

OSSIA and CREA submit these comments on the final set of Division 1 rules set to be addressed in AR 641 at the July 1, 2021 workshop and on the draft cumulative redline provided by ALJ Moser on June 16, 2021. OSSIA previously submitted comments in this docket on March 9, 2021, CREA on March 10, 2021, and we submitted a joint redline on April 6, 2021. These comments build upon but do not entirely repeat our prior comments, but do contain further comments on portions of the draft cumulative redline that we have not yet had the opportunity to comment on.

Our comments in this docket generally have been targeted at creating pathways for stakeholders in the Oregon Public Utility Commission's ("Commission" or "PUC") various dockets to increase accessibility and transparency. It is extremely important that PUC proceedings are accessible to all interested stakeholders and the public and that sufficient transparency is provided into data and inputs that affect the Commission's decisions. There is a significant information and resource imbalance between ratepayer-funded, well-lawyered monopoly utilities and non-profit trade associations or public interest organizations. We do not have access to the same types of data and models that utilities do and cannot adequately advocate before the Commission without sufficient transparency into those data and models. As such, we make the following recommendations

I. Comments on Final Set of Division 1 Rules

**Notice of Contested Case Hearing 860-001-0570**

We are particularly concerned about the PUC's use of the contested case process to decide policy matters. Fundamentally, dockets deciding policy matters should be open to all stakeholders and not limited only to those who have the resources to participate in a full contested case process, which can be costly and complex.

This section of the rules says that notice of the hearing in a contested case must be served on all parties at least 10 days prior to the hearing. However, it is not entirely clear how or when a docket becomes a contested case, and at what point or how a stakeholder needs to be involved to advocate for a different process. In the Commission's internal operating guidelines, "a contested case proceeding official commences when the Administrative Law Judge issues a notice of prehearing conference."<sup>1</sup> Before the notice of prehearing conference, stakeholders are often not yet on notice of the docket and at that stage there is often no formal process to become involved and/or comment on a docket to provide input about whether it should be treated as a contested case. As such, additional clarity should be provided on what makes a docket a contested case, at what point in time that occurs, and how stakeholders can provide input on whether it should be a contested case.

II. Comments on Cumulative Redline

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<sup>1</sup> Order No. 20-386, Attachment A at 15.

### **Discovery in Contested Case Proceedings 860-001-0500**

In our joint redline submitted on April 6, 2021, we advocated for limiting discovery requests submitted to an intervenor that is not a public utility to address only matters upon which the intervenor has testified. The purposes of this recommendation would help alleviate the burden of discovery on non-utility participants to encourage broader participation. While the cumulative redline does not adopt this recommendation, we are encouraged that ALJ Moser suggests further discussing ways to apply rules that recognize that parties are not always similarly situated. We also want to recognize the Commission's recent adoption of a "case management" rule contained at OAR 860-001-0360 which suggests that a case management conference be held to establish a schedule for the docket including dates for discovery. While we continue to advocate that less burdensome and more accessible discovery processes be adopted in rule, we also encourage the Commission and the administrative law judges to use this new process to proactively consider the differential burden on different parties.

### **Data Requests 860-001-0540**

In our joint redline submitted on April 6, 2021, we advocated for (1) lengthening the time for responding to requests for production of documents to 30 days in line with the Oregon Rules of Civil Procedure and eliminating interrogatories for non-utility parties; and (2) making data requests and responses in matters of general utility regulation public. These requests also are targeted at reducing the burden on non-utility participants with fewer resources. The cumulative redline also does not adopt these changes, however, ALJ Moser notes that he plans to propose a variety of options for the Commission to consider that are consistent with contested case requirements. We look forward to reviewing these options once available.

### **Delegation of Authority to Administrative Law Judge 860-001-0090**

We support the comments that subsection (g) of this section should be modified as follows:

Decide procedural matters, but not to ~~grant~~ **decide** contested motions to dismiss or other contested motions that involve final determination of the proceedings

It seems rather odd that an ALJ may not decide to "grant" contested motions to dismiss or other contested motions that involve final determination of the proceedings, but that by exclusion, an ALJ may deny such a motion. Rather, we believe the intent of this language is that the ALJ may do neither and instead the Commission itself should be the decider of such motions.

### **Former Employees 860-001-0330**

The cumulative redline proposes to change the language in this rule from applying to former PUC employees who "took an active part" in a docket to a broader set of former employees who "participated" in such a docket. The full rule with ALJ Moser's proposed redline is reproduced here:

- (1) A former Commission employee may not appear on behalf of other parties in contested case or declaratory ruling proceedings in which the former employee ~~took an active part participated~~ on the Commission's behalf.
- (2) Except with the Commission's written permission, a former Commission employee may not appear as a witness on behalf of other parties in contested case proceedings in which the former employee ~~took an active part participated~~ on the Commission's behalf.
- (3) Except with the Commission's written permission, a former employee of a party may not appear as a witness on behalf of the Commission in contested case proceedings in which the person ~~took an active part participated~~ on the party's behalf. Prior to giving its written permission to the person, the Commission must notify the affected party and all other parties to the proceedings, and allow the affected party an opportunity to object to the Commission granting permission to the person. Other parties to the proceedings may respond to the affected party's objection, if any.

We strongly oppose making modifications to this section, particularly considering the recent ruling allowing a former employee to appear as a witness specifically because she had not taken an *active part* in the contested case while employed by the Commission.<sup>2</sup>

First, the effect of this revision would be more burdensome on non-utility participants than it would be for utility participants. There is an inequity in the ability of utilities and non-utility participants to hire multiple experts and thus still be able to benefit from a former staffer's immense knowledge and experience but without having that person submit testimony. Utilities can simply have the former staffer working behind the scenes to help someone else on their staff get up to speed and submit testimony. However, for non-utility participants, they often have fewer resources and cannot hire two experts, or there may simply be limited people who are expert in a particular matter.

Second, given that so many PUC matters are handled in contested cases, this further increases the burden on stakeholders to meaningfully participate. These former employee rules by their terms only apply to contested cases and declaratory rulings. The utilities often urge for matters to become contested cases (especially for PURPA matters), or as noted above it's not always clear whether the docket should be a contested case if it is considering a policy issue or when the docket becomes contested. So, as long as matters are going to be handled via the contested case process, this will be an issue and an additional burden to participation.

We support keeping the status quo on this rule.

### **Practice Before the Commission 860-001-0300**

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<sup>2</sup> UM 2032 ALJ Ruling (Dec. 23, 2020) <https://edocs.puc.state.or.us/efdocs/HDA/um2032hda172459.pdf>.

While we don't have a specific redline to propose to this section, we wanted to note one challenge. Subsection 2 of this section notes that any party may intervene in a contested case proceeding. While this is true, a new participant reading the PUC procedural rules for the first time may not be aware that the Commission also often requires intervention in hybrid proceedings like integrated resource plans (IRPs) and requests for proposals (RFPs) for parties to gain access to the Huddle workspace and the data requests or responses therein. While this may not be a huge burden for some participants, it can be a barrier for some groups to meaningfully participate or gain access to the same information. This dilemma further supports our request above to make data requests and responses accessible by the public in certain cases of general utility matters like IRPs, RFPs, rate cases, and policy dockets or other dockets with general applicability. However, the PUC's procedural rules do not generally address the types of hybrid procedures just mentioned and could also be expanded to be clearer.

### III. Conclusion

Thank you for considering the above revisions. OSSIA and CREA are small non-profits with limited capacity to engage in the many dockets, rulemaking proceedings, and contested cases at the PUC. Increasing simplicity and transparency allows us to more fully engage in processes where industry and community input is valuable.