

ORDER NO. 20-386

ENTERED Oct 27 2020

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 2055

In the Matter of

PUBLIC UTILITY COMMISSION OF  
OREGON,

Amending Internal Operating Guidelines.

ORDER

**DISPOSITION: STAFF'S RECOMMENDATION ADOPTED**

At its public meeting on October 20, 2020, the Public Utility Commission of Oregon adopted Staff's recommendation in this matter. The Staff Report with the recommendation is attached as Appendix A.

BY THE COMMISSION:



A handwritten signature in blue ink, appearing to read "Nolan Moser".

**Nolan Moser**  
Chief Administrative Law Judge

A party may request rehearing or reconsideration of this order under 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 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Circuit Court for Marion County in compliance with ORS 183.484.

**PUBLIC UTILITY COMMISSION OF OREGON  
AHD REPORT  
PUBLIC MEETING DATE: October 20, 2020**

**REGULAR**     **CONSENT**   X   **RULEMAKING**     **EFFECTIVE DATE**   N/A  

**DATE:** October 14, 2020

**TO:** Public Utility Commission

**FROM:** Nolan Moser **SIGNED**

**SUBJECT:** OREGON PUBLIC UTILITY COMMISSION: (Docket No. UM 2055)  
Amending Internal Operating Guidelines

**RECOMMENDATION:**

The Commission should adopt the revised Internal Operating Guidelines attached as Attachment A.

**DISCUSSION:**

The Commission adopted the current version of the Commission's Internal Operating Guidelines through order No. 20-065, issued on March 3, 2020, in this docket.

The Internal Operating Guidelines are formally codified its internal decision-making procedures and policies to improve the transparency, perception of fairness, and confidence level in the agency's actions. Since the most recent update to the Internal Operating Guidelines, we have identified a portion of the guidelines concerning Integrated Resource Planning (IRP) and Request for Proposal (RFP) dockets that requires an update.

Specifically, the current Internal Operating Guidelines, in the section describing Commission Hybrid Processes, implies that Staff may not have discussions with Commissioners outside of public meetings during IRP and RFP dockets, which are non-contested cases. This implication is inaccurate, and contrary to long-standing Commission processes.

The Commission relies on Staff for independent recommendations, but also relies on Staff to provide technical advice. The provision of technical advice, separate from independent recommendations to Commission, is a central role for Commission Staff. As Commissioners have limited dedicated advisory Staff, they have historically relied on

Staff to provide impartial technical advice and background information in the IRP and RFP process.

The changes reflected in the attached amended Internal Operating Guidelines serve to ensure that this historic practice is accurately reflected. These changes emphasize that the Commission will not generally engage in discussions with external stakeholders during IRP and RFP proceedings, and language implying that Staff would also not engage in discussion has been removed.

This is the only change to the Internal Operating Guidelines proposed at this time.

**PROPOSED COMMISSION MOTION:**

Adopt the Internal Operating Guidelines attached as Attachment A.

## INTERNAL OPERATING GUIDELINES

These internal operating guidelines are organized by the four different decision-making processes used by the Commission: (1) Open Meetings; (2) Rulemakings; (3) Contested Cases; and (4) Hybrid Proceedings. Each decision-making process is shaped by its own set of procedures and rules, including varying limits on communications among Commissioners, agency employees, and Assistant Attorneys General (AAG) assigned by the Department of Justice (DOJ) to represent the Commission and its Staff.

In many instances, the Commission is required to use a certain decision-making process to resolve certain issues or disputes. For example, a formal complaint or a petition for declaratory ruling<sup>1</sup> requires the use of a quasi-judicial contested case proceeding. By statute, the terms and conditions for the purchase of energy and capacity from qualifying facilities under the Public Utility Regulatory Policies Act must be done through a quasi-legislative rulemaking process.<sup>2</sup>

In other instances, however, the Commission has discretion as to which process it may use. Certain disputes may be addressed through an open meetings process or a contested case proceeding. Investigations or generic issues may be addressed through either of these processes or via a rulemaking. The Commission decides which type of proceeding to use through a variety of considerations. For each external filing seeking Commission action, the Administrative Hearings Division consults with the Utility Program and, at times, agency leadership and the Commissioners, as to how to process the request. The Commission may also schedule a prehearing conference to address process with stakeholders. For internally initiated proceedings, the Commission generally makes determinations as to process when opening an investigation at a Public Meeting. These events provide opportunities for stakeholders to weigh in on process considerations.

As a general rule, the Commission uses an Open Meetings Process for those matters that are time sensitive, are less contentious, or address less complex matters that do not require significant fact-finding. Contested Case Process are generally used where resolution of matters involves significant and complex issues that would benefit from party discovery, written testimony, formal argument, and Commission decision meetings. The Commission normally uses rulemakings to establish formal guidelines of general applicability, and hybrid proceedings to help balance the need for an informal process with certain rights of parties to facilitate participation and access to information.

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<sup>1</sup> OAR 860-001-0430.

<sup>2</sup> ORS 758.535(2)(a).

In addition to describing the Commission's decision-making processes, these IOGs also generally summarize requirements imposed by law or rule. To the extent these IOGs impose additional requirements on PUC employees, the Commission will treat those as employee requirements, the violation of which will be subject to discipline, up to and including dismissal.

## **I. OPEN MEETINGS**

The Commission conducts much of its business in open meetings, such as its Regular Public Meetings generally held every other Tuesday at the Commission's offices in Salem, Oregon. The Commission uses open meetings to address a variety of items, including utility requests to make minor revisions to tariffs, affiliated interest filings, security issuances, or other matters relating to rates and service. The Commission also addresses matters related to agency rulemaking through open meetings. Given the unique and extensive requirements applicable to rulemakings, those proceedings are also addressed in a separate section below.

### **A. Applicable Law**

The Commission conducts open meetings under the Public Meetings Law codified at ORS 192.610 *et seq.* This law establishes Oregon's policy that decisions of governing bodies be made through an open process. The law generally requires that (1) the meetings and decisions of public bodies be open to the public; (2) the public has notice of the meetings; and (3) the meetings are accessible to persons wishing to attend.

The Public Meetings Law defines a meeting as the convening of a governing body on an issue "for which a quorum is required to make a decision or to deliberate toward a decision in any manner."<sup>3</sup> Essentially, the public meeting requirements must be observed when two or more Commissioners are present and the purpose of the meeting is to decide matters that must be determined by a quorum of the Commission or to gather information to serve as the basis for a subsequent decision that requires a quorum.<sup>4</sup> "Meetings" include informal gatherings and correspondence via electronic mail. "Decision" is any determination related to agency business that requires a quorum.

The Commission may hold closed meetings to address certain matters in an executive session. These include meetings to discuss personnel matters, to consult with counsel concerning pending or likely litigation, or to consider exempt public records.<sup>5</sup> Although the Commission may exclude the public from executive sessions, it must allow the news media to attend but may require that specified discussions not be reported.

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<sup>3</sup> ORS 192.610(5).

<sup>4</sup> ORS 192.630.

<sup>5</sup> ORS 192.660(2).

The authority to hold executive sessions does not exempt the Commission from complying with other requirements of the Public Meetings Law, such as providing notice. Furthermore, executive sessions are for discussion only; decisions must be made in a 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.

One type of Commission meeting is statutorily exempt from the public meeting laws. As further discussed below, Commissioners may meet privately in decision meetings to deliberate in contested case proceedings.<sup>6</sup>

## **B. Open Meeting Process**

The Commission provides notice of public meetings to persons who have requested to receive such notice, as well as to the news media. The notice is also posted on the Commission's website, which is linked to the State of Oregon's transparency website. The Commission also makes efforts to notify persons with a special interest in particular action, such as parties to a prior docket that addressed related issues. The notice must be specific enough to allow members of the public to recognize matters in which they are interested.

The Commission Chair establishes an agenda for each public meeting, which is divided into four parts:

### *1. General Public Comment*

The PUC generally reserves up to 15 minutes to receive public comments on issues not listed on the agenda. The Commissioners generally do not engage in a discussion or answer questions, and persons wishing to comment on items not listed on the agenda should contact the Commission in advance.

### *2. Consent Agenda*

Items on the Consent Agenda are generally routine matters that do not appear to be disputed. If the item becomes disputed, the Chair generally will move the item to the Regular Agenda. The Commissioners will consider all Consent Agenda items collectively without public comment.

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<sup>6</sup> ORS 192.690(1).

### 3. *Rulemaking Agenda*

The Rulemaking Agenda includes items related to the Commission's rulemaking activities. Items may include requests to initiate pre-rulemaking activities, conduct informal or formal proceedings, to adopt, amend, or repeal permanent rules, to adopt temporary rules, or to provide informational updates.

Commissioners will individually address items listed under the Rulemaking Agenda. For each item, the agenda will identify whether the Commissioners will take public comment (referred to as Public Hearing), will engage in Commission deliberations (Work Session), or receive information from invited speakers (Informational-only).

### 4. *Regular Agenda*

The Regular Agenda generally includes items that are in dispute or significant and require individual discussion. They may also include informational presentations with invited speakers. For each agenda item (other than informational presentations), a Commission employee prepares a report. The reports contain information about the requested Commission action and the recommended disposition. The Public Meeting Reports are generally published the Wednesday prior to the public meeting and posted on the agency's website.

For each item, the agenda will identify whether the Commissioners will take public comment (referred to as Public Hearing), will engage in Commission deliberations (Work Session), or receive information from invited speakers (Informational-only).

The Commission Chair opens the public meeting. After soliciting comments from members of the public on items not contained on the agenda, the Commission considers the Consent Agenda as a single action item. The Commission then considers each item on the Rulemaking and Regular Agenda. As each item is called, a Commission employee presents his or her recommendation and responds to Commissioners' questions. If the matter is scheduled for Public Hearing, representative of utilities, customer groups, or members of the public may also request permission to speak. The extent of participation is at the Commission's discretion. At the conclusion of the discussion of each agenda item, the Commissioners will deliberate and make a decision. Where appropriate, an order is later prepared to memorialize the decision. The Commission will assign a docket number to any item that requires an order. The Commission may also choose to postpone a decision until a later public meeting or may choose to refer an item to the Administrative Hearings Division for a contested case proceeding.

The Commission prepares minutes of all decisions made at the public meeting, and posts video files for each item on the agency website. Minutes or audio recordings of executive sessions are not posted and need not always be disclosed if exempt from disclosure. All minutes and written reports and comments on agenda items are subject to the public record laws and must be retained under appropriate retention schedules.

## **C. Roles of Commission Employees and Assistant Attorneys General**

### **1. *Commission Employees***

For each agenda item, an assigned employee generally prepares a Public Meeting Report that provides independent analysis and recommendations for Commission action. When developing recommendations, the Commission employee may solicit input from other persons who have expressed interest in the item. Any recommendation is intended to balance any factual and policy considerations, and protect the public interest.

The Public Meeting Report provides the Commissioners and the public with information necessary to understand the issue to be addressed and the legal and factual basis to support Commission action. The report generally includes a concise and accurate description of the requested action, a summary of the law or Commission precedent governing the request, a statement of any support or opposition to the request, analysis and recommendation, and an explanation of why the recommendation protects the public interest. When possible, the Public Meeting Report should provide a range of other legally supportable recommendations so that the Commission has options when making a final decision.

The assigned Commission employee may discuss any issue to be addressed at a public meeting with any Commission employee or member of the public, subject to any restrictions related to the protection of confidential information. He or she may also discuss any public meeting matter with Commissioners, but must do so with each Commissioner individually due to requirements of the Public Meetings Law. To avoid an inadvertent violation of the Public Meetings Law, the Commission employee must send electronic mail messages related to open meeting items to Commissioners individually.

### **2. *Chief Administrative Law Judge and Commission Counsel***

The Chief Administrative Law Judge (ALJ) and the Commission Counsel attend public meetings to assist the Commissioners with legal and procedural issues. The Chief ALJ provides advice on procedural issues and assists the Commission Counsel in addressing legal questions. The Chief ALJ also makes assignments to ensure the Commission's Public Meeting decisions are implemented and made effective, including signing some orders in matters where the

Commission has adopted the recommendation in the Public Meeting Report without changes or additions.

The Commission Counsel provides legal advice and responds to legal questions relating to individual agenda items from the Commissioners. An Assistant Attorney General (AAG) is also usually assigned to Public Meeting agenda items and will represent a member of the Utility Program Staff or the Policy and Administration Division during the Public Meeting. The AAG provides legal advice with regard to the recommendation and responds to legal questions related to the assigned agenda item.

## II. RULEMAKINGS

The Commission acts in a quasi-legislative capacity when it conducts rulemakings to implement or interpret a statute, or prescribe law or policy on matters of general applicability. The Commission has authority to adopt rules relative to all statutes it administers.<sup>7</sup>

### A. Applicable Law

The Commission conducts rulemakings under the Administrative Procedures Act (APA) (ORS 183.325 through 183.410), and rules adopted in OAR 860-001-0200, *et seq.* These provisions impose two primary procedural requirements when the Commission proposes to adopt, amend, or repeal a rule. The Commission must (1) give proper notice of the proposed rulemaking; and (2) allow interested persons an opportunity to comment or request a hearing on the rulemaking.

Although an agency is required to maintain a record of any comments it receives during a rulemaking proceeding, the Commission's adoption, amendment, or repeal of a rule does not need to be based on an evidentiary record. Like a legislator, a Commissioner may talk to any person about the rulemaking prior to the deadline set for comments. The Commissioners, however, may not consider comments received after that deadline unless it extends the deadline for others.<sup>8</sup> Moreover, the Public Meetings Law applies to any discussion among Commissioners regarding the substantive issues in the rulemaking except decisions regarding rulemaking process and timeline, which are delegated to the Commission Chair and do not require a quorum.

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<sup>7</sup> ORS 756.060.

<sup>8</sup> ORS 183.355(14).

The Commission is required to appoint a Rules Coordinator, who is responsible for coordinating all agency rulemaking proceedings.<sup>9</sup> The Commission's Rules Coordinator is Diane Davis (503-378-4372).

## **B. Rulemaking Process**

The APA sets out three ways for an agency to adopt and amend rules. The processes identified in these guidelines relate to permanent rulemaking—where the Commission is using standard rulemaking procedures to adopt rules that could remain in effect indefinitely. The APA also allows an agency to adopt rules with little or no public notice under two circumstances. First, ORS 183.335(1) allows an agency to adopt temporary rules if necessary to avoid serious prejudice to the public interest. Second, ORS 183.335(7) allows an agency to amend a rule without notice to fix clerical errors, change the name of an agency or program, or to correct other non-substantive matters.

The processes used for permanent rulemakings vary considerably depending on the nature and complexity of the issues addressed. Some rulemakings, such as the annual adoption of electrical safety codes, are relatively routine in nature and may be completed through a streamlined process. Other rulemakings, such as the adoption of rules to create a new legislatively required program like the Community Solar Program, warrant a more extensive and engaged process. For any type of rulemaking, however, the Commission is committed to providing adequate notice to stakeholders and an opportunity for comment to ensure an effective and efficient process.

Although the Commission uses a flexible process that can be adapted to meet the needs of each particular rulemaking, there are three primary phases:

- (1) Initiation Phase
- (2) Informal Phase
- (3) Formal Phase

### **(1) Initiation Phase**

In this phase, the Commission decides whether to conduct a rulemaking. Unless mandated by law, the Commission retains discretion whether to conduct a rulemaking. This is consistent with the quasi-legislative nature of rulemaking proceedings.

The need for a rulemaking proceeding may arise under many circumstances, including a state or federal legislative mandate, a requirement to implement policy following a Commission investigation, or a need to adapt regulations to a changing regulatory environment. Although

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<sup>9</sup> ORS 183.330(2).

rulemakings are generally initiated internally, any person may petition the Commission to promulgate, amend, or repeal a rule.<sup>10</sup>

Once a need for rulemaking is identified, Commission management will assign needed resources to begin preliminary planning. Resources may include assignment of Staff, an Administrative Law Judge, and an Assistant Attorney General. The scope of preliminary planning will vary depending on the complexity of the rulemaking, and may include outreach to stakeholders.

This first phase ends with a recommendation to the Commissioners at a Public Meeting to initiate informal rulemaking. Any recommendation will address the need for the rulemaking and authority, the issues, scope, and goals for the rulemaking, the potential legal and policy issues and proposed process to address, the affected stakeholders and level of stakeholder engagement, and a recommended procedural timeline for rule development.

At the public meeting, the Commissioners will take public comment on the need and scope for rulemaking and make a decision whether to initiate informal rulemaking.

## **(2) Informal Phase**

Once a rulemaking is approved, the Informal Phase begins. The primary objective of this phase is to draft proposed rule language and to prepare other information required for permanent rulemaking (summary for each rule change, need for the rulemaking, and fiscal impact). Working as a team in coordination with the Rules Coordinator, the assigned Staff, ALJ, and AAG will schedule necessary workshops to inform and seek input from stakeholders. The purpose of the workshops, which may be attended by Commissioners, will vary. Workshops may be used to educate participants on process or technical matters, address policy issues, review and seek comment on draft rule materials, or discuss alternative proposals.

In addition to the workshops, the assigned agency employees and AAG will hold internal meetings to synthesize and discuss stakeholder input, draft and revise rules as necessary, and determine need for additional workshops or rulemaking activities.

The Informal Phase ends when consensus is achieved or when it is clear that the positions of the participants are not likely to change with further discussion. At this point, the assigned agency employee makes a recommendation to the Commissioners at a Public Meeting to commence a formal rulemaking. The recommendation, in the form of a Public Meeting Report must include the following:

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<sup>10</sup> ORS 183.390; OAR 137-001-0070.

- Proposed Rules, with rule summaries
- Statement of Need, and Fiscal Impact
- Summary of informal workshops and stakeholder comments
- Proposed dates for notice, comments, rulemaking hearing

At the public meeting, the Commissioners will take public comment on the proposed rules and other issues related to the rulemaking.

NOTE: Under certain circumstances, including the adoption of noncontroversial federal standards or repeal of outdated, unused rule provisions, the Initiation and Informal Phase may be eliminated.

### **(3) Formal Phase**

Once a decision is made to commence a formal rulemaking, the Rules Coordinator publishes notice in the Secretary of State's Oregon Bulletin, and delivers a copy of the proposed rule and notice to persons on the PUC's mailing lists and legislators specified in ORS 183.335(15). The notice of proposed permanent rulemaking includes:

- A summary of the subject matter, purpose, and need for the rulemaking
- A summary of the changes for each proposed rule or rule change
- The last date for comment on the proposed rulemaking
- The date of the hearing or ability to request a hearing, and
- A statement of fiscal impact quantifying the economic effect of the proposed rulemaking
- Proposed rule language

Any person may file written comments on the proposed rules by the date identified in the rulemaking notice. The Commission may request that participants file comments in a structured manner to allow for rounds of comments with opportunities to respond.

Persons may file a request for the Commission to hold a rulemaking hearing if not already scheduled. An ALJ presides over the hearing. In a complex rulemaking, the Commissioners may attend and participate in the discussion of the issues. The assigned agency employee or the ALJ will begin the hearing with a summary of the informal process that preceded the formal rulemaking. The hearing is usually scheduled before the close of comment period to allow opportunity for persons to file comments responding to oral comments at the hearing.

Any person may provide unsworn comments during the rulemaking hearing. The ALJ has discretion to determine the extent of participation by limiting the duration of comments or by

setting aside specified time periods for comments based on issues or categories of participants. The ALJ and any Commissioners attending may question any person commenting at the hearing. All written and oral comments are placed in the record of the proceeding, which is maintained by the Rules Coordinator.

Following the hearing and close of the comment period, the ALJ reviews the proposed rules, comments, applicable laws, and existing policies, and consults with assigned employees and DOJ, as well as with the Commissioners on an individual basis. The ALJ may revise the proposed rules based on comments received during the formal comment and hearing phase. The ALJ then prepares a Public Meeting Report and a proposed order for the Commissioners to consider. The Public Meeting Report should include a description of the rulemaking and applicable laws, a discussion of key provisions and summary of contested issues, and recommendations for Commissioner action. The public meeting report may or may not include a draft order or an issues discussion document.

Depending on the complexity of the rulemaking, the Commissioners may schedule special public meetings to review draft rules prepared by the ALJ and deliberate. These deliberations after the close of the comment period may include the ALJ, agency employees, and AAGs, but no public comment. Ultimately, the ALJ presents a final draft of rules to the Commissioners at a Public Meeting in a Commissioner Work Session, where the Commissioners will address the adoption, amendment, or repeal of rules with no public comment. The Commission may take action only on rules covered by the notice of proposed rulemaking.

Following the final decision to adopt, amend, or repeal rules, the Rules Coordinator serves the order with final rules and prepares documents to file with the Secretary of State Archives Division (and Legislative Counsel). Any rulemaking action is effective when filed with the Secretary of State, unless a different effective date is specified in the rule.

### **C. Roles of Commission Employees and Assistant Attorneys General**

The Commission's three-phase rulemaking process represents a shift in culture at the agency. Previously, draft rules would be developed by agency employees and DOJ with input from stakeholders but without involvement of the Commissioners or ALJs. Similarly, AHD would finalize permanent rules with little involvement of agency employees and DOJ. The Commission has adopted this more collaborative process to more effectively utilize agency expertise, and to more efficiently address the many complex and significant policy issues relating to utility regulation.

The assigned agency employee serves as the Project Manager during the Initiation and Informal Phases, and is the main communicator with stakeholders. ALJs assume Project Management duties during the Formal Phase. DOJ serves as a legal resource throughout the process.

**1. *Agency Rules Coordinator***

The Agency Rules Coordinator serves as the procedural coordinator for all rulemakings from beginning to end, and manages the Secretary of State's notice and filing requirements.

The Agency Rules Coordinator monitors all phases of rulemaking activities conducted by the Commission. This includes coordinating all rulemaking dockets and executing procedures necessary to comply with statutory standards and Secretary of State requirements. These activities include preparing and filing rulemaking notices, statements of need and fiscal impact statements, and preparing the final version of rules for publication.

The Rules Coordinator serves as a process resource and assists agency employees with drafting rule language with regard to form, format, and clarity. The Rules Coordinator also ensures new rules use language and definitions that are consistent with other agency rules, and that the amendments to certain rules do not implicate other rules in related divisions.

**2. *Utility Program Staff***

The Utility Program Staff is a project manager for Initiation and Informal Phases for most rulemaking proceedings. (In few instances, agency employees other than Utility Program Staff project manage rulemakings.) Staff generally initiates a potential need for rulemaking through information gathering and discussions with stakeholders.

During the Initiation Phase, Staff helps to identify issues and concerns among stakeholders, conducts workshops, and identifies areas of agreement and disagreement. Staff also prepares and presents a recommendation to the Commissioners to open a rulemaking.

During the Informal Phase, Staff seeks input from interested persons in developing rule language and drafting the statement of fiscal impact. During this process, Staff attempts to determine the interests of affected persons and reach consensus on proposed rule language. Staff may schedule workshops, with or without Commissioner participation. With assistance from AAGs and in consultation with the agency rules coordinator, Staff also generally develops proposed rule language and other documents to support agency rulemaking.

During the Formal Phase, Staff participates in any rulemaking hearing and may file further comments in support of the proposed rules or to respond to comments by others. Staff may

discuss any rulemaking issue with any member of the public, other Staff members, or the ALJ. Staff also participates in Commissioner Work Sessions on rulemaking items at Public Meetings.

### **3. *Administrative Law Judge***

An ALJ serves as a project manager for the Formal phase, and serves as a process and legal resource throughout the rulemaking activities.

During the Initiation and Informal phases, the ALJ contributes to process as team member with Staff, and maintains a neutral role as resource and facilitator. The ALJ also updates Commissioners on rulemaking activities, and identifies and facilitates the need for communication between Commissioners and Staff on policy issues where the Commissioners may need to weigh in. The ALJ also reviews initial drafts of proposed rules.

During the Formal phase, an ALJ presides over rulemaking hearings, and has discretion to determine the extent of participation and may question any person commenting at the hearing. At the conclusion of the hearing or after the last date for submitting comments, the ALJ coordinates individual briefings with Commissioners, establishes a Public Meeting schedule for Commissioner deliberation, prepares a Public Meeting Report or draft order addressing the proposed rulemaking, and manages the process to completion.

Prior to the deadline for filing comments, the ALJ may consult with any Commission employee or member of the public. Once the deadline for comments has passed, the ALJ may still consult with Commission employees and AAGs. The ALJ may also discuss any rulemaking matter with Commissioners at any time during the rulemaking, but must do so with each Commissioner individually due to requirements of the Public Meetings Law.

### **3. *Assistant Attorneys General***

An AAG is assigned to all rulemaking proceedings to assist Staff, the ALJ, and Commissioners. Unlike our guidelines governing contested case proceedings discussed below, one AAG may provide legal services to all Commission employees and Commissioners during all phases of a rulemaking proceeding.

In rulemaking proceedings, AAGs support Staff with legal review of issues, and may provide formal legal advice to Commissioners via executive sessions. AAGs provide advice about the scope of permissible rulemaking and assisting with crafting proposed rule language to ensure the rules are consistent with the Commission's delegated authority. AAGs also work with Staff and the agency's rules coordinator to ensure that all documents supporting the rulemaking meet

requirements imposed by statute. AAGs attend rulemaking workshops and rulemaking hearings, and counsel ALJs and Commissioners.

### III. CONTESTED CASES

The Commission acts in a quasi-judicial capacity when it determines the rights of individual parties, or where the Commission has determined to use trial-like procedures to investigate a particular matter.<sup>11</sup> In these cases the Commission must base its decisions exclusively on an evidentiary record developed in a trial-like proceeding. Contested case proceedings are subject to the most procedural requirements of any decision-making process used by the Commission.

#### A. Applicable Law

The Commission conducts contested cases under provisions contained in ORS 756.500 through 756.558, the Administrative Procedures Act (APA) set forth in ORS 183.310 *et seq.*, as well as rules adopted in OAR 860-001-0300 *et seq.* The Commission uses contested case procedures to address a wide variety of issues. These cases utilize trial-like proceedings and range from individual consumer complaints and general rate case proceedings to generic industry investigations.

The APA and related laws provide the Commission this flexibility to meet its needs in providing effective and efficient regulation, but require that fundamental rules be followed to ensure government accountability and fairness. These provisions are generally designed to ensure that persons affected by agency action (1) are given prior notice of the case, (2) have a fair opportunity to present evidence and argument on the issues raised, and (3) are able to respond to all evidence and argument offered by other parties.

The APA requires that final orders in contested cases be based upon the evidentiary record. The evidentiary record consists of testimony received into evidence, a transcript of the hearing, evidence officially noticed, and offers of proof. The evidentiary record can also include all noticed *ex parte* contacts and written rebuttals (discussed below), as well as bench requests and responses.

When deliberating, the Commissioners must observe a high degree of conduct to protect the integrity, impartiality, and independence to promote confidence in contested case proceedings. The Commissioners may infer facts from other basic facts contained in the record. They may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidentiary record. The Commissioners are not limited to the legal and policy arguments

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<sup>11</sup> ORS 183.310(2)(a). The Commission uses contested case proceedings to address declaratory rulings filed under ORS 756.450. See OAR 860-001-0300.

raised by the parties, but its decision on legal and policy issues will be based upon the evidentiary record.

To ensure that decisions made in contested cases are based solely on the formal record developed in the proceeding, ORS 183.462 and OAR 860-001-0340 require the Commission to place on the record the substance of any private, off-record written or oral communication made to a Commissioner or presiding ALJ that relates to the merits of any pending contested case. As further discussed below, this includes communications between a Commissioner or presiding ALJ and Staff witnesses or AAG representing Staff in the proceeding. Any *ex parte* communication made outside the presence of other parties must be noticed to all parties with the opportunity to rebut the substance of the communication.

In addition to the statutes and rules governing contested case proceedings, the Commission has adopted these internal operating guidelines to address proper separation of functions. Regulatory agencies by their very nature perform a combination of functions. They investigate, prosecute, and adjudicate. Because the Commission relies on the Utility Program Staff to assist in all of these functions, the Commission has adopted internal procedures to separate incompatible functions to promote fairness and enhance confidence in agency decision-making. As further discussed below, the Commission has separated the advocacy functions of the agency from the adjudicative functions.

Finally, it is important to note that ORS 756.026 (prohibiting Commissioner pecuniary interests) and 756.028 (requiring Commission employees to disclose interests), as well as the Oregon Government Ethics Laws, codified in ORS Chapter 244, eliminate conflicts of interest and help ensure Commission cases are decided impartially and fairly.

## **B. Contested Case Process**

The Administrative Hearings Division is responsible for the processing of contested case proceedings. The Commission has delegated its ALJs the authority to preside over contested case hearings in a fair and impartial manner. ALJs regulate all aspects of the case, including ruling on procedural and evidentiary matters. Under Oregon law the Commission provides parties to a contested case notice of contested case rights and procedures.<sup>12</sup>

### **1. Prefiling Activities**

On occasion, a party initiating a contested case may reach out to Staff or the Commissioners to engage in pre-filing discussions. The purpose of these discussions vary, but may be to provide advanced notice of the filing or to discuss potential issues or areas of interest. Requests to meet

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<sup>12</sup> ORS 183.413.

with Commissioners are not always granted. When held, the Commissioners will not engage in a discussion of the merits of likely issues, and if appropriate will allow other likely parties to the proceeding an opportunity for a prefiling meeting.

## **2. *Prehearing Conference***

A contested case proceeding officially commences when the Administrative Hearings Division issues a notice of prehearing conference (PHC). A person may request to receive notice of all contested case proceedings that concern particular regulated industries.<sup>13</sup> At the PHC, the ALJ will identify parties and issues, adopt a procedural schedule, and discuss other preliminary matters.

Many cases involve trade secrets and other commercially sensitive information. The Commission uses protective orders to allow parties the ability to review confidential information while ensuring that it is not disclosed publically. The rules governing the use of protective orders are set forth in OAR 860-001-0080.

Any person may petition to intervene as a party in any contested case.<sup>14</sup> The ALJ will grant the petition if the petitioner has sufficient interest in the proceeding and petitioner's participation will not unreasonably broaden the issues, burden the record, or delay the proceedings. Certain entities are parties as of right in Commission cases. For example, those initiating the action or named in the filing, such as a utility company, are deemed original parties and need not intervene. Staff participates in cases in which it chooses to appear. Under ORS 774.180, the Oregon Citizens' Utility Board has a right to intervene in any docket by filing a notice.

Party status confers certain rights and responsibilities in the case, such as the ability to present testimony, cross-examine other parties, file briefs, receive filings from other parties, and become qualified to review information that is designated as confidential. A person who does not want the rights and responsibilities of a party may monitor the docket through the agency's eDocket feature. See <https://www.puc.state.or.us/pages/efiling/edocketindex.aspx>.

## **3. *Procedural Schedule and Public Comments***

Contested cases often require an extended procedural schedule that includes formal discovery, settlement conferences, multiple rounds of pre-filed testimony, evidentiary hearings, and legal briefs. The Commission may also hold workshops to learn more about technical issues in an informal setting, or hold oral arguments in major proceedings.

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<sup>13</sup> OAR 860-001-0030(2).

<sup>14</sup> ORS 756.525.

In some proceedings, the Commission may travel to areas affected by the case for evening Public Comment Hearings to provide information about the request and regulatory process and listen to public comment. The Commission also accepts public comments in major proceedings through a link on its webpage.

All public comments received are generally processed by our Consumer Services Division, and reviewed by Commission Staff and the ALJs. Traditionally, the public comments were made available for inspection by the parties, but were not made part of the evidentiary record of the proceeding.

To help provide more transparency about the public comments and their appropriate use in contested cases, the Commission has adopted a new process through which the public comments received will be made part of the evidentiary record. Transcripts of public comment hearings will be prepared and included in the record in the same fashion as transcripts from evidentiary hearings. The Commission's Consumer Services Division will also compile written comments received and prepare a summary. The summary will be made part of Staff's written testimony, and the comments themselves will be included as exhibits to that testimony. Depending upon the number of comments, the exhibits may be presented in scanned format, or compiled and presented in bulk.

Generally, the summary and comments will be included as part of Staff's opening and reply testimony. Written comments received after Staff's last scheduled opportunity to file testimony will neither be reviewed by the Commission Staff nor included in the record.

Presenting comments at a Public Comment Hearing or through the Commission's website does not subject the person to cross examination. Any party, however, may respond to Staff's summary of the public comments or the comments themselves in evidentiary testimony.

#### ***4. Settlements and Stipulations***

In contested case proceedings, parties may meet informally to explore informal resolution of some or all issues. Settlements are governed by OAR 860-001-0350. Any settlement must be memorialized in a written stipulation for Commission review, and be accompanied by an explanatory brief or written testimony in support. A stipulation is not binding on the Commission, which may adopt or reject it, or propose it be modified and schedule additional proceedings.

### **5. *Evidentiary Hearings and Oral Arguments***

ALJs preside over evidentiary hearings, and may be joined by Commissioners on the bench. The ALJ has a duty to ensure a full and fair inquiry into the facts necessary for consideration of all issues properly before the Commission. To ensure a complete record or in response to a request from the Commission, an ALJ may issue a bench request seeking clarification of evidence or additional testimony on a matter not addressed by the parties. Where possible, the ALJ will issue the bench request prior to the close of the record.

At hearings, the parties formally introduce into the record pre-filed testimony, and witnesses are sworn-in and made available for examination by Commissioners and the ALJ, and cross-examination by other parties. After hearing, parties file legal briefs. In most cases, a court reporter records the hearing and prepares a transcript for the Commission and parties. Parties may request the opportunity to present oral arguments to the Commission in certain cases. The criteria for determining which contested case proceedings give rise to the right to oral argument are set forth in OAR 860-001-0650 and 860-001-0660. The Commission may, on its own motion, request the parties to provide oral argument in any case and has discretion to determine the extent of participation of parties during oral argument hearings.

### **6. *Post-Hearing Activities and Decision Meetings***

At the end of the hearing and submission of all evidence, the ALJ will close the record. Parties generally file briefs, and the ALJ will begin writing a draft order or decision-meeting memorandum for Commission consideration. In cases where one party carries the burden of proof, such as rate cases, the parties typically file sequential briefs, so that the party with the burden has the last opportunity to present argument.

The Commission holds regularly-scheduled decision meetings to discuss and arrive at a decision on the outcome of contested cases. In addition to the Commissioners, decision meetings are attended by the presiding ALJ, the Chief ALJ, the Utility Program Director, the Deputy Utility Program Director, a Utility Division Administrator, Commission Advisors, Executive Director, Commission Counsel, and occasionally the Public Information Officer.

Because contested cases are quasi-judicial in nature, the Public Meeting Law allows Commissioners to meet in private to deliberate towards a decision.<sup>15</sup> Private meetings allow a full and candid discussion about the evidence presented without influence from those presenting the evidence and without exposing sensitive legal considerations to those who may appeal a decision. Although ORS 192.690 exempts "deliberations" at a decision meeting, the statute does

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<sup>15</sup> ORS 192.690(1).

not exempt portions of a meeting if used to gather information upon which the Commission will deliberate and decide.<sup>16</sup>

Once a final Commission decision has been reached, the ALJ will finalize a Commission order for further review by the Commission Advisors, Utility Program, and the Commission Counsel for technical and legal accuracy, and then the order is submitted to the Commissioners for review, possible revision, and signature.

## **C. Roles of Commission Employees and Assistant Attorneys General**

### ***1. Utility Program Staff***

The Utility Program Staff provides independent, expert testimony and recommendations in contested case proceedings. Staff considers the positions of other parties to the proceeding, balances the facts and policy considerations, and makes recommendations that protect the public interest. 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. The rationale for each outcome should be described on the record so the parties have an opportunity to address the Staff analysis.

Staff must discharge its duties consistent with the Commission's obligation to protect customers and set utility rates that are fair, just, and reasonable. This requires an appreciation of customers' short-term interests and long-term interests. For example, in a rate proceeding, Staff (and ultimately the Commission) must seek rates that are sufficiently low to avoid unjust exactions, yet are sufficient to able the utility to conduct their operations as financially sound enterprises.

Staff often serves two roles in contested case proceedings. First, in cases where it participates, Staff serves as an advocate for the public to ensure its interests are protected. This means presenting an independent analysis of the issues in the proceeding and, if appropriate, of the other parties' positions, and evaluating and recommending options for Commission resolution of the case in the public interest. To accomplish this, Staff engages in discovery, attends settlement conferences, sponsors testimony, participates in hearings, and submits legal briefs. Second, in all contested cases, regardless of whether it participates as an advocate by filing testimony and briefs, Staff serves as an advisor to the Commissioners and ALJs, subject to the *ex parte* restrictions discussed below. This helps ensure that the decision-makers have adequate policy and technical advice in the making of the decision.

The Commission recognizes that the fact that Staff may appear as witnesses in contested case proceedings may create a perception that Staff management involved in the decision-making

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<sup>16</sup> *Oregonian Publishing Co. v. Oregon State Board of Parole*, 95 Or App 501 (1989).

process would attempt to persuade the Commissioners to adopt a position recommended by the Staff witness. For this reason, the Commission limits Staff's involvement in the decision-making process, as described below. 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."

*a. Staff Witnesses*

Any Staff member who sponsored testimony in a contested case proceeding is subject to *ex parte* rules governing communications with Commissioners and presiding ALJs.<sup>17</sup> Thus, any private communication that relates to the merits of an issue in the case between a Staff witness and a Commissioner or presiding ALJ must be disclosed to other parties and placed on the record. The Commission does not allow a Staff witness to attend a Commission decision meeting to deliberate on the case, and only allows Staff witnesses to review draft decisions for purposes of ensuring technical accuracy.

Restrictions governing the communications of Staff members who appeared as witnesses in a contested case also apply to AAGs. As further discussed below, the AAGs representing Staff in the hearing process must follow the same procedures as apply to the Staff witnesses, and are similarly excluded from the decision-making process.

It is important to note that Staff does not always participate in a contested case docket. For example, Staff may not appear as a participant in a complaint proceeding between a customer and a utility or a qualifying facility and a utility. In these cases, any Staff member may serve in an advisory role to assist the Commissioners and ALJs in the resolution of disputes and may be asked to participate in Commission deliberations. In such instances, the Staff member's responsibilities are to serve as a resource and provide guidance on contested case matters to ensure effective, fair, and efficient agency decision-making based on information contained in the evidentiary record. The Commissioners should avoid addressing issues that are likely to be addressed in other contested cases where Staff is likely to be engaged as a party, and the Staff member should refrain from advocacy and not attempt to persuade Commissioners to adopt a particular position.

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<sup>17</sup> OAR 860-001-0340. *NOTE: Ex parte* rules do not apply to communications between Staff and other parties in a contested case proceeding.

*b. Utility Program Director, Deputy Program Director, and Division Administrators*

*Ex parte* restrictions governing Staff apply to particular individuals, rather than the entire Staff. Thus, while it would not be permissible for a Staff witness to participate in the deliberation of a decision, it is permissible for the person's supervisor to do so.

Accordingly, the Utility Program Director, Deputy Director, and Division Administrators attend decision-meetings and participate in Commission deliberations. Allowing these Staff members to fully participate in the decision-making process assures that the Commission and ALJs will have adequate policy and technical advice.

The Utility Program Director, Deputy Director, and Division Administrators may not attempt to persuade Commissioners to adopt a particular position. Their responsibilities in decision meetings and Commissioner briefings are to serve as a resource and provide guidance on contested case matters to ensure effective, fair, and efficient agency decision-making.

The Commission recognizes that these members of the Utility Program may have participated in the development of Staff's position in the case. They may have discussed case strategy, attended settlement conferences, and taken part in the drafting or review of Staff testimony. Due to this overlap in roles, the Utility Program manager advisors are not subject to *ex parte* restrictions, but may not discuss any information outside the record and must make certain that their advice addresses only matters contained in testimony and exhibits to the case. The Utility Program managers may not provide guidance based on information gained through participation in settlement conferences. Similarly, Staff managers who participate in decision meetings or Commissioner briefings may not disclose the views of Commissioners at settlement conferences.

If the Utility Program Director, Deputy Director, or a Division Administrator played an active role in settlement conferences or the development of Staff's position in the case, he or she must disclose the extent of that participation to the decision meeting participants prior to deliberations. Any information about matters outside the record gained through their management of Staff or attendance at settlement conferences may not be discussed and, if raised, will be noticed to the parties as an *ex parte* communication.

**2. Administrative Hearings Division**

The Administrative Hearings Division is an independent division reporting directly to the Commissioners. The Hearings Division is separate from the Utility Program in order to help ensure the objectivity and impartiality of the Commission's decision-making processes. The division is staffed by Administrative Law Judges (ALJs) and legal support staff. ALJs are

responsible for conducting fair and impartial hearings and ensuring 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 must also make certain that a full inquiry is made on all issues to provide an adequate factual basis for Commission decision making. ALJs are also responsible for making independent recommendations based on the record that will aid the Commission in arriving at a proper final disposition of the case.

*a. Presiding ALJs*

An ALJ is assigned to every contested case and has been delegated the authority to regulate the course of proceedings, including presiding over hearings, making evidentiary rulings, supervising discovery, deciding procedural matters, and issuing protective orders.<sup>18</sup> The ALJ must ensure that the proceedings are fair, impartial, and orderly. To secure a complete record for Commission decision-making, the presiding ALJ may conduct independent questioning of witnesses and require parties to supplement the evidentiary record with information on technical issues and other matters.

Presiding ALJs are also responsible for obtaining Commission input on scheduling of significant cases, keeping Commissioners informed of case developments, providing the Commissioners with background materials and briefings so that they can participate effectively in hearings and meetings. Following hearing and briefing, the presiding ALJs prepare decision meeting memoranda or draft orders that address the relevant positions of each party and legal and factual issues necessary to the decision.

At the decision meeting, it is the responsibility of the presiding ALJ to summarize the case and any draft order. The ALJ also outlines the outstanding issues. After the Commission reaches a final decision after deliberations, the ALJ then works with the Chief ALJ to prepare an order consistent with the Commission's directions for final review and signatures.

Throughout the contested case process, a presiding ALJ may discuss procedural issues with any party, member of Staff, or AAG assigned to represent Staff. ALJs may only discuss matters relating to merits of the case with decision meeting participants.

*b. Chief ALJ*

The Chief ALJ leads and supports the activities of the ALJs and is responsible for the overall processing of contested cases and the fairness and transparency of Commission proceedings. The Chief ALJ chairs Commission decision meetings and participates in deliberations. The Chief ALJ evaluates the legal adequacy of orders and recommendations submitted to the Commission, and ensures that the Commissioners receive the broad range of legally acceptable

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<sup>18</sup> See OAR 860-001-0090(1).

options consistent with its legal authority. Following the decision meeting, the Chief ALJ works with the presiding ALJs and other decision meeting participants to ensure that draft orders reflect Commission decisions, and are legally sufficient, accurate, and timely.

Like Utility Program managers, the Chief ALJ is not subject to *ex parte* restrictions, but may not discuss any information outside the record nor advocate for any decision.

### 3. *Assistant Attorneys General*

The Department of Justice has assigned AAGs to provide legal services to the Commission for all aspects of contested case proceedings. Like Staff, AAGs serve dual roles. First, they represent Staff as an advocate for the public interest. AAGs work as a partner with Staff in all matters relating to Staff's participation in the proceedings. Second, AAGs serve as counsel to the Commission with respect to legal issues. They provide interpretation of laws, rules, and other sources of authority, and ensure that decisions are legally supportable.

Consistent with its policies to separate incompatible functions performed by Staff, the Commission has also adopted procedures to separate the AAG's advocacy functions from its advisory functions. As described below, the Commission and its Staff are represented by different AAGs in contested case proceedings. Although this separation of roles is not required by law,<sup>19</sup> the Commission has adopted this practice to foster good government.

#### *a. Staff Counsel*

An AAG is assigned to all contested case proceedings in which Staff participates. AAGs partner with Staff and provide opinions, advice, and assistance on case strategy, preparation, and execution. AAGs analyze filings, attend internal Staff meetings, identify legal issues, help Staff identify issues to address, assist with discovery, participate in or lead settlement discussions, help Staff draft testimony and prepare for hearing, and write legal briefs.

Like Staff witnesses, any AAG who represented Staff in a contested case proceeding is subject to *ex parte* rules governing communications with Commissioners and presiding ALJs.

#### *b. Commission Counsel*

The Department of Justice has assigned an AAG to serve as full time Commission Counsel. The Commission Counsel does not directly represent Staff in contested cases, but manages and oversees the work of other AAGs who represent Staff in an advocacy capacity. Given this

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<sup>19</sup> The Oregon Attorney General's Administrative Law Manual, Jan 1, 2008, at 64, makes clear that due process does not require such a formal separation.

management role over Staff-assigned AAGs, the Commission Counsel is not subject to *ex parte* restrictions, but may not discuss any information outside the record nor advocate for any decision. The Commission Counsel must refrain from party advocacy and be prepared to discuss all legally supportable options for Commission consideration.

The Commission Counsel generally works with Commissioners, the presiding ALJ, and Chief ALJ about any matter relating to the conduct of the hearing or the agency's decision in the matter. The Commission Counsel is responsible for providing timely and accurate legal advice to ensure that the Commission's actions and decisions are consistent with its delegated authority and constitutional constraints. Where applicable, the advice should clearly set forth the range of discretion the Commission may exercise within the legal framework.

The Commission Counsel, working together with the presiding and Chief ALJ, also ensures that no *ex parte* communications occur during decision meetings and Commissioner briefings, and that the separation of functions are not violated. The AAG representing the Commission is an employee of the DOJ and, therefore, maintains a measure of independence from the agency.

The Commission may invite AAGs other than assigned Commission Counsel to participate in deliberations in cases where the AAG was not assigned as Staff counsel or Staff did not participate. In such instances the AAGs role and responsibilities will be consistent with those described above for Commission Counsel.

#### **4. Executive Office**

The Commission's Executive Office is responsible for the overall strategic performance of the agency, public policy engagement, and agency communications. Members of the Executive Office participate in contested case proceedings as described below.

##### *a. Commission Advisors*

The Commission's policy and technical advisors provide expert analysis of the case record and independent advice on party arguments to support Commission decision-makers. In the context of contested case proceedings, they serve as a technical or policy resource to assist Commissioners and Administrative Law Judges to promote well-informed decision-making. Activities performed by Commission Advisors in contested cases include working with ALJs to help ensure a full and complete record and, if necessary, help draft bench requests to supplement the record. In coordination with ALJs, the Commission Advisors will also provide technical and policy analysis and support based on a review of the evidentiary record and party arguments, and assist with the preparation and review of Commission orders.

Like Commissioners and Administrative Law Judges, Commission Advisors are subject to *ex parte* restrictions in OAR 860-001-0340 and may only discuss matters relating to merits of a contested case with decision meeting participants.

*b. Executive Director*

The Executive Director attends Commission decision meetings and serves as a resource during deliberations. In collaboration with others, the Executive Director may provide historical context of past Commission precedent, address the potential implications of the range of legally supportable actions, and explore options to help reach Commission consensus.

Like the Utility Program management advisors, the Chief ALJ, and Commission Counsel, the Executive Director is not subject to *ex parte* restrictions, but may not discuss any information outside the record nor advocate for any decision. If any non-record information is shared with the Commissioners or ALJ, the information will be noticed to the parties as an *ex parte* communication.

The Executive Director also reviews significant draft orders to provide advice on the messaging of Commission decisions through summaries provided in the order or in media releases.

*c. Public Information Officer*

The Public Information Officer (PIO) may attend decision meetings on significant cases to help inform media releases.

#### **IV. HYBRID PROCESS**

The Commission may use a unique hybrid processes for certain matters to help balance the need for an informal process while providing participants with certain rights to help facilitate their participation and access to information. These hybrid proceedings fall under the Commission's Open Meetings Process, but contain some unique features that warrant a separate discussion in our guidelines.

An example of this Hybrid Process is that which is used for dockets related to utility resource planning. The utility resource planning filings are the review and acknowledgement of (1) an integrated resource plan (IRP); and (2) a request for proposal (RFP) for a major resource acquisition. These guidelines will use these resource planning dockets to help explain the requirements and roles of agency and DOJ employees in this Hybrid Process.

**A. Applicable Law****1. Integrated Resource Plans**

Since 1989, the Commission has required energy utilities to develop and file IRPs to help ensure the utilities acquire an adequate and reliable supply of energy at the least cost and risk to ratepayers.<sup>20</sup> Commission acknowledgement of an IRP means only that the Commission finds that the utility's proposed actions are reasonable at the time of acknowledgment, and does not constitute ratemaking. The Commission views the IRP process as a means to inform a subsequent review of a utility request to include new resources in rates.<sup>21</sup>

Because the Commission does not finally determine the individual rights, duties, or privileges of any party during the IRP process and, as addressed below, does not use contested case procedures, IRP dockets are not considered contested cases under the APA.<sup>22</sup> An acknowledgment order is not an order subject to judicial review because it does not "preclude further agency consideration of the subject matter" of the order.<sup>23</sup>

For this reason, a person need not intervene as a party to participate in the proceeding. Participation includes the ability to attend Staff workshops, submit written comments, and provide oral comments to the Commissioner at a public meeting. The Commission, however, will grant persons party status for the limited purposes of obtaining access to confidential information pursuant to the terms of a protective order. The Commission also assigns an ALJ to help preside over the docket to resolve procedural disputes.

**2. Request for Proposal**

To help promote the acquisition of least-cost resources, the Commission generally requires utilities to issue an RFP for all major resource acquisitions identified in its IRP.<sup>24</sup> Major resources are those resources with a duration of over five years with an output of more than 80 megawatts.

The Commission's competitive bidding guidelines require, among other things, that a utility seek acknowledgment of its final short list based on price and other criteria. The Commission's acknowledgment of short-list has the same meaning as that used in the IRP process—that is, a conclusion that the final short-list seems reasonable, based on the information provided to the Commission at that time. Any ratemaking determinations would occur in a later ratemaking

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<sup>20</sup> See Order No. 89-507.

<sup>21</sup> Order No. 89-507 at 7.

<sup>22</sup> ORS 183.310(2)(a)(A).

<sup>23</sup> ORS 183.310(6)(a)(B).

<sup>24</sup> See Order No. 06-446.

proceeding. Thus, like IRP proceedings, RFP dockets are not considered contested cases under the APA, and an acknowledgment order is not a final order subject to judicial review.

## **B. Utility Planning Processes**

The Commission Staff is primarily responsible for the processing of IRP and RFP filings. Although these matters are not contested cases, an ALJ is assigned to monitor the proceedings and to approve a procedural schedule. In certain instances, an ALJ may participate in pre-filing activities and update Commissioners on preliminary activities, as well as help identify and facilitate needed communication between Commissioners and Staff on policy issues where the Commissioners may need to weigh in.

The ALJ grants petitions to intervene for procedural purposes only. The designation of parties is necessary so persons can be placed on the service list and be eligible to sign a protective order to obtain access to confidential information related to the utility filings. The ALJ grants petitions to intervene in IRP and RFP dockets for these limited purposes, even though party status does not confer the general rights and duties to individuals who participate in contested case proceedings. The procedural schedules for these filings are intended to educate the Commission and interested persons about the utility's proposed actions and to allow comment or objection. The schedules generally include utility presentations before the Commission at a public meeting, and rounds of opening and reply comments from interested persons, Staff, and utilities.

The Commission takes action on IRP and RFP dockets at a public meeting. Prior to the meeting, Staff generally publishes a report containing its analysis and recommendation.

## **C. Roles of Commission Employees and Assistant Attorneys General**

The roles of Staff, ALJs, Commission Advisors, and AAGs in IRP and RFP dockets are similar to those listed above under Open Meetings Process. Staff provides independent analysis and expert recommendations on the utility requests, and is assisted and represented by an AAG. All Staff Reports provide the Commissioners and the public with information necessary to understand the issues to be addressed, describe the requested actions, and provide Staff's analysis and recommendation.

Although *ex parte* rules do not apply to IRP and RFP proceedings, once an IRP or RFP is filed, the Commission will generally not engage in discussions with external stakeholders, other than the IE, regarding the proceedings outside of scheduled events. .

Public Meetings Law requirements apply throughout the pre-filing and post-filing activities. Thus, Commissioner briefings must be done individually with each Commissioner. This includes sending e-mail messages to Commissioners individually to avoid an inadvertent violation of the Public Meetings Law.

Once the Commission has taken action on the filing, the presiding ALJ will prepare an order consistent with the Commission's decision for signatures.

**Internal Operating Guidelines**  
**Applicability of Law Summary**

	<b>Contested Cases</b>	<b>Rulemakings</b>	<b>Open Meetings</b>	<b>Resource Planning</b>
<b><i>Ex Parte</i> Restrictions Apply?</b>	Yes	No, but ALJ and Commissioners may not consider comments made after deadline unless the deadline is extended for all	No	No
<b>Public Meeting Law Apply?</b>	Yes, but Commissioners may deliberate in private	Yes	Yes	Yes
<b>Decision based on sworn testimony and evidence subject to cross-examination?</b>	Yes	No	No	No
<b>Persons Given Party Status?</b>	Yes	No	No	Yes, but only for purposes of service and protective orders
<b>Action Results in Appealable Order?</b>	Yes, to Court of Appeals	Yes, to Court of Appeals	Maybe – if so to Circuit Court	No