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STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:

PUBLIC UTILITIES COMMISSION

Attorney General File No. 14-008 and  
Attorney General File No. 14-017

OMLO No. 2014-002

BACKGROUND

This Opinion resolves two Open Meeting Law (OML) complaints against the Nevada Public Utilities Commission (PUC) following an investigation.

AG File No. 14-008 is based on an allegation that the State of Nevada Public Utilities Commission (PUC) (NRS 703.020 et seq.) in conjunction with its General Counsel, Carolyn Tanner, denied Complainant "accommodation" under the Open Meeting Law, the Americans With Disabilities Act (ADA), Section 504, of the Rehabilitation Act (RA) and other unspecified statutes.<sup>1</sup>

Complainant filed a second complaint, 14-017, on June 9, 2014, alleging that PUC Commissioner David Noble interfered with the public's right to appear at a PUC agenda meeting and consumer sessions when he issued an order that scheduled two separate consumer sessions, avoiding a video conference that would have connected consumers from the north and south in the same meeting. Separate consumer sessions meant that video conferencing was not available. The gravamen of the complaint is that avoidance of video consumer sessions deliberately interfered with complainant's right of access to these meetings.

These two Open Meeting Law complaints are being considered together in this opinion.

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<sup>1</sup> Title II of the Americans with Disabilities Act (ADA) 42 U.S.C. § 12131 applies to state and local government services, and activities; it prohibits discrimination on the basis of disability. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794. The OML does not have jurisdiction to decide claims of discrimination based on disability except where access to a public meeting was denied because of a disability for which an accommodation had not been provided.

**FACTS**

**AG File No. 14-008**

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3 Complainant asserts she is disabled by "environmental issues and numerous other  
4 physical medical conditions and [has been] unable to work since 2003." The PUC has not  
5 contested Complainant's assertion and has not previously questioned her disability and in fact  
6 has accommodated her separate request to ask the public to avoid wearing fragrances to  
7 public meetings.

8 On March 12, 2014, Complainant called the PUC's assistant secretary to request to  
9 telephonically appear at the PUC's agenda meeting on March 14, 2014 to make public  
10 comment. The Secretary told Complainant she could not appear by telephone to make public  
11 comment, but she could submit a written comment that would be annexed to the agenda  
12 docket. Complainant alleged she said she was in a major "fibro" flare, so she was unable to  
13 physically appear and asked for an accommodation. The PUC secretary later said she was  
14 not told the nature of the sickness, only that the Complainant said she was "having a flare up."  
15 The Secretary did not inquire any further.

16 Complainant then explained she was asking for a reasonable accommodation, one that  
17 the PUC had already created and could easily access. The Complainant's reference to an  
18 accommodation already created meant that because the PUC had previously allowed agenda  
19 item presenters to appear telephonically, an appearance by telephone was already an existing  
20 accommodation, so her request as a disabled person should be granted. However, the  
21 secretary informed the Complainant the PUC did not allow the public at large to call in to give  
22 public comment. Complainant indicated that it was necessary for her to appear because she  
23 was a repetitive presenter on one of the issues on the agenda for discussion and comment.  
24 She wanted to make sure her comments were heard during the first comment period on the  
25 agenda.

26 Since the agenda hearing was the next day, PUC General Counsel emailed  
27 Complainant, acknowledging her request for an accommodation; but because the request did  
28 not specify the nature of the illness, and because the ADA generally does not cover short

1 term, non-chronic conditions, Complainant was advised to submit her comments in writing to  
2 be placed in PUC public comment files. Moreover, Counsel informed Complainant that the  
3 PUC does not provide call-in services for regular meetings.

4 **AG File No. 14-017**

5 Complainant alleged an OML violation based on the PUC's decision to hold separate  
6 consumer sessions, north and south, on a consolidated docket. The consumer sessions and  
7 hearings were held without video conferencing between PUC's Carson City office and its Las  
8 Vegas office. The allegation is that the public has been denied the right to "appear" at  
9 consumer sessions and PUC agenda hearings<sup>2</sup>.

10 **ISSUES**

11 **1) Whether Nevada Public Utilities Commission made reasonable efforts to**  
12 **assist and accommodate Complainant's request for accommodation for purposes of**  
13 **making public comment.**

14 **2) Whether the absence of a video conference at two PUC consumer**  
15 **sessions constituted denial of meeting access in violation of the Open Meeting Law.**

16 **ANALYSIS**

17 **1) Whether Nevada Public Utilities Commission made reasonable efforts to**  
18 **assist and accommodate Complainant's request for accommodation when making**  
19 **public comment.**

20 The Open Meeting law requires that public officers and employees responsible for  
21 public meetings "shall make reasonable efforts to assist and accommodate persons with  
22 physical disabilities desiring to attend." NRS 241.020(1). The Complainant essentially  
23 complains she has been denied meaningful access to the Commission for purposes of public  
24 comment. The Complainant asserts that even if she submitted written comments, as  
25 suggested by the PUC staff, and even if they were attached to the docket record, the  
26 comments would not provide meaningful access to the decision makers at the appropriate

27  
28 <sup>2</sup> PUC "agenda hearing" is a term used to differentiate it from "consumer session." A consumer session is not held before the full Commission. It is not subject to the OML like an agenda hearing.

1 time. Complainant requested telephonic access to the PUC at the beginning of the consumer  
2 session so that her comment would be heard early in the meeting. She said she was a  
3 frequent commenter on this particular issue on the agenda, and unless her comment could be  
4 heard at the first public comment period, the Commission would be unlikely to read or  
5 consider her written comments.

6 Courts continue to define what constitutes access in the context of public entity  
7 programs and benefits. The Courts are often called upon to decide whether rights of the  
8 disabled to access to programs and benefits have been violated in different factual contexts.  
9 Courts' recognition that both the RA and the ADA mandate meaningful access to public entity  
10 programs and/or benefits is relevant to the facts and the issues of this Complaint.<sup>3</sup> The  
11 parameters of "meaningful access" have not been precisely defined; nevertheless the cases  
12 that have considered it provide the rationale that resolves this case.

13 The issue in many cases is whether "meaningful access" requires the public entity to  
14 create or expand services to the disabled. Essentially the Complainant's claim is that the  
15 PUC failed to expand its public comment service to accommodate the request for telephonic  
16 public comment. Telephonic facilities for public comment for any person, whether disabled or  
17 not, are not now and have not been provided by the PUC.

18 In *Alexander v. Choate*, 469 U.S. 287, (1985) the U.S. Supreme Court clarified the  
19 meaning of "meaningful access," which had received disparate treatment in lower federal  
20 courts. The *Alexander* Court considered a case in which the State of Tennessee reduced the  
21 number of days Tennessee would pay for Medicaid use. The Court stated, "To the extent  
22 respondents further suggest that their greater need for prolonged inpatient care means that, to  
23 provide meaningful access to Medicaid services, Tennessee must single out the handicapped  
24 for *more* than 14 days of coverage, the suggestion is simply unsound." *Id.* at 302-03, 105 S.  
25 Ct. 712.

26  
27 <sup>3</sup> Title II of the Americans with Disabilities Act (ADA) 42 U.S.C. § 12131 applies to state and local  
28 governments and it prohibits discrimination on the basis of disability from state and local government services,  
and activities. So, too, does the Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

1           Following *Alexander*, courts have routinely agreed that even though the definition of  
2 “meaningful access” to programs and benefits under both the RA and the ADA is not precisely  
3 defined, decisions must reflect the message communicated in *Alexander* that the statutory  
4 mandates of the RA and the ADA only require a program to provide equal access to its core  
5 services. If a program provides these core services in a non-discriminatory manner then it  
6 has provided **meaningful access** to its benefits and an expansion of those services is not  
7 required by statute or regulation. *Liberty Resources, Inc. v. Philadelphia Housing Authority*,  
8 528 F. Supp. 2d 553, 567 (E.D. Pa. 2007).

9           The Court noted that Tennessee’s reduction in days of inpatient care applied to both  
10 handicapped and non-handicapped individuals. *Alexander*, 469 U.S. at 302. As a result, the  
11 Court held that plaintiffs were not denied meaningful access to a program benefit just because  
12 the benefit offered by the State was an inpatient stay of fourteen days or fewer. *Id.* The Court  
13 concluded that “Section 504 does not require the State to alter this [newer] definition of [in  
14 patient care] benefit being offered simply to meet the reality that the handicapped have  
15 greater medical needs.” *Id.* at 303. The Court concluded that although the RA “seeks to  
16 assure evenhanded treatment and the opportunity for handicapped individuals to participate in  
17 and benefit from programs receiving federal assistance[,] [t]he Act does not . . . guarantee the  
18 handicapped equal results . . . .” *Id.* at 304. *See also Kruelle v. New Castle County Sch.*  
19 *Dist.*, 642 F.2d, 687, 695 (3d Cir.1981) (court held that the RA “does not require more than  
20 evenhanded treatment of handicapped and nonhandicapped [persons] by state agencies.

21           Because NRS 241.020(1) requires reasonable efforts to provide physically  
22 handicapped persons access to public meetings, we believe the issue to be decided in this  
23 OML complaint is whether Complainant has been denied meaningful access to PUC public  
24 meetings.

25           Since the Court’s ruling in *Alexander*, two other cases have explored the “meaningful  
26 access” issue. *See Rodriguez v. City of New York*, 197 F.3d 611 (2nd Cir. 1999); *Safe Air for*  
27 *Everyone v. Idaho*, 469 F. Supp. 2d 884 (D. Idaho 2006).

28

1 In *Rodriguez*, the plaintiffs were mentally disabled Medicaid recipients who claimed that  
2 New York's Medicaid program violated the ADA and the RA because it did not include safety  
3 monitoring in its personal-care services and hence denied the plaintiffs meaningful access to  
4 the program's benefits. *Rodriguez*, 197 F.3d at 618. The Second Circuit found that safety  
5 monitoring was not offered to anyone and therefore New York had not violated the ADA or the  
6 RA because no one received this benefit. *Id.* The Second Circuit affirmed that the ADA and  
7 the RA do not "mandate the provision of new benefits." *Id.* at 619. The PUC does not allow  
8 telephonic public comment during its meetings. No one receives this benefit—neither the  
9 disabled nor the general public.

10 In *Safe Air*, the court also concluded there was no denial of meaningful access to  
11 benefits. 469 F. Supp. 2d 884. It was alleged in *Safe Air* that Idaho violated the ADA and RA  
12 in its implementation of its Smoke Management Program (SMP), which regulated field burning  
13 in Idaho, affecting disabled citizens. *Safe Air*, 469 F. Supp. 2d at 888. The Idaho District  
14 Court found that both disabled and non-disabled citizens received the same benefits from  
15 SMP. *Id.* The District Court of Idaho held that the State had not violated the ADA or RA  
16 because there was no denial of meaningful access to benefits. *Id.*

17 These opinions do not precisely define "meaningful access to benefits," however they  
18 do reflect the message communicated in *Alexander* that the statutory mandates of the RA and  
19 ADA only require a program to provide equal access to its core services. If a program  
20 provides these core services in a non-discriminatory manner, then it has provided meaningful  
21 access to its benefits and an expansion of those services is not required. *Olmstead v.*  
22 *Zimring*, 527 U.S. 581, 603 n. 14, (1999) ("We do not in this opinion hold that the ADA . . .  
23 requires States to 'provide a certain level of benefits to individuals with disabilities.' We do  
24 hold, however, that States must adhere to the ADA's nondiscrimination requirement with  
25 regard to the services they in fact provide") (internal citations omitted); *Rodriguez*, 197 F.3d at  
26 618 ("The ADA requires only that a particular service provided to some not be denied to  
27 disabled people."); *Safe Air for Everyone v. Idaho*, 469 F. Supp. 2d at 889–90 ("meaningful  
28 access does not require that the disabled receive a greater benefit but, instead, that the

1 handicapped are provided equal access to the benefit offered by the state as provided to non-  
2 handicapped individuals”).

3 **2) Whether the absence of a video conference at two PUC consumer**  
4 **sessions constituted denial of access in violation of the Open Meeting Law.**

5 Commissioner David Noble was the presiding officer for consolidated Dockets 14-  
6 05004 and 14-05005. He scheduled a consumer session at the Las Vegas office for the  
7 southern docket and another consumer session at the Carson City office for the northern  
8 docket. Each docket affected consumers in different service areas. Docket #14-05004 was a  
9 general rate case affecting only Nevada Power customers in southern Nevada. Docket 14-  
10 05005 was a cost recovery case affecting only Sierra Pacific Power Company customers in  
11 northern Nevada.

12 Commissioner Noble acknowledged that he had previously allowed one consumer  
13 session to be video-conferenced in 2012, but he also stated that it was an error on his part,  
14 because he did not realize a scheduling error had been made until it was too late to  
15 reschedule and renote the session. He thought it was prudent under those circumstances to  
16 allow it to proceed as a video conference.

17 The complaint alleges that the conduct of single location consumer sessions without  
18 video conferencing on issues that the PUC is obligated to allow public comment upon is a  
19 violation of the OML. The sole mention of video conference in the OML is in NRS 241.010(2).  
20 It requires: “If any member of a public body is present by means of teleconference or  
21 videoconference at any meeting of the public body, the public body shall ensure that all  
22 members of the public body and the members of the public who are present at the meeting  
23 can hear or observe and participate in the meeting.” Availability of videoconference or  
24 teleconference is clearly discretionary so that members of the public may hear and/or see the  
25 public body deliberations, and that discretion is exercised by the public body. There is no  
26 OML requirement that public bodies must videoconference meetings.

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1 The Commission may hold sessions or hearings at its office or at such other place or  
2 places as the convenience of the Commission or of the parties involved (NRS 703.160).

3 **CONCLUSION**

4 **1) Whether Nevada Public Utilities Commission made reasonable efforts to**  
5 **assist and accommodate Complainant's request for accommodation when making**  
6 **public comment.**

7 PUC Staff's offer to Complainant to attach her written comments to the docket was a  
8 reasonable effort to accommodate the Complainant's request under NRS 241.020(1). There  
9 is no provision in federal or state law that would require PUC to provide telephonic public  
10 comment to the disabled when it is not offered to anyone. *Olmstead* reaffirms that the ADA  
11 does not mandate that new benefits be created for a certain segment of the population.  
12 Meaningful access does not require that the disabled receive a greater benefit; the disabled  
13 must only receive equal access to the benefit that is offered. It is true that agenda item  
14 presenters are allowed to call in telephonically, but it is also true that the PUC does not allow  
15 telephonic general public comment. Such general telephonic public comment would be an  
16 expansion of services which the PUC is not required to provide.

17 **2) Whether the absence of a video conference at two PUC consumer**  
18 **sessions constituted denial of meeting access in violation of the Open Meeting Law.**

19 Complainant contends that she has a right to hear other consumer comments via video  
20 conference. Complainant asserts that the PUC can not pick and choose when consumer  
21 sessions will or will not be video-conferenced. However, the OML does not speak to any  
22 requirement regarding the public's right to hear or give public comment via video conference  
23 or telephonically.

24 The significance of making public comment before the public body takes action on an  
25 agenda item lies in its impact on the public body and this is the issue that was of paramount  
26 importance to the Complainant. Complainant confirmed that the issue underlying her  
27 complaint was her view that Commissioners do not read or pay attention to public comment  
28 filings. (Complainant letter, April 14, 2014, p. 1.) However, we do not find any support in the

1 OML for the legal conclusion that a person is entitled to make public comment at the time of  
2 his or her choosing. Furthermore, the OML does not require public bodies to videoconference  
3 its meetings.

4 DATED this 3<sup>rd</sup> day of October, 2014.

5 CATHERINE CORTEZ MASTO  
6 Attorney General

7 By: George H. Taylor

8 GEORGE H. TAYLOR  
9 Senior Deputy Attorney General  
10 Nevada State Bar No. 3615  
11 100 North Carson Street  
12 Carson City, Nevada 89701-4717  
13 (775) 684-1230

Nevada Office of the Attorney General  
100 North Carson Street  
Carson City, NV 89701-4717

CERTIFICATE OF MAILING

I hereby certify that on October 3, 2014 I mailed the foregoing OMLO No. 2014-008 by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following:

Mr. Angel De Fazio  
P.O. Box 29194  
Las Vegas, NV 89126

BY INTERDEPARTMENTAL MAIL:

Carolyn Tanner, Esq.  
Public Utilities Commission  
1150 E. William St. Ste. 250  
Carson City, NV 89701



Vicki Beavers  
Employee of the State of Nevada  
Office of the Attorney General

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