, contested cases are all cases in which there has been a hearing or in which an opportunity for hearing has been provided. ORS 183.310(2)(a).

confidential qualifies as exempt under the public records law could embroil the Commission in needless litigation and delay.³

5. The Commission issues a written order that makes public the reasons for its decisions.

Policies and Procedures:

The legal requirements for both contested cases and open meetings are set out in statute and case law. The policies set forth below are designed to assure the integrity of the Commission's decision-making process while also achieving the benefits of a flexibility and effectiveness. Because of the importance of fairness in Commission cases, the Commission has implemented a number of procedures that go well beyond the minimum requirements of Oregon law.

Contested Cases:

Commission Administrative Law Judges (ALJs) preside over these matters. All parties are given an opportunity to present their evidence and all other parties are given an opportunity to respond to that evidence.⁴ With a limited exception for evidence based on official notice,⁵ the Commission's final decision must be based on the evidence in the administrative record received at the hearing. It is the responsibility of the ALJ to conduct fair and impartial hearings and make independent recommendations which will aid the Commission in arriving at a proper final disposition of the case.

³ There are other reasons to exclude parties from Commission deliberations. First, it avoids the possibility that a party could raise collateral issues in an appeal by challenging views expressed at the decision meeting. Commission orders should be evaluated on the findings of fact and conclusions of law expressed in the written document. Collateral attacks only add to the cost and time to defend an order in the appellate process. Second, it allows counsel to give legal advice in private. Third, the attendance of party representatives at decision meetings could impair frank discussions and could mislead attendees about the Commission's intentions. For example, a comment intended to provoke thought may be interpreted as a statement of position. Misperceiving the intent of a comment could unsettle a party or an outside financial analyst to the disadvantage of the public or the utility. Finally, Commissioners can meet informally to discuss the issues in a case with or without Staff present. Requiring notice to the public before engaging in an informal discussion would impair such interactions.

⁴ The Commission's contested case procedures are set forth in the Commission's administrative rules. OAR 860, Divisions 11-16.

⁵ If the Commission takes official notice of facts, Oregon law requires the Commission to allow parties to respond to those facts with 15 days from the date of service of the order.

It is a general practice for the Commission to schedule, when practical, a decision meeting to discuss and arrive at a decision on the outcome of a contested case. At the decision meeting, it is the responsibility of the ALJ to summarize the case and any draft final order. The ALJ also outlines the outstanding issues. Upon reaching a final decision, the ALJ then prepares a final order consistent with the Commission's directions.

Separation of Functions. Regulatory agencies by their very nature perform a combination of functions. They investigate, prosecute, legislate and decide matters of fact and of policy. Because the Commission has one staff to assist in all of these functions, guidelines relating to the separation of incompatible functions are necessary to make agency proceedings as fair as possible.

In contested case proceedings, the Commission has separated the investigative functions of the agency from the adjudicative or decision-making functions.⁶ The Commission recognizes that Staff participation in evidentiary proceedings may create a perception that a Staff witness attending a decision meeting would attempt to persuade Commissioners to adopt a position that the witness had recommended. Consequently, the Commission limits Staff access to the decision making process. In addition, it is the Commission's expectation that any Staff participants in decision meetings refrain from advocacy. Neither ALJs nor Utility Program Staff should attempt to persuade Commissioners to adopt a particular position. Their responsibilities in decision meetings are to analyze, advise, and recommend. The general responsibilities of ALJs, Staff and the Assistant Attorneys General (AAGs) are described in Appendix A .

The basic Commission policy regarding separation of functions is outlined in an Attorney General opinion of January 21, 1987. The basic principle is that "Judging should be separated from functions which are incompatible with judging. An individual who tries to win for one side should not participate in the judging."

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.

⁶ The Attorney General's Administrative Law Manual, March 27, 2000, at 57, makes clear that due process does not require such a formal separation.

The restriction applies to particular individuals, rather than the entire Staff. So, for example, if a Staff member were actively promoting a particular position in a formal utility proceeding, that person should not participate in the deliberation and drafting of the final agency order, although it would be permissible for the person's supervisor to do so. Allowing the supervisor to participate assures the Commission, under the current staff structure, that it will have adequate policy and technical advice in the making of its decision. However, the requirement that the staff person not promote a particular position is still applicable.

The policy of excluding from decision meetings the Staff members who appeared as witnesses in a contested case also applies to AAGs. The AAGs are assigned to cases by the AG's Office. The AAGs representing Staff in the hearing process must follow the same procedures as apply to the Staff witnesses. The AAG representing the Commission shall be a different AAG than the one who represents staff in a particular case.

The presence of the AAG representing the Commission at the decision meetings also provides a check to assure that the separation of functions is not violated. The AAG representing the Commission is independent of the agency. The AAG is employed by a separate state agency, the Attorney General's Office, with responsibility to make sure the laws of the state are upheld. This includes the responsibility to make sure that no ex parte contact occurs at the decision meeting and that any such communication be disclosed to all parties under the ex parte rules adopted by the Commission.

There may be instances when, outside of the decision meetings, Commissioners or ALJs may call upon Utility Program Staff to advise them on technical issues that arise in a case. If ALJs or Commissioners require technical assistance, they should contact the Director of the Utility Program to request that a Staff member be assigned. If a Staff member is called upon to assume that role, the Staff member may provide technical advice, but must not promote a particular position.

Ex parte rules. The Commission has also adopted policies that protect the record in contested case. Oregon law requires that the hearing officer and agency must notify the parties of the substance of any written or oral ex parte communication on a fact in issue made during a contested case.⁷ The parties must also be given an opportunity to rebut the substance of the communication on the record. The Commission has broadened this

⁷ ORS 183.462.

requirement to apply to the *merits of an issue*, which would include legal and policy arguments.⁸

Consistent with the need to isolate judge-like decisions from outside influences, the Commission does not allow parties in contested cases to attend its deliberations. This policy promotes fairness in Commission proceedings by eliminating the possibility that a party may influence the outcome of cases by attending the decision meeting. Such influence could occur because one party has the resources to send a representative, while another party does not. It could also occur if an attending party participates in the deliberations by invitation or inadvertence.

Public Meetings:

The Oregon Public Meetings law requires that decisions which must be made only by a quorum of the Commission, but which do not arise from contested cases, are subject to the public meeting requirement. Essentially, the public meeting requirements must be observed when two or more Commissioners are present and the purpose of the meeting is to *decide* or *deliberate* on matters that must be determined by a quorum. Meetings, on matters before the Commission that need not be decided by a quorum, are not *meetings* subject to the public meeting requirements.

Rulemaking decisions, even though they follow a hearing at the Commission, are not considered contested cases. Therefore, discussion of and adoption of rules must be done at a public meeting.

In a rulemaking proceeding, the Commission acts like a mini-legislative body. Rulemakings resemble legislative proceedings where the Commission is making policy decisions that have the force of law. That is something it can do in public, just as legislators hold floor debates in public and then vote in public. Because rulemakings involve the making of laws, there is no prohibition against *ex parte* contacts with the Commissioners. Anyone may lobby a Commissioner, just as someone may lobby a legislator. No administrative record is required. The Commission is not fact finding. Instead, it is hearing argument about what the law should be. Hence, there is no requirement for prehearing discovery, testimony under oath, cross-examination, or any kind of evidence. However, the Commission must follow notice requirements under rules established by the Secretary of State and it must make its decision on adoption of any rules at a public meeting.

⁸ OAR 860-012-0015.

Unless the Commission has lawfully delegated its authority to one person, all matters, which may result in an order, are those for which a quorum is required. Therefore, discussions by two Commissioners relating to a matter, which may be the subject of an order entered by the Commission, must be had in a public meeting. On the other hand, if the Commission has lawfully delegated its authority to one Commissioner, that Commissioner may consult with the others in private on the delegated subject. However, the Commissioner's power to delegate authority to an employee or single Commissioner is limited by ORS 756.055.

Executive sessions. Some types of Commission business may be discussed in executive session. The public meetings law sets forth the matters that may be considered in this manner. Personnel matters are in this category, as are discussions with counsel relating to current or expected litigation. News media must be allowed in executive sessions but the Commission may require that specified discussions not be disclosed.

It should be noted that executive sessions are for discussion only. Decisions must be made in the public, either in the public portion of the Commission meeting, or in a later public meeting. It is not considered improper, however, for a quorum to reach a consensus during the executive session, as long as the decision is made in public.

Notice and administrative requirements. The requirements of the public meeting include advance notice to the media and interested persons of the time, location, and subjects to be discussed. The Commission has regular, special and occasionally emergency meetings. The public meeting law sets forth the notice requirements for each. The Commission Secretary is responsible for the preparation and the publishing of the public meeting agenda. The agenda contains a brief description of the business to be discussed at the meeting.

Matters reach the agenda at the instigation of the Staff and the Commissioners themselves. The Staff provides the Commissioners Staff memoranda at the time matters are placed on the agenda so that Commissioners will have some familiarity with each item. The Staff memos include a recommended disposition. The memoranda are available to the public in advance of the public meeting. As each item is called at the public meeting, a Staff member responds to Commissioners' questions. Members of the public are also allowed to speak, but the extent of public participation is within the Commission's discretion.

At the conclusion of the discussion of each item, the Commission votes, the vote is noted and where appropriate, an order is later prepared for signature. Sometimes a proposed order has been submitted in advance. Whether a formal order is prepared depends on the nature of the decision. The Commission may choose to postpone a decision until a later date or may choose to set an individual matter for hearing.

Minutes must be prepared of public meetings. Commission meetings are taped. Later, minutes are prepared from the tapes. Minutes or tapes of executive sessions need not always be disclosed. They are subject to the public record laws. If they are taped, the tape can be substituted for executive session minutes and it need not be transcribed. However, it must be retained.

The Commission may adopt administrative rules that have the force of law. In rulemakings, therefore, the Commission is passing laws.

The law allows decision meetings in contested cases, but not in rulemakings, because the two proceedings are fundamentally different in nature. In a contested case, the Commission is acting as a court does. It is adjudicating the rights of individual parties by examining the facts that are specific to that party and applying law to the case. Hence, it may deliberate in private, just as the Oregon Court of Appeals or the Supreme Court do.

Counsel can advise the Commissioners on legal issues in private in executive sessions allowed under the Public Meetings Law. Likewise, legislators can consult in private with Legislative Counsel.

It may seem that rulemakings involve fewer procedural protections for the public than contested cases, but there is one important protection. It is that, if the Commission wants to meet to deliberate toward a decision, it must do so in public. That is the case because there is no decision meeting exception for rulemakings under Oregon's Public Meetings Law.

APPENDIX A

RESPONSIBILITIES OF THE ADMINISTRATIVE LAW JUDGES

The Administrative Law Judges (ALJs) are responsible for conducting fair and impartial hearings and making independent recommendations, which will aid the Commission in arriving at a proper final disposition of the case. The ALJs are also responsible for insuring that all parties have an opportunity during the course of the proceeding to present their positions and to respond to the views of other parties.

ALJs are responsible for submitting draft orders to the Commission that reflect the ALJs proposed resolution of the case. The draft orders must be legally sufficient, accurate, and timely. In addition, the orders must address the relevant positions of each party and resolve all necessary legal and factual issues necessary to the decision. The ALJ is also responsible for providing the Commissioners with background materials and briefings so that they can participate effectively in hearings and meetings.

An important aspect of the ALJ's job is to work occasionally with Staff technical advisors on complex cases. Upon request of the ALJ, the Director for the Utility Program will assign a Staff advisor. Where required by the complexity or unusual nature of an issue, the ALJ may need to call upon a Staff member who is a case participant.

RESPONSIBILITIES OF UTILITY PROGRAM STAFF

In both public meeting and contested case proceedings, the Utility Program Staff provides independent, expert recommendations on issues before the Commission. The Staff responsibility is particularly important because, in most instances, the Commission Staff is the only participant in a proceeding that does not have a financial stake in the outcome of the case. When developing recommendations, the Commission Staff must consider the positions of other parties to the proceeding, must balance the facts and policy considerations, and must make recommendations that further the public interest. Commission Staff is also responsible for ensuring that the record includes a range of legally supportable positions so that the Commission has options when making a final decision.

This Staff responsibility must be discharged consistent with the Commission's obligation to conduct fair proceedings. Directly related to fairness is an obligation to balance the various interests affected by Commission proceedings. While Oregon law requires the Commission, and by implication, the Commission Staff to represent the customers of any public or telecommunications utility in all

matters in which the Commission has jurisdiction, this responsibility also carries a broader obligation. Representation, as used here, requires an appreciation of both the interests of the customers in having reasonable rates and the advantages to the customers from having utilities that are able to conduct their operations as financially sound enterprises. It also requires an understanding of the appropriate steps to take in promoting competition.

With this broad view of representation, the Commission does not perceive Staff as acting as an advocate in Commission proceedings. Advocacy should be the province of the parties who are asserting the interests of the utilities, customer groups, or others with a financial interest in the proceeding. The Staff is to provide an analysis of the facts that recognizes the impacts of particular outcomes on all stakeholders, and this analysis is intended to objectively meet the Commission's legal responsibilities to set utility rates that are fair and reasonable. Particularly for issues of significant controversy, the Staff should provide several possible outcomes and should recommend a preferred outcome. The rationale for each outcome should be described on the record so the parties have an opportunity to address the Staff analysis. Because this is a contested case, Staff may be called upon to explain its rationale upon cross-examination. Staff, however, should not support a particular position simply because it benefits a particular group of customers.

RESPONSIBILITIES OF ASSISTANT ATTORNEYS GENERAL

The Department of Justice (DOJ) is involved in all aspects of the Commission's workload. It advises the Commission, it advises and represents the Staff at Commission hearings, and it represents the Commission in litigation.

On a given day, one DOJ lawyer may advise the Commission Staff on the interpretation of a statute or rule, while a second is appearing at a Commission hearing to represent Staff, a third is appearing at a decision meeting to advise the Commissioners on how to make an order defensible on appeal, and a fourth is appearing in court to defend a Commission order.

In contested cases, the AAGs have dual roles. They represent Staff at hearing and advise the Commissioners during decision meetings. Assistant Attorneys General representing the Commission have long been aware that some parties are bothered by the dual role, so years ago, the section that represents the agency adopted the practice of having one attorney advise the Staff in a contested case and another attorney advise the Commissioners. The Commission's lawyers have also made certain that an attorney representing Staff in a contested case

does not discuss the merits of that case with any of the Commissioners or with the Administrative Law Judges hearing the case.

The Commission's lawyers adopted these practices to foster good government. There is nothing in the law that prevents an Assistant Attorney General who has represented Staff in a contested case from giving advice to the Commission. The Oregon Attorney General's Administrative Law Manual provides, in relevant part, that:

In contested case hearings ..., the AAG acts as legal advisor to the entire agency, including the hearing officer. That advisory role may include assisting the agency at the hearing. For example, if the claimant or petitioner presents a particularly one-sided or zealous view of the facts, the AAG may need to aggressively cross-examine witnesses in order to adequately demonstrate the reasons for the agency's intended action and to ensure a full and fair development of the record. (Footnote omitted.) The AAG may also advise the hearing officer in public or in private about any matters relating to the conduct of the hearing or the agency's decision in the matter, so long as the advice does not bring relevant facts not in the record to the hearing officer's attention.

In any contested case, ... an AAG may also advise the agency decision maker in private regarding the facts in the record, all legal issues in the case, the agency's rationale and the proposed disposition of the case. *See* pg. 117.