

HOUSE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON CIVIL LAW

February 19, 1997 Hearing Room 357

1:00 P.M. Tapes 24 - 25

MEMBERS PRESENT:

Rep. Lane Shetterly, Chair

Rep. Judith Uherbelau, Vice-Chair

Rep. Roger Beyer

Rep. Jo Ann Bowman

Rep. George Eighmey

Rep. Floyd Prozanski

Rep. Charles Starr

Rep. Larry Wells

VISITING MEMBER: Rep. John Minnis

STAFF PRESENT:

Bill Taylor, Counsel

Lisa Fritz, Administrative Support

MEASURE/ISSUES HEARD:

HB 2078 - Public Hearing

These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.

Tape/#	Speaker	Comments
Tape 24, A		
001	Chair Shetterly	Calls the meeting to order at 1:09 p.m.

<u>HB 2078 - OPENS PUBLIC HEARING</u>		
015	Thomas G. Barkin	Administrator for the Administrative Hearings Division of the Oregon Public Utility Commission (PUC) Submits written testimony in support of HB 2078 (EXHIBIT A). Submits written testimony for Denise McPhail of Portland General Electric (EXHIBIT B).
062	Rep. Uherbelau	Is the scope denovo?
064	Barkin	No. The courts will look at two things: whether the commission decision is consistent with state law and whether the commission's finding of fact are supported by substantial evidence.
065	Rep. Uherbelau	And that is true at the circuit court level?
066	Barkin	Yes.
068	Rep. Eighmey	Does the present law provide for intervenors between circuit court and the appellate court despite the fact that the rule is only the parties participating in the hearings at the local level may go to circuit court now? Are we, in any way, jeopardizing intervenors' status, presently, between circuit and appellate court?
072	Barkin	No, it will operate the same way. Under current law, in order to intervene at either the circuit court level, appellate court level, or Supreme Court level, you have to have been a party at the agency level.
		Continues testimony in favor of HB 2078.
092	Rep. Uherbelau	Could you be more specific about what procedures you're talking about?
095	Barkin	Something as simple as you have to file a complaint at the court level. Just filing documents, filing paper has to be done the way the trial courts do it. Gives example to illustrate the differences between trial and circuit court procedures.
		Continues testimony in favor of HB 2078.
160	Rep. Wells	We had a bill earlier in the session dealing with who was a party to an action. Do you have any problem with that definition of who is a party? Do they have to be in the room? Do they have to appear? Do you have any concerns along that line?
169	Barkin	That hasn't been a problem for us. We have the utility that is involved in the commission proceeding as a party. The Citizen's Utility Board (CUB) is a party by statute. Any other party that wishes to participate files a petition to

		intervene, and that petition is granted. Statute tells us who can intervene and what the conditions are regarding intervention.
175	Chair Shetterly	CUB is a party by statute?
177	Barkin	Yes.
180	Bill Taylor	Committee Counsel You are adopting that part of the Administrative Procedures Act (APA) as it relates to judiciary review, but you're keeping your own procedures as they relate to contested cases?
181	Barkin	Yes.
182	Taylor	What's the reason for that?
183	Barkin	They're historical. We've been working with these statutes for a long time. They do not part significantly from the contested cases procedures. It something we're used to that fits, and no one has raised a question about it.
187	Rep. Uherbelau	Questions how "trial" is used within the language.
205	Barkin	As I mentioned, that's one of our problems. We have procedures at the trial court level that don't fit the review procedure. Look at ORS 756.598 and scope of review.
211	Rep. Uherbelau	Yes, I have both of them, but they seem to contradict each other.
212	Barkin	We have not had requests to have our proceedings tried denovo at the circuit court level. I suspect that if there was an effort to do that, the trial courts would be singularly unreceptive.
219	Chair Shetterly	It seems like sort of a truncated trial that you have to jam within this scope of review, if that's what you're talking about.
222	Barkin	Responds.
228	Rep. Eighmey	In trying to figure out where you have deleted the provisions of the statute where it applies to the rules set forth in the circuit court so you can continue to follow your own rules, on page one of the bill, lines 26-29, you make reference to the statutes that are exceptions or to which you don't have to follow. In the PUC there are corresponding rules that are set forth in what your deleting. You're saying those parties will only be the parties that are parties presently under your rules?
248	Barkin	Right.
250	Rep. Eighmey	But this also eliminates all of these other provisions, such as the appeals court having the ability to review denovo. Cites 183.410 and reads aloud. Asks if, keeping in mind what was just read, the court of appeals will have that opportunity under the PUC rules if the statute is eliminated totally.
264	Barkin	We have a parallel provision in our statutes: ORS 756.450, declaratory rulings. It is very similar.
268	Chair	450 is on page two of the bill, line six.

	Shetterly	
281	Rep. Eighmey	It does look parallel. Then 415 is your section three, section four?
288	Barkin	Yes.
294	Rep. Eighmey	I'm just concerned that those parts that are deleted are corresponding in the bill itself, so that the provisions, other than the parties that participate, have all of the same rights and rules.
299	Barkin	We also have a set of administrative rules that incorporate a number of the provisions of the APA.
309	Rep. Uherbelau	I'm still having problems with the concept that the trial court does, in effect, the same thing the court of appeals does. If that's true, I can understand that it's a waste of time and money to have to go through the same procedure twice. But, I'm looking at the statutes and the annotations, and usually if it a substantial evidence rule that you're reviewing on, there is either substantial evidence or there is not. That's the criteria. In the annotations I'm looking at, it talks about a proceeding to modify findings, but modifying findings is not a substantial evidence review. There's also another statute here that allows a person to file a motion (application) to present additional evidence, and I don't think you can do that on the court of appeals level, so it doesn't seem to be the exact same procedure. I feel a little uncomfortable about that.
352	Barkin	Take a look at ORS 183.484, subsection five.
371	Rep. Uherbelau	But that's talking about a contested case.
373	Barkin	I'm sorry, 482, subsection five.
384	Rep. Minnis	I'm just a little troubled by the desire to retain the narrowness of individuals having standing, and I would like some more dialogue on why they want to keep that current law. The back-drop of that is deregulation, and my assumption of that is as deregulation moves along, it's going to affect more people who do not and have not had consistent dealings with the PUC. So, my assumption is there may be more people a little more interested in potential standing before the court of appeals.
TAPE 25, A		
005	Barkin	Our standards for intervention are fairly straight-forward. Basically, we will allow intervention at any time in the proceeding, as long as the party or the proposed intervenor does not burden the record or delay the proceeding. I think that's the standard. We have allowed intervenors in our proceedings, even at the last minute, as long as those intervenors understand that they take the record as they find it. They can't delay the proceeding by asking us to retry issues that we've already spent a good amount of time working through. The public really does have an opportunity to participate extensively at the agency level. When we get to the appellate level, our

		proceedings are very complex and very different from most administrative agencies, where the record may be thousands of pages long. Consequently, we feel that if a party wants to come in and participate in an appeal, they should tell the other parties and the commission what their issues are at a time when the parties can address those concerns, rather than waiting until the last minute. The parties that do participate are well represented, including CUB.
030	Rep. Minnis	I don't know if that's a good argument to say that the record is too complex for the average citizen to understand. I'm a little concerned because in applications of the APA for other agencies, they have one standard, and you are asking for a different standard. Give me a real good reason why you should be different.
037	Barkin	The reason is we have a party that is designated to represent the public, by statute, and they intervene as a matter of right in all the proceedings. The public interest is represented in our proceedings, and the commission's statutory obligation is to represent the public.
056	Ron Eachus	PUC Commissioner Testifies in favor of HB 2078. Responds to Rep. Minnis' concerns. We're trying to eliminate unnecessary duplication and costs. The reason we're asking for different application in this case is that, by statute, we have people who participate and protect the public. Anyone from the public is allowed to participate and intervene. The nature of our decisions is fairly broad. Almost every citizen is affected by our agency and its decisions. The purpose is to give all parties a chance to address, with evidence, on the record, the issues that are raised by all the other parties. Anybody who is served by a utility (gas, electric, etc.), having the ability to come, makes it unworkable for us.
105	Eachus	Continues testimony.
124	Rep. Minnis	I'm really wondering whether the general rule in the APA shouldn't be narrowed for all other agencies. He made all of my arguments for me.
130	Rep. Eighmey	What were the governor's reasons for vetoing the bill (that had this bill included in it) last session?
135	Barkin	The bill (that HB 2078 was put into) included in it language that changed many practices that had been in place for a long time. By making all these changes, the heads of agencies felt as if this was opening doors for all different kinds of appeals. I believe that was the reason for the veto.
154	Rep. Uherbelau	Has this idea ever come up on its own? If so, what reasons, concerns, and/or objections were raised?
167	Eachus	I think this is the bill's third or fourth session. During the first and second sessions, the court of appeals and a couple other parties had some concerns, and by the time we got them resolved, it was too late in the session to do anything about it. Last session, it was vetoed as a result of being combined with another bill that had its own problems.
195	Chair Shetterly	Calls attention to Denise McPhail's written testimony. That, in part, responds to the question Rep. Uherbelau raised as well.

205	Rep. Bowman	How assessable will the court of appeals be to people who are challenging a decision? I guess I see us closing a door and taking away people's options on how they can disagree with a decision made by your organization. This sounds like, with passage of this bill, people would have only one way to handle things.
214	Eachus	I think that's a very legitimate concern. I believe we're actually increasing the opportunities because we are reducing cost and duplication for parties involved.
234	Barkin	Parties don't have options right now. If they want a review of a PUC decision, they must go to the circuit court. What we are saying, under this bill, is that if they want review of a PUC decision, they must go to the court of appeals. The problem that people are facing right now is they must go to the circuit court. Even if they get a favorable decision in the circuit court, they have to do it all over again in the court of appeals, which is time consuming and expensive.
240	Rep. Bowman	So there is not a greater burden on the person who is appealing the decision going to appellate court than one going to the circuit court?
244	Barkin	I would take the position that it is less of a burden because they are going to have to do it in the court of appeals anyway.
251	Rep. Eighmey	What is the CUB's position on this?
260	Barkin	They are supporting this bill because it will save them money.
273	Rep. Bowman	So what happens if it goes directly to the court of appeals? Is there a next step.
278	Barkin	Most of the time it will stop at the court of appeals.
284	Chair Shetterly	Explains the process of the court of appeals further.
288	Barkin	The example that I gave earlier illustrates the ricochet system the court sends us through.
297	Rep. Uherbelau	I think it's important to point out that the Supreme Court takes very few cases.
343	Chair Shetterly	Adjourns at 1:57 p.m.

Submitted by, Reviewed by,

Lisa Fritz, Sarah Watson,

Administrative Support Office Manager

EXHIBIT SUMMARY

A - HB 2078, written testimony, Thomas G. Barkin, Administrator of the Administrative Hearings Division, Public Utility Commission, 2 pages.

B - HB 2078, written testimony, Denise McPhail of Portland General Electric, 1 page.