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Re: AR 629 – Joint Utilities' Response Comments

PacifiCorp, dba Pacific Power, Portland General Electric Company, and Idaho Power Company (together, the Joint Utilities) submit these comments in response to the Alternative Dispute Resolution (ADR) Framework Proposal circulated by Chief Administrative Law Judge (ALJ) Nolan Moser on January 9, 2020 (hereinafter the Straw Proposal). The Joint Utilities appreciate the collaborative effort that has occurred in this docket to date and look forward to continuing work sessions aimed at developing a consensus framework for ADR and for providing greater clarity to the contested case process for those disputes that are not resolved through ADR.

The following comments address each of the two parts of the Straw Proposal. First, the Joint Utilities provide comments and recommend modest modifications to the proposed ADR process. Second, the Joint Utilities provide comments and recommendations on how to modify the contested case process to provide greater structure in an effort to minimize procedural disputes.

ADR Proposal

The Joint Utilities generally support the framework laid out in the Straw Proposal for a mandatory mediation process that would precede the contested case. Although not directly addressed in the Straw Proposal, the Joint Utilities emphasize that the ADR process discussed here should not replace the existing processes in each utility's PURPA schedules and the Commission's rules that apply before a complaint or a request for ADR is filed. In other words, the ADR process should be triggered once a complaint has been or will be filed not at the first moment of disagreement between a utility and a QF that could potentially be resolved through the existing contracting framework. With this clarification in mind, the Joint Utilities offer the following comments on the ADR components of the Straw Proposal.

ADR process should not change standards for establishing a Legally Enforceable Obligation

The Straw Proposal states: "Commencement of the ADR/Mediation process would have the same effect as the filing of a complaint for the purposes of preserving rights at issue."[1] The Joint Utilities support this principle and agree that the mandatory ADR process should not place a litigant in a better or worse position than they would be in absent the ADR process. To that end, the Public Utility Commission of Oregon (Commission) should make clear that the adoption of an ADR process, or its use by a party, does not change the Commission's standard for determining whether a QF has established a legally enforceable obligation (LEO). In Order No. 16-174, the Commission adopted the following framework for determining when there is a LEO:

> A LEO will be considered established once a QF signs the final draft of an executable contract provided by a utility to commit itself to sell power to the utility. A LEO may be established earlier if a QF demonstrates delay or obstruction of progress towards a final draft of an executable contract, such as a failure by a utility to provide a QF with required information or documents on a timely basis. Through the complaint process, the Commission will resolve a dispute and determine the avoided cost price to apply on a case-by-case basis.[2]

According to this standard, the filing of a complaint does not, in all circumstances, trigger a LEO. On a case-by-case basis, the Commission may determine through the complaint process that a LEO has been established earlier than when the QF signs an executable power purchase agreement. Therefore, engaging in an ADR process also should not automatically trigger a LEO. To the extent a party believes the Commission should revisit its recently adopted LEO standard, that party should make a request to add the LEO issue to the scope of docket UM 2000. It is not an ADR issue.

All communications must be strictly confidential

The Straw Proposal affirms in several places that all communications made during mediation would be confidential.[3] The Joint Utilities agree with this recommendation. The rules should be clear that confidentiality extends to anything said orally during the mediation appointment and any written material submitted by either party during the mediation, including the statement of the case submitted with the request for mediation and the response (discussed below). For ADR to be successful, parties must be confident that nothing said in aid of settlement will be used against them if the matter is ultimately litigated in a contested case.

The mediator should be an ALJ

The Joint Utilities support the Straw Proposal's call for an ALJ trained in mediation to lead the ADR process, rather than Staff or a third-party.[4] The Joint Utilities agree that the ALJ

[1] Straw Proposal at 1.
[2] *See* Order No. 16-174 at 3.
[3] *See, e.g.*, Straw Proposal at 3.
[4] Straw Proposal at 2.

mediator must be prohibited from communicating with the ALJ assigned to the complaint, Staff, and the Commission on both substantive and procedural matters.

Mediation should toll all relevant deadlines

The Straw Proposal would allow a party to file a complaint simultaneously with the request for mandatory mediation.[5] The Joint Utilities do not object to this recommendation. But the rules should be clear that all procedural time limits (e.g., the timeline for filing an answer) must be tolled until the ADR process has concluded. Reducing litigation costs is one of the key benefits of a robust ADR process and that goal will be thwarted if the contested case process continues in parallel to the ADR process.

Mediation should be expedited but not at the expense of meaningful participation

The Joint Utilities agree that the mandatory ADR process must be expedited and appreciate the timeline set out in the Straw Proposal.[6] The expedited process, however, should not undermine the parties' ability to meaningfully participate in the mediation process. Therefore, the Joint Utilities recommend several modifications intended to maintain the expedited nature of the process while allowing sufficient time for meaningful participation by the party responding to the mediation request.

The Straw Proposal would require the initiating party to file a short statement of the case together with the request for mediation.[7] The Straw Proposal would then require the responding party to file a short response (herein after, the Response) within seven calendar days. The Joint Utilities are concerned that a week is insufficient time to prepare a meaningful Response, particularly because the responding party will have no control over the timing of the request for mediation (e.g., the seven calendar days could include a holiday). Depending on the nature of the complaint, preparation of the Response may require input from one or more subject matter experts, and/or require the responding party to review voluminous documents, which may or may not have been attached to the request for mediation. If the Response is rushed or incomplete because of inadequate time, then it will be unhelpful in moving the mediation forward. Therefore, the Joint Utilities recommend that the Response be due within *10 business days* of receiving the request for mediation. This additional time should be adequate in most cases to allow the responding party to prepare a Response that accurately reflects its position based on its preliminary review of the relevant facts and law.

In turn, the Joint Utilities recommend that the time between the initial request and the mediation appointment change to 17 business days to allow the initiating party and mediator sufficient time to review the Response before the mediation appointment.

The Joint Utilities also recommend that the rules make clear that the request for mediation must include sufficient detail to identify the specific issues in dispute and the relevant

[5] Straw Proposal at 2.
[6] Straw Proposal at 2.
[7] Straw Proposal at 2.

issues of fact and law. Broad allegations of wrongdoing or a laundry list of allegations that are unrelated to the elements of a legally meaningful complaint are insufficient to start mediation and will distract from a meaningful process. Such allegations also draw out the time and effort required to resolve disputed issues. A respondent may feel compelled—out of an abundance of caution—to respond to each and every allegation made by a QF, whether that allegation is clearly relevant to a legal issue in dispute or not. This may necessitate additional time for investigation into the allegations, as well as more generous page limits to provide even a minimally meaningful written response to a laundry list of allegations. In short, the rules (and the ALJ) should require the allegations in any petition for mediation to be specific and relevant to the elements of a valid claim with the potential to give rise to an award of relief.

The ALJ's evaluation of the case should be provided to only the parties

The Joint Utilities generally support the element of the Straw Proposal that would allow the ALJ to provide an overall evaluation of the case to the parties.[8] That evaluation could address both substantive and procedural issues and include a recommendation on the process that should be used for litigating the case if mediation is unsuccessful. The Joint Utilities support the idea underlying this recommendation that the mediation process can address both substantive and procedural issues. In that way if mediation is unsuccessful on the substantive issues, it may still result in agreement over the process for the contested case, including potential timelines, scope, and process for discovery, subject to the recommendations below addressing the complaint process.

The Joint Utilities object to the recommendation that the mediating ALJ's evaluation would be provided to the ALJ that would preside over the contested case, unless both parties agree.[9] If parties understood that their confidential settlement discussions would inform a recommendation that could be sent to the presiding ALJ, then it is likely to undermine the ability to have meaningful settlement discussions. For example, parties may be unwilling to acknowledge counterarguments or other potential weaknesses in their cases to the mediating ALJ, and thus make the ADR process less successful. Consistent with the recommendation above, the Joint Utilities strongly recommend that all communications made in the context of mediation should be strictly confidential—including any evaluation of the case provided by the mediating ALJ.

Scope Clarification

It would be helpful to clarify the scope of the mediation process. In particular, the Joint Utilities recommend making clear that the outcome of the mediation is non-binding unless reflected in a settlement agreement mutually agreed to, and executed, by both parties. In addition, it would be helpful if the rule provided for when the mediation would be deemed

[8] Straw Proposal at 3.
[9] Straw Proposal at 3.

concluded. This clarification would assist a party who may be concerned that the mediation process was being used to unduly delay commencement of litigation.

Complaint Process Options

The Joint Utilities support the Straw Proposal's recommendation to address deficiencies in the complaint process for cases that are not resolved through ADR. The Joint Utilities caution, however, that the details of complaint-process reform have not been addressed in detail to this point, and thus are quite underdeveloped as compared to the ADR process. In addition, the complaint process in theory may affect the efficiency of QF complaint resolution (or the lack thereof) even more than adoption of a new ADR process. For that reason, the Joint Utilities believe it is important to have robust discussions of the complaint-resolution process before any draft rules are issued. With those caveats, the Joint Utilities offer the following recommendations in response to the complaint process components of the Straw Proposal.

First, the Joint Utilities support a streamlined litigation process for simpler complaints that may be resolved with less robust process.[10] But that streamlined process should be used only if both parties agree. The Joint Utilities strongly object to adjudication of a complaint with limited due process over a party's objection. While there are some QF-related complaints that could potentially be resolved with a limited evidentiary record or process, in the Joint Utilities' experience, litigated complaints typically involve complex factual patterns, legal issues that are not easily resolved with limited process, or matters with substantial financial and precedential impact. Forcing the parties to attempt to resolve complex and financially significant disputes through a truncated process without due process protections will only create additional controversy.

Second, the Joint Utilities recommend that, for complaints that are not susceptible to a more streamlined, comment-type process, the Commission adopt a more detailed process that imposes greater structure on the complaint process. The case-management process established by federal rules of civil procedure (and used by Oregon federal courts) might serve as a useful template for streamlining the resolution of QF complaints. For example, federal rules and practice call for scheduling and discovery conferences that result in meaningful case management orders that impose limitations and deadlines (including discovery limits and deadlines, deadlines to amend complaints, and deadlines for dispositive motions) in the proceedings consistent with the scope of the case.[11] Federal courts also actively entertain motions intended to focus the dispute, such as motions for more definite statements and motions to strike. When legitimate motions are filed, federal courts require litigants to better focus their pleadings, thereby better focusing the scope of the case.

While some elements of federal court case management would presumably be too detailed or prescriptive for use at the Commission (i.e., Rule 26 disclosures), other elements might be easily adapted for use in the QF complaint process. And just as a Commission ALJ

[10] Straw Proposal at 4.
[11] *See* FRCP 16 (attached).

would find mediation training widely available for use in the ADR process, a Commission ALJ would likewise find federal court case management procedures to be the subject of CLE courses throughout the state. In short, the parties may want to explore the possibility of developing a relevant and limited subset of requirements pulled from federal rules that would streamline and improve the QF complaint process.

Third, the Joint Utilities have concerns about using the unexecuted filing approach available for interconnection disputes at the Federal Energy Regulatory Commission (FERC).[12] The FERC process is designed for FERC-jurisdictional interconnection agreements where the disputes are typically limited and unlike those that have been litigated in Oregon. Moreover, it appears that QF parties raised a similar proposal in docket UM 1610 and it was rejected by the Commission. Finally, the Joint Utilities are concerned that adopting this type of process could be incompatible with the Commission's established LEO standard (discussed above).

Conclusion

The Joint Utilities largely support the ADR process set forth in the Straw Proposal, subject to the modest clarifications and revisions discussed above. The Joint Utilities look forward to discussing the Straw Proposal at the workshop on January 30, 2020.

Respectfully submitted,

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[12] Straw Proposal at 4.

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USCS Fed Rules Civ Proc R 16

Current through changes received January 15, 2020.

USCS Federal Rules Annotated > Federal Rules of Civil Procedure > Title III. Pleadings and Motions

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1)expediting disposition of the action;

(2)establishing early and continuing control so that the case will not be protracted because of lack of management;

(3)discouraging wasteful pretrial activities;

(4)improving the quality of the trial through more thorough preparation; and

(5)facilitating settlement.

(b) Scheduling.

(1)*Scheduling Order.* Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A)after receiving the parties' report under Rule 26(f); or

(B)after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2)*Time to Issue.* The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3)*Contents of the Order.*

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may:

(i)modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii)modify the extent of discovery;

(iii)provide for disclosure, discovery, or preservation of electronically stored information;

(iv)include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under *Federal Rule of Evidence 502*;

(v)direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi)set dates for pretrial conferences and for trial; and

(vii)include other appropriate matters.

(4)*Modifying a Schedule.* A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1)*Attendance.* A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2)*Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A)formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B)amending the pleadings if necessary or desirable;

(C)obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D)avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under *Federal Rule of Evidence 702*;

(E)determining the appropriateness and timing of summary adjudication under Rule 56;

(F)controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G)identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H)referring matters to a magistrate judge or a master;

(I)settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J)determining the form and content of the pretrial order;

(K)disposing of pending motions;

(L)adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M)ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N)ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O)establishing a reasonable limit on the time allowed to present evidence; and

(P)facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1)*In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney:

(A)fails to appear at a scheduling or other pretrial conference;

(B)is substantially unprepared to participate—or does not participate in good faith—in the conference; or

(C)fails to obey a scheduling or other pretrial order.

(2)*Imposing Fees and Costs.* Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

History

Amended April 28, 1983, eff. Aug. 1, 1983; March 2, 1987, eff. Aug. 1, 1987; April 22, 1993, eff. Dec. 1, 1993; April 12, 2006, eff. Dec. 1, 2006; April 30, 2007, eff. Dec. 1, 2007; April 29, 2015, eff. Dec. 1, 2015.