

**PUBLIC UTILITY COMMISSION OF OREGON  
ADMINISTRATIVE HEARINGS DIVISION REPORT  
PUBLIC MEETING DATE: March 23, 2021**

REGULAR \_\_\_ CONSENT \_\_\_ RULEMAKING  X  EFFECTIVE DATE  N/A

**DATE:** March 16, 2021

**TO:** Public Utility Commission

**FROM:** Christopher Allwein

**THROUGH:** Nolan Moser and Diane Davis **SIGNED**

**SUBJECT:** ADMINISTRATIVE HEARINGS DIVISION: Adopt new rules for an alternative dispute resolution process for certain disputes, complaint filings and requests for declaratory rulings and to establish the expectations of a complaint management conference for contested cases. (AR 629)

**RECOMMENDATION:**

Adopt the new administrative rules as set forth in the attached draft order.

**BACKGROUND:**

This rulemaking presents new rules in a new division OAR 860-002 to institute an alternative dispute resolution (ADR) process for certain disputes, complaint filings and requests for declaratory rulings and to establish the expectations of a case management conference for contested cases.

The Administrative Hearings Division (AHD) proposed new ADR rules in this docket, and the Commission opened the formal stage of this rulemaking on August 14, 2020, through Order No. 20-273. AHD held a hearing on October 6, 2020, and NewSun Energy LLC (NewSun), the joint utilities (PGE, PacifiCorp and Idaho Power), the Renewable Energy Coalition and Northwest and Intermountain Power Producers Coalition (NIPPC) made comments at the hearing. The comment period closed on October 23, 2020. The joint utilities, NewSun, and Renewable Energy Coalition, NIPPC, and the Community Renewable Energy Association (collectively, QF Trade Associations) provided written comments. Three issues remain outstanding from the comments received at hearing and through written comments:

1. Whether to adopt the joint utilities' recommendation of the meet and confer rule;
2. Whether to maintain confidentiality provisions as proposed in the rules; and
3. Whether to include NewSun's Staff consultation proposal.

Each of these issues are discussed below.

**DISCUSSION:**

**OAR 860-002-0000**

This rule states that the ADR process is applicable to complaints (subject to ORS 756.500, OAR 860-029-0100, or OAR 860-082-0085) and to petitions for a declaratory ruling (subject to ORS 756.450). Any of the rules in this new section may be waived for good cause shown. This section also notes that the deadlines associated with the filing of a related complaint or petition for declaratory ruling are stayed until the completion of the ADR process.

**OAR 860-002-0010**

This rule explains that the purpose of the rules in this new division is to provide for fair, timely, and confidential ADR to assist parties in reducing the issues presented to the PUC.

**OAR 860-002-0020**

This rule includes the definitions for complainant, mediator, party, petitioner, and respondent as used in this division.

**OAR 860-002-0030**

This rule specifies when a petition for ADR may be made and the obligations of the parties during the process. The rule notes that a respondent named in a request for mediation, complaint or petition for declaratory ruling may choose to file a petition for ADR under these rules. Before filing such a petition, the respondent must first provide written consent to the petitioner to participate in the ADR, and the petitioner must provide express agreement.

**OAR 860-002-0040**

This rule sets forth the process and timeline of the ADR presented by the rules in this division. Under this rule, the mediation must be held within 14 business days of the filing of the petition.

### **OAR 860-002-0050**

This rule sets forth the requirements for a petition for ADR, the supporting materials, and response to the petition. The petitioner must use a form supplied by the Commission to file for ADR. Supporting materials and explanation, not to exceed five pages, are exchanged between parties and not filed with the Commission. The respondent is also limited to five pages, unless parties agree otherwise. Reference material may be supplied to the mediator to enhance understanding of the issues.

### **OAR 860-002-0060: Assignment of a Mediator**

This rule describes who may be appointed as the mediator for the ADR and restrictions of the mediator appointed. The Chief ALJ must appoint a mediator to facilitate the process. This appointment may be an ALJ trained in mediation, a mediation expert contracted to provide services to the Commission, or a mediator suggested by both parties. Any ALJ appointed as mediator will not preside over any related complaint or petition for declaratory ruling. An ALJ acting as a mediator may not disclose any aspect of the parties' positions, statements, or proposals with anyone (other than the parties).

The mediator must maintain confidentiality with respect to the mediation proceedings and may disclose only whether an agreement was reached and, if so, the terms of the agreement if authorized by both parties.

### **OAR 860-002-0070**

This rule explains the maintenance of confidentiality of the ADR process and materials. Unless expressly agreed to by the parties, all written or oral communications made by the parties in preparation for or during the mediation session(s) must be kept confidential by the parties and the mediator and may not be used by the non-disclosing party for any purpose other than participation in the mediation process. In accordance with ORS 192.502(4), the Commission is obligated to protect from disclosure any document submitted in confidence during settlement discussions.

#### *Comments on the Presumption of Confidentiality*

The joint QF trade associations assert that this ADR confidentiality rule is broader than other Commission confidentiality requirements. Specifically, the QF trade associations urge us to make publicly available any settlements achieved through ADR, regardless of whether the parties agree to do so. Otherwise, according to the QF trade associations, individual developers will be at a disadvantage when negotiating with a utility because they will not know what concessions or agreements the utility made with other QF developers based on previous ADR outcomes. The utilities will be able to bargain from

a better position, because they are likely to negotiate with several developers to resolve disputes through the ADR process.

Further, the QF trade associations argue that all settlements reached in Commission-funded mediation settlements should be publicly available. By doing so, the QF trade associations believe this will expose wrongful, repeated, and systemic conduct by utilities when negotiating PURPA contracts, and will ensure that a PUC mediation process will accomplish the goals of furthering PURPA goals in a non-discriminatory manner.

The joint utilities disagree, stating that the proposed rules maintain the confidentiality that we have always accorded settlement discussions. The joint utilities believe that confidentiality is required to encourage frank and open discussions, to encourage the willingness of parties to admit weaknesses or errors, and to identify creative solutions to the problems raised. Further, the joint utilities disagree with the QF trade associations that utilities may use confidential settlement negotiations and discussions to discriminate among qualifying facilities (QFs). The joint utilities state that they are obligated to implement PURPA evenhandedly among QFs. The joint utilities note it is true that within the settlement of a dispute, extenuating circumstances may be considered in adjusting relief agreed to by the parties. However, the joint utilities insist that, overall, they maintain uniformity in treatment among similarly situated QFs. Therefore, the confidentiality rules should remain as proposed.

#### *AHD Recommendation on Confidentiality*

AHD recommends that the Commission adopt the confidentiality rules for ADR as proposed. Staff agrees that confidentiality is necessary to encourage frank discussions in settlement negotiations, whether in a PUC proceeding or an ADR mediation. The rule allows the parties to agree to make public the settlement if all parties agree to do so. Finally, the utilities do have a legal obligation to administer PURPA contracts in a non-discriminatory manner, and therefore may not use confidential mediation and negotiation with QFs to engage in wrongful or discriminatory behavior. Therefore, AHD recommends the adoption of the rule as proposed.

#### **OAR 860-002-0080**

This rule describes the actions within an ADR mediation session. It includes the condition that no more than four persons for each party may attend the mediation session (unless otherwise agreed to), and that the session will be led by the mediator. During the session, the mediator will introduce the parties, review protocol for the session, and state the goals for the session. Each party will present their view of the

dispute without interruption. The session may result in a negotiation and the mediator may assist the parties in the development of settlement proposals. The mediator may lead a settlement discussion, engage in shuttle diplomacy between parties, or develop proposed settlement concepts after the mediation session for presentation at a subsequent session. Where an agreement is reached, the mediator may continue to work with the parties under this rule in resolving any issues arising while drafting a final written settlement agreement.

### **OAR 860-002-0090**

This rule allows the mediator to provide parties with an independent and confidential assessment of the issues and potential outcomes.

### **OAR 860-001-0360**

This rule is an addition to the division 001 procedural rules. The rule creates a case management conference requirement for complaint cases and declaratory ruling proceedings to identify disputed legal and factual issues; establish an appropriate schedule of events and filings; and provide discussion of motion practice, discovery process, ADR, and other relevant matters or options to encourage case management efficiency.

## **Additional Proposals**

### **Meet and Confer Proposal**

#### *Joint Utilities' Meet and Confer Proposal*

The meet and confer proposal requires a meeting between senior representatives of the complainant and utility prior to filing a complaint or a petition for declaratory judgement. The joint utilities propose adding the meet and confer process because they believe it is “a potentially effective tool to resolve disputes before the parties become embroiled in litigation.” The joint utilities state that involving senior representatives in the dispute resolution process makes it more likely the parties will identify a mutually agreeable resolution.

The joint utilities added that this proposed provision may be waived for good cause shown after objections by developers in stakeholder meetings that such a rule might prejudice their efforts. The joint utilities claim that any delay caused by a conferral is a small price to pay to allow for the possibility of entirely avoiding litigation.

*QF Trade Association's Comments on Meet and Confer*

The QF trade associations object to the meet and confer proposal. They state support for an optional ADR process and understand the need to avoid litigation whenever possible. The QF trade associations object to the proposal for several reasons. First, they state that they meet and confer voluntarily with the utilities after a complaint is filed. The QF trade associations provided documentation with their comments demonstrating that demand letters and meetings ahead of litigation occurred in a majority of the cases filed before us in the last four years. They assert that most of the time the utilities are aware that a complaint will be filed ahead of time, and that senior management could become involved in a dispute at that time.

Next, the QF trade associations state that nothing prevents the scheduling of a meeting or conference after a complaint is filed. They note that adding another required step will make the process of resolving disputes even more expensive. Third, they state that requirement to meet and confer will prejudice the QF developers. Here the QF trade associations use an avoided cost price change as an example. By filing a complaint, the QF is able to lock in an avoided cost price before a change in that price occurs. The incorporation of a mandatory meet and confer process could block the QF from obtaining that current price before it is modified. Finally, the QF trade associations note that such a requirement may diminish or deny venue choices, hamper the completion an executable PPA, and delay access to justice.

*NewSun's Comments on Meet and Confer*

NewSun does not support the utility-proposed pre-complaint meet and confer requirement. NewSun states that the elevation of disputes within a utility hierarchy should be up to the utility's own internal process. NewSun states that our rules should not place the burden of requiring the utility to comply with mandatory purchase obligations on the QF. NewSun believes that the QFs already attempt to resolve the issue with the utility. A meet and confer requirement, according to NewSun, would simply add another mandatory step in the process for a QF and therefore should not be adopted.

*AHD Recommendation on Meet and Confer*

AHD recommends that the process remain voluntary for both the utility and for QF developers. AHD believes this will promote and encourage mediation and settlement of the issues. In an effort to avoid litigation, the utility may engage in a meet and confer after it becomes aware a dispute is in process or after the complaint is filed. By having a voluntary process, AHD believes that the parties will be more apt to engage in frank,

meaningful, and good faith discussions. Therefore, AHD recommends that a meet and confer process not be adopted at this time.

### **Staff Consultation Proposal**

#### *NewSun's Staff Consultation Proposal*

NewSun proposed a Staff consultation rule during the informal phase and reiterated this proposal in its final comments. NewSun states that a staff consultation rule would provide for an informal dialogue between the utility, the QF and PUC Staff before a dispute arises to the level of filing a complaint. The purpose of this informal dialogue is to enable the QF and the utility to present their respective positions on a given topic, engage in a staff-facilitated discussion, and hear staff's thoughts on the PUC's likely applicable rules and policies.

NewSun believes that utilities would be more inclined to moderate their positions with Staff present and facilitating a discussion. While NewSun admits that it is currently possible to arrange an information conversation between Staff, QF, and a utility, many QF developers remain unaware that this possibility exists. According to NewSun, codifying this option will ensure that the QF developers are aware of this consultation option and that more may choose to employ it. NewSun states that Staff could decline to participate if doing so would somehow be a matter of conflict or if Staff simply did not have the resources to facilitate a discussion at a given time. NewSun asserts that offering this option, even on a pilot basis, would provide more options for QF developers to participate in some type of informal ADR process and potentially avoid litigation.

#### *QF Trade Associations Comments on the Staff Consultation Proposal*

The QF trade associations support the Staff consultation proposal. Similar to NewSun, they believe that QF developers are unaware that Staff offers this valuable informal guidance. The QF trade associations recommend that, in the event we choose not to codify the full proposal, it should still be noted in the rules that Staff is available to provide insight. The QF trade associations recommend that Staff place conditions on these consultations to address availability concerns.

#### *Joint Utilities Comments on the Staff Consultation Proposal*

The joint utilities recommend against the adoption of the Staff consultation proposal. The joint utilities disagree with the QF trade associations' position, stated at hearing, that the rule simply codifies a process that is already available. The joint utilities note that, while it is true that either a developer or a utility may reach out to Staff to request

input on an issue in dispute, there is no existing process and no presumption for Staff to serve as a facilitator or arbiter for disputes. The joint utilities state that because Staff participates as a party in all PURPA policy dockets, it should not be presumed Staff is unbiased on particular disputed issues. The joint utilities note that this kind of process could potentially draw on significant Commission resources and that participation in these discussions may have the result of excluding Staff experts from future related complaints.

*AHD Recommendation on the Staff Consultation Proposal*

We recommend that the Staff consultation option, as proposed by NewSun, not be adopted at this time. While AHD agrees with NewSun and the QF trade associations that Staff experts may be informally and voluntarily available to provide insight, codifying the proposal may obligate Staff to provide a form of ADR to an extent they are not currently prepared to undertake. As presented in these rules, the ADR process is based on the discussions, comments, and workshops held in this docket. AHD believes this process, as codified, will be sufficient to potentially resolve some disputes between QFs and utilities, thus reducing litigation time and expense.

**PROPOSED COMMISSION MOTION:**

Adopt AHD's recommendation to adopt new alternative dispute resolution rules as presented and attached to this AHD report.

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

AR 629

In the Matter of

Rulemaking to Address Dispute Resolution  
for PURPA Contracts.

ORDER

DISPOSITION: NEW RULES ADOPTED

**I. SUMMARY**

In this order, we adopt new rules to institute an alternative dispute resolution process for certain disputes, complaint filings and requests for declaratory rulings and to establish the expectations of a case management conference for contested cases.

**II. BACKGROUND**

In Order No. 19-254, we directed the Administrative Hearings Division (AHD) to open a rulemaking on dispute resolution in the context of Oregon's implementation of the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>1</sup> Upon commencement of the informal phase of the rulemaking, the Chief ALJ presented questions to the stakeholders to help frame issues and held workshops with opportunities to provide written comment. As a result, AHD developed a strawman rulemaking proposal and presented it to stakeholders in an early January 2020 participant workshop. AHD presented the strawman proposal and scoping questions to the Commission at the March 10, 2020 public meeting. At the public meeting, the Commission discussed continuation of the docket through the informal process.

Additionally, through Order No. 20-076<sup>2</sup>, the Commission directed AHD to offer alternative dispute resolution (ADR) services to stakeholders navigating a policy and

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<sup>1</sup> *In the Matter of Public Utility Commission Of Oregon, Investigation into PURPA Implementation*, Docket UM 2000, Order No. 19-254, Appendix A at 1 (Jul 31, 2019).

<sup>2</sup> *In the Matter of Public Utility Commission of Oregon, Community Solar Program Implementation*, Docket UM 1930, Order No. 20-076 at 2.

legal dispute associated with Oregon’s Community Solar Program. Over a period of two months, AHD conducted a multi-party ADR process leading to a settlement.

Subsequent to the completion of the Community Solar ADR process, the informal phase of this rulemaking continued through a series of proposed rule exchanges and workshops. AHD continued to circulate draft proposed rules for comment throughout the summer. In addition, AHD conducted a confidential survey of participants in the Community Solar ADR process, and AHD summarized the responses and shared them with the AR 629 rulemaking participants.

On August 14, 2020, we issued Order No. 20-273 and began the formal phase of the rulemaking process. On August 28, 2020, we filed a Notice of Proposed Rulemaking Hearing with Statement of Need and Fiscal Impact with the Secretary of State. On September 1, 2020, notice was provided to all interested persons on the service lists maintained pursuant to OAR 860-01-0030(1)(b) and to certain legislators specified in ORS 183.335(1)(d). Notice of the rulemaking was published in the September 2020 *Oregon Bulletin*, establishing a hearing date of October 6, 2020, and a comment due date of October 20, 2020. We held a public comment hearing on October 6, 2020. NewSun Energy LLC (NewSun), the joint utilities (PGE, PacifiCorp and Idaho Power), and the QF trade associations made comments on the record. The joint utilities, NewSun, and the Renewable Energy Coalition, Northwest and Intermountain Power Producers Coalition, and the Community Renewable Energy Association (collectively, QF Trade Associations) provided written comments.

Below, we discuss the three issues presented at the hearing and in the written comments, summarized here as:

- Whether to adopt the joint utilities’ “meet and confer” rule;
- Whether to maintain confidentiality provisions as proposed in the rules; and
- Whether to include NewSun’s Staff consultation proposal.

### **III. DISCUSSION**

We appreciate the participants’ efforts to develop and refine the processes contained within the proposed rules. We note this was a lengthy process and appreciate the thoughtful comments received through the informal and formal phases of this proceeding. We provide a summary of the rule additions and a review of specific comments received from participants in the sections below, where applicable. We provide our resolutions to outstanding issues and clarifications where appropriate.

**A. OAR 860-002-0000: Applicability of Division 002**

This rule states that the ADR process is applicable to complaints (subject to ORS 756.500, OAR 860-029-0100, or OAR 860-082-0085) and to petitions for a declaratory ruling (subject to ORS 756.450). Any of the rules in this new section may be waived for good cause shown. This section also notes that the deadlines associated with the filing of a related complaint or petition for declaratory ruling are stayed until the completion of the ADR process.

**B. OAR 860-002-0010: Purpose of Division 002**

This rule explains that the purpose of the rules in this new division is to provide for fair, timely, and confidential ADR to assist parties in reducing the issues presented to the PUC.

**C. OAR 860-002-0020: Definitions**

This rule includes the definitions for mediator, party, petitioner, and respondent as used in this division.

**D. OAR 860-002-0030: Initiation of Alternative Dispute Resolution Process**

This rule specifies when a petition for ADR may be made and the obligations of the parties during the process. The rule notes that a respondent named in a request for mediation, complaint or petition for declaratory ruling may choose to file a petition for ADR under these rules. Before filing such a petition, the respondent must first provide written consent to the petitioner to participate in the ADR, and the petitioner must provide express agreement.

**E. OAR 860-002-0040: Process and Timeline for Alternative Dispute Resolution**

This rule sets forth the process and timeline of the ADR presented by the rules in this division. Under this rule, the mediation must be held within 14 business days of the filing of the petition.

**F. OAR 860-002-0050: Contents of a Petition for Alternative Dispute Resolution, Supporting Materials, and Response Requirements**

This rule sets forth the requirements for a petition for ADR, the supporting materials, and response to the petition. The petitioner must use a form supplied by the Commission to file for ADR. Supporting materials and explanation, not to exceed five pages, are exchanged between parties and not filed with the Commission. The respondent is also

limited to five pages, unless parties agree otherwise. Reference material may be supplied to the mediator to enhance understanding of the issues.

**G. OAR 860-002-0060: Assignment of a Mediator**

This rule describes who may be appointed as the mediator for the ADR and restrictions of the mediator appointed. The Chief ALJ must appoint a mediator to facilitate the process. This appointment may be an ALJ trained in mediation, a mediation expert contracted to provide services to the Commission, or a mediator suggested by both parties. Any ALJ appointed as mediator will not preside over any related complaint or petition for declaratory ruling. An ALJ acting as a mediator may not disclose any aspect of the parties' positions, statements, or proposals with anyone (other than the parties).

The mediator must maintain confidentiality with respect to the mediation proceedings and may disclose only whether an agreement was reached and, if so, the terms of the agreement if authorized by both parties.

**H. OAR 860-002-0070: Confidentiality and Use of Statements, Proposals, or Materials in Alternative Dispute Resolution**

This rule explains the maintenance of confidentiality of the ADR process and materials. Unless expressly agreed to by the parties, all written or oral communications made by the parties in preparation for or during the mediation session(s) must be kept confidential by the parties and the mediator and may not be used by the non-disclosing party for any purpose other than participation in the mediation process. In accordance with ORS 192.502(4), the Commission is obligated to protect from disclosure any document submitted in confidence during settlement discussions.

***1. Stakeholders' Comments on the Presumption of Confidentiality***

In their comments, the joint QF trade associations assert that this ADR confidentiality rule is broader than other Commission confidentiality requirements. Specifically, the QF trade associations urge us to make publicly available any settlements achieved through ADR, regardless of whether the parties agree to do so. Otherwise, according to the QF trade associations, individual developers will be at a disadvantage when negotiating with a utility because they will not know what concessions or agreements the utility made with other QF developers based on previous ADR outcomes. The utilities will be able to bargain from a better position, because they are likely to negotiate with several developers to resolve disputes through the ADR process.

Further, the QF trade associations argue that all settlements reached in Commission-funded mediation settlements should be publicly available. By doing so, the QF trade

associations believe this “will allow the Commission, other developers, and the public to learn about any systemic or wrongful conduct” and discourage secrecy that may “encourage repeat harmful behavior.”<sup>3</sup>

The joint utilities disagree, stating that the proposed rules maintain the confidentiality that we have always accorded settlement discussions. The joint utilities believe that confidentiality is required to encourage frank and open discussions, to encourage the willingness of parties to admit weaknesses or errors, and to identify creative solutions to the problems raised.

In addition, the joint utilities disagree with the QF trade associations that utilities may use confidential settlement negotiations and discussions to discriminate among QFs. The joint utilities state that they are obligated to implement PURPA evenhandedly among QFs. The joint utilities note that it is true that within the settlement of a dispute, extenuating circumstances may be considered in adjusting relief agreed to by the parties. However, the joint utilities insist that, overall, they maintain uniformity in treatment among similarly situated QFs. Therefore, the confidentiality rules should remain as proposed.

## **2. *Commission Resolution on Confidentiality***

We adopt the confidentiality rules for ADR as proposed. We agree that confidentiality is necessary to encourage frank discussions in settlement negotiations, whether in a PUC proceeding or an ADR mediation. The rule allows the parties to make public the settlement if all parties agree to do so. Therefore, we adopt the rule as proposed.

### **I. OAR 860-002-0080: Alternative Dispute Resolution Mediation Session**

This rule describes the actions within an ADR mediation session. It includes the condition that no more than four persons for each party may attend the mediation session (unless otherwise agreed to), and that the session will be led by the mediator. During the session, the mediator will introduce the parties, review protocol for the session, and state the goals for the session. Each party will present their view of the dispute without interruption.

The session may result in a negotiation and the mediator may assist the parties in the development of settlement proposals. The mediator may lead a settlement discussion, engage in shuttle diplomacy between parties, or develop proposed settlement concepts after the mediation session for presentation at a subsequent session. Where an agreement

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<sup>3</sup> Joint Comments of the QF Trade Associations on the Proposed ADR Rules at 22 (Oct 10, 2020).

is reached, the mediator may continue to work with the parties under this rule in resolving any issues arising while drafting a final written settlement agreement.

**J. OAR 860-002-0090: Mediator Evaluation**

This rule allows the mediator to provide parties with an independent and confidential assessment of the issues and potential outcomes.

**K. OAR 860-001-0360: Case Management Conferences**

This rule is an addition to the division 001 procedural rules. The rule creates a case management conference requirement for complaint cases and declaratory ruling proceedings to identify disputed legal and factual issues; establish an appropriate schedule of events and filings; and provide discussion of motion practice, discovery process, ADR, and other relevant matters or options to encourage case management efficiency.

**L. Additional Proposals**

**1. *Meet and Confer Proposal***

*a. Joint Utilities Comments on Meet and Confer*

The meet and confer proposal requires a meeting between senior representatives of the complainant and utility prior to filing a complaint or a petition for declaratory judgment. The joint utilities propose adding the meet and confer process because they believe it is “a potentially effective tool to resolve disputes before the parties become embroiled in litigation.”<sup>4</sup> The joint utilities state that involving senior representatives in the dispute resolution process makes it more likely the parties will identify a mutually agreeable resolution.

The joint utilities added that this proposed provision may be waived for good cause shown after objections by developers in stakeholder meetings that such a rule might prejudice their efforts. The joint utilities claim that any delay caused by a conferral is a small price to pay to allow for the possibility of entirely avoiding litigation.

*b. QF Trade Association’s Comments on Meet and Confer*

The QF trade associations object to the meet and confer proposal. They state support for an optional ADR process and understand the need to avoid litigation whenever possible. The QF trade associations object to the proposal for several reasons. First, they state that

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<sup>4</sup> Joint utilities final comments at 1 (Oct 20, 2020).

they meet and confer voluntarily with the utilities after a complaint is filed. The QF trade associations provided documentation that demand letters and meetings ahead of litigation occurred in a majority of the cases filed before us in the last four years.<sup>5</sup> They assert that most of the time the utilities are aware that a complaint will be filed.

Next, the QF trade associations state that nothing prevents the scheduling of a meeting or conference after a complaint is filed. They note that adding another required step will make the process of resolving disputes even more expensive. Third, they state that requirement to meet and confer will prejudice the QF developers. Here the QF trade associations use an avoided cost price change as an example. By filing a complaint, the QF is able to lock in an avoided cost price before a change in that price occurs. The incorporation of a mandatory meet and confer process could block the QF from obtaining that current price before it is modified.

Finally, the QF trade associations note that such a requirement may diminish or deny venue choices, hamper the completion an executable PPA, and delay access to justice.

*c. NewSun's Comments on Meet and Confer*

NewSun does not support the utility-proposed pre-complaint meet and confer requirement. NewSun states that the elevation of disputes within a utility hierarchy should be up to the utility's own internal process. NewSun states that our rules should not place the burden of requiring the utility to comply with mandatory purchase obligations on the QF. NewSun believes that the QFs already make attempts to resolve the issue with the utility. A meet and confer requirement, according to NewSun, would simply require the QF to "jump through one more hoop in order to hold the utility accountable" and therefore should not be adopted.<sup>6</sup>

*d. Commission Resolution on Meet and Confer*

We decline to include the meet and confer proposal in the rules. We prefer a voluntary process in order to promote and encourage mediation and settlement of the issues. As noted above, the utility may engage in a meet and confer after the complaint is filed, in an effort to avoid litigation. By having a voluntary process, we believe that the parties will be more apt to engage in frank, meaningful, and good faith discussions.

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<sup>5</sup> See Joint utilities final comments at Appendix A (Oct 20, 2020).

<sup>6</sup> NewSun Final Comments at 5 (Oct 20, 2020).

**2. *Staff Consultation Proposal***

*a. NewSun's Staff Consultation Proposal*

NewSun proposed a Staff consultation rule during the informal phase and reiterated this proposal in its final comments. NewSun states that a staff consultation rule would encourage informal discussions between parties and Staff:

[A Staff consultation rule] would provide for an informal dialogue between the utility, the QF and PUC Staff before disputes arise. The purpose of this informal dialogue is to enable the QF and the utility to present their respective positions on a given topic, engage in a staff-facilitated discussion, and hear staff's thoughts on the PUC's likely applicable rules and policies.<sup>7</sup>

NewSun supports the inclusion of this proposal by noting that this would create dialogue before disputes arise and parties become entrenched in a litigation position.

NewSun believes that utilities would be more inclined to moderate their positions with Staff facilitating a discussion. While NewSun admits that it is currently possible to arrange an informational conversation between Staff, QF, and a utility, many QF developers remain unaware that this possibility exists. According to NewSun, codifying this option will ensure that the QF developers are aware of this consultation option and that more may choose to employ it.

NewSun states there is no downside to this proposal. Staff could decline to participate if doing so would somehow be an issue, or if Staff simply did not have the resources to facilitate a discussion at a given time. NewSun asserts that offering this option, even on a pilot basis, would provide more options for QF developers to participate in some type of ADR process and potentially avoid litigation.

*b. QF Trade Associations Comments on the Staff Consultation Proposal*

The QF trade associations support the Staff consultation proposal. Similar to NewSun, they state that “many QFs are unaware that Staff offers this valuable informal guidance.”<sup>8</sup>

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<sup>7</sup> NewSun Final Comments at 1 (Oct 20, 2020).

<sup>8</sup> Joint Comments of the QF Trade Associations at 24 (Oct 20, 2020).

The QF trade associations recommend that, in the event we choose not to codify the full proposal, it should still be noted in the rules that Staff is available to provide insight.<sup>9</sup> The QF trade associations recommend that Staff place conditions on these consultations to address availability concerns.

*c. Joint Utilities Comments on the Staff Consultation Proposal*

The joint utilities recommend against the adoption of the Staff consultation proposal. The joint utilities disagree with the QF trade associations' position, stated at hearing, that the rule simply codifies a process that is already available. The joint utilities note that, while it is true that either a developer or a utility may reach out to Staff to request input on an issue in dispute, there is no existing process and no presumption for Staff to serve as a facilitator or arbiter for disputes. The joint utilities state that because Staff participates as a party in all PURPA policy dockets, it should not be presumed Staff is unbiased on particular disputed issues. The joint utilities note that this kind of process could potentially draw on significant Commission resources and that participation in these discussions may have the result of excluding Staff experts from future related complaints.

*d. Commission Resolution on the Staff Consultation Proposal*

We decline to adopt the Staff consultation option as proposed by NewSun. We agree that Staff experts are already available for informal guidance and may provide value to voluntary, informal discussions between utilities and QFs by giving insight on PURPA issues and assisting with understanding rules and procedures. However, we believe that codifying the proposal may obligate Staff to provide a form of ADR to an extent they are not currently prepared to undertake and may not be positioned to undertake given their role. As presented in these rules, the ADR process is based on the discussions, comments, and workshops held in this docket. We believe this process, as codified, will be sufficient to potentially resolve some disputes between QFs and utilities, and it is our hope that stakeholders will use the process as outlined in a good faith attempt to reduce litigation time and expense.

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<sup>9</sup> *Id.* at 24.

**IV. ORDER**

IT IS ORDERED that:

1. New rules OAR 860-001-0360, OAR 860-002-0000, OAR 860-002-0010, OAR 860-002-0020, OAR 860-002-0030, OAR 860-002-0040, OAR 860-002-0050, OAR 860-002-0060, OAR 860-002-0070, OAR 860-002-0080, and OAR 860-002-0090 are adopted as set forth in Appendix A of this order;
2. The new rules become effective upon filing with the Secretary of State.

Made, entered, and effective \_\_\_\_\_.

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**Megan W. Decker**  
Chair

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**Letha Tawney**  
Commissioner

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**Mark R. Thompson**  
Commissioner

A person may petition the Public Utility Commission of Oregon for the amendment or repeal of a rule under ORS 183.390. A person may petition the Oregon Court of Appeals to determine the validity of a rule under ORS 183.400.

RULE SUMMARY: The purpose of this is to explain how the Alternative Dispute Resolution rules apply to complaint filings and requests for declaratory ruling.

**860-002-0000**

**Applicability of Division 002**

(1) The rules in this division apply to a complaint subject to ORS 756.500 or OAR 860-029-0100 or OAR 860-082-0085 or a petition for declaratory ruling subject to ORS 756.450. These provisions supplement the generally applicable filing and contested case procedures contained in OAR chapter 860, division 001, division 029, and division 082.

(2) Upon request or its own motion, the Commission may waive any of the division 002 rules for good causes shown.

(3) Upon the filing of a petition for alternative dispute resolution consistent with these rules, all procedural deadlines associated with a related complaint or petition for declaratory ruling are stayed. A complaint or petition for declaratory ruling is related to the alternative dispute resolution if it raises the same dispute or concerns the same underlying circumstances, or both, and concerns the same parties. The stay is lifted upon the conclusion of the alternative dispute resolution process.

Statutory/Other Authority: ORS 756.040, 756.060

Statutes/Other Implemented: ORS 183.502

**RULE SUMMARY:** This rule clarifies the purpose of the rules in this division to provide for fair, timely, and confidential dispute resolution to aide parties in reducing the issues presented to the PUC.

**860-002-0010**

**Purpose of Division 002**

(1) OAR chapter 860, division 002 is intended to facilitate informal resolution of disputes, prevent litigation, and save time and resources for electric companies, qualifying facilities, and the Commission.

(2) These rules are intended to provide for fair, timely, and confidential dispute resolution that will aide parties in reducing the issues presented to the Commission.

Statutory/Other Authority: ORS 756.040, 756.060

Statutes/Other Implemented: ORS 183.502

RULE SUMMARY: This rule defines the key terms used in division 002 rules.

**860-002-0020**

**Definitions**

For purposes of this division, unless the context requires otherwise:

(1) "Mediator" refers to the person or persons appointed by the Chief Administrative Law Judge to serve as the Commission's representative to facilitate the alternative dispute resolution process.

(2) "Party" refers to either the petitioner or respondent identified in the petition for alternative dispute resolution.

(3) "Petitioner" refers to the party that files a petition for alternative dispute resolution under these rules.

(4) "Respondent" refers to the adverse party named in a petition for alternative dispute resolution under these rules, a complaint under ORS 756.500 or OAR 860-029-0100 or OAR 860-082-0085, or a petition for declaratory ruling filed pursuant to ORS 756.450.

Statutory/Other Authority: ORS 756.040, 756.060

Statutes/Other Implemented: ORS 183.502

**RULE SUMMARY:** This rule specifies when a petition for alternative dispute resolution may be made and the obligations of the parties.

**860-002-0030**

**Initiation of Alternative Dispute Resolution Process**

(1) At any time or concurrent with the filing of a complaint or a petition for declaratory ruling in a dispute, either party may petition for alternative dispute resolution with the Commission. Before filing such a petition, the petitioner must first provide a written request to the non-petitioning party to participate in the alternative dispute resolution process before the Commission and the non-petitioning party must confirm in writing its agreement to participate in the alternative dispute resolution process. Once both parties confirm in writing their agreement to participate in the alternative dispute resolution process, the Commission will provide mediation services under these rules.

(2) In the event a party files a complaint or petition for declaratory ruling but does not petition for alternative dispute resolution, the respondent named in the complaint or petition for declaratory ruling may file a petition for alternative dispute resolution under these rules. Before filing such a petition, the respondent must first provide written consent to the petitioner to participate in the alternative dispute resolution process before the Commission and petitioner must confirm in writing its agreement to participate in the alternative dispute resolution process. Once both parties confirm their agreement to participate in the alternative dispute resolution process, the Commission will provide mediation services under these rules.

(3) A party receiving a written request to participate in the alternative dispute resolution process under section (1) or (2) above must promptly advise in writing whether or not it agrees to participate in the alternative dispute resolution process under these rules. After the party consents to alternative dispute resolution, the petitioning party will promptly file its petition for alternative dispute resolution as provided in these rules.

Statutory/Other Authority: ORS 756.040, 756.060

Statutes/Other Implemented: ORS 183.502

**RULE SUMMARY:** This rule sets forth the process and timeline of the alternative dispute resolution process contemplated in the division 002 rules.

**860-002-0040**

**Process and Timeline for Alternative Dispute Resolution**

- (1) A petition for alternative dispute resolution under these rules will be filed with the Commission and will state the names of the parties and an affirmation that the non-petitioning party has agreed to participate in an alternative dispute resolution process.
- (2) Within one business day of the filing of a petition for alternative dispute resolution, the Commission will contact the parties to inform them that a mediator has been appointed and to schedule the first mediation session.
- (3) Within one business day of the appointment of a mediator, the petitioner will serve upon the non-petitioning party and the mediator the supporting materials described in OAR 860-002-0050.
- (4) Within seven business days of receiving supporting materials, the non-petitioning party will serve a response on the petitioner and the mediator.
- (5) A mediation session will be held within 14 business days after the initial petition is filed. Subsequent mediation sessions may be scheduled, if both parties agree.
- (6) If no agreement is reached in the mediation session and the parties do not request additional mediation sessions, then, no later than three business days following the mediation session, the mediator will file a statement with the Commission indicating that no agreement was reached.
- (7) Upon being informed that no agreement was reached, the Commission's Administrative Hearings Division will provide notice in any associated complaint or declaratory ruling docket that the stay on procedural deadlines is lifted.
- (8) After the notice is provided, if the parties would like to continue discussions outside of the mediation process, the parties may jointly file a motion to stay further complaint proceedings to facilitate further settlement discussion. Thereafter, either party may provide notice that will end the stay.
- (9) Any deadline in this rule may be modified by the agreement of the parties.

Statutory/Other Authority: ORS 756.040, 756.060

Statutes/Other Implemented: ORS 183.502

**RULE SUMMARY:** This rule sets forth the requirements for a petition for alternative dispute resolution, the supporting materials, and response to the petition.

**860-002-0050**

**Contents of a Petition for Alternative Dispute Resolution, Supporting Materials, and Response Requirements**

(1) A petition for alternative dispute resolution under these rules will be filed using a form made available by the Commission. The petition will include the names of the parties, the docket number of the related complaint or petition for declaratory ruling (if applicable), and an affirmation that the non-petitioning party has agreed to participate in alternative dispute resolution.

(2) Supporting materials for a petition for alternative dispute resolution will not be filed with the Commission but instead will be exchanged by the parties in accordance with OAR 860-002-0040. Supporting materials must not exceed five in length, unless otherwise agreed to by both parties, and

(a) Must explain the core issues in the dispute and provide a summary of background information, and

(b) May be accompanied by reference material intended to aid the mediator's understanding of the issues. Petitioners are particularly encouraged to attach draft or partially-executed power purchase agreements to disputes related to a power purchase agreement. Reference material will not count towards the five-page limitation but should be limited in nature.

(3) The non-petitioning party's statement should not exceed five pages in length, unless otherwise agreed to by both parties, and

(a) The response must address the core issues in the dispute and provide summary of background information.

(b) May be accompanied by reference material intended to aid the mediator's understanding of the issues. Non-petitioning parties are particularly encouraged to attach draft or partially-executed power purchase agreements to complaints related to a power purchase agreement. Reference material will not count towards the five-page limitation but should be limited in nature.

Statutory/Other Authority: ORS 756.040, 756.060

Statutes/Other Implemented: ORS 183.502

**RULE SUMMARY:** This rule explains who may be appointed as the mediator for the alternative dispute resolution and restrictions of the mediator appointed.

**860-002-0060**

**Assignment of a Mediator**

(1) For each request for alternative dispute resolution, the Chief Administrative Law Judge must appoint a mediator to facilitate the process.

(2) The Chief Administrative Law Judge may appoint an Administrative Law Judge trained in mediation, a mediation expert contracted to provide services to the Commission, or a mediator that has been suggested by both parties.

(a) If the Chief Administrative Law Judge appoints an Administrative Law Judge as mediator, that same Administrative Law Judge will not be appointed to preside over any related complaint or petition for declaratory ruling.

(b) An Administrative Law Judge that acts as mediator for a dispute is not permitted to disclose any aspect of the parties' positions, statements, or proposals with anyone (other than the parties), including but not limited to the Administrative Law Judge assigned to the related complaint or petition for declaratory ruling, Commissioners, Commission Staff, or Commission Advisors.

(c) The mediator must maintain confidentiality with respect to the mediation proceedings, and may disclose only whether an agreement was reached and if so, may disclose terms of the agreement if authorized by both parties.

Statutory/Other Authority: ORS 756.040, 756.060

Statutes/Other Implemented: ORS 183.502

RULE SUMMARY: This rule explains the confidentiality confines of alternative dispute resolution process and materials.

**860-002-0070**

**Confidentiality and Use of Statements, Proposals, or Materials in Alternative Dispute Resolution**

(1) Unless otherwise agreed to by the parties in writing, all written or oral communications made by the parties in preparation for or during the mediation session(s) including but not limited to offers of settlement must be kept confidential by the parties and the mediator, may not be used by the non-disclosing party for any purpose other than participation in the mediation process, and may not be released to any third party or be offered into evidence in any legal proceeding unless agreed to in writing by both parties. Confidentiality obligations in this section apply to each party's employees and representatives (including each party's counsel).

(2) For purposes of ORS 192.502(4), the Commission obligates itself to protect from disclosure any document submitted in confidence during settlement discussions.

Statutory/Other Authority: ORS 756.040, 756.060

Statutes/Other Implemented: ORS 183.502

RULE SUMMARY: This rule describes the actions within an alternative dispute resolution mediation session.

**860-002-0080**

**Alternative Dispute Resolution Mediation Session**

(1) Unless otherwise agreed to by the parties, no more than four persons for each party may attend the mediation session. Only the parties and the mediator may attend the mediation session, except as provided in section 2 of this rule.

(2) If agreed, parties may request that Commission Staff participate in a mediation. The Administrative Hearings Division will assess whether or not it is possible for Commission Staff to participate in an individual mediation. Any appointed Staff is not permitted to participate in any related complaint or petition for declaratory ruling proceedings, and is not permitted to disclose any aspect of the parties' positions, statements, or proposals with anyone (other than the parties), including but not limited to the Administrative Law Judge or Commission Staff assigned to the related complaint or petition for declaratory ruling, Commissioners, or Commission Advisors.

(3) The mediation session is led by the mediator. The mediator will begin the session by introducing parties, reviewing the protocol for the session, and stating the goals for the session. At the outset of the mediation, each party will be given time to present their view of the dispute without interruption.

(4) Where appropriate, the session may result in a negotiation. The assigned mediator will be available to the parties to support the development of settlement proposals.

(a) At the request of parties, the mediator may lead a settlement discussion, engage in shuttle diplomacy between parties, or develop proposed settlement concepts after the mediation session for presentation at a subsequent mediation session.

(b) If an agreement is reached, at the request of the parties, the mediator may continue to work with the parties under this rule in resolving any disputes that may arise in drafting a final written settlement agreement.

Statutory/Other Authority: ORS 756.040, 756.060

Statutes/Other Implemented: ORS 183.502

**RULE SUMMARY:** This rule explains that the mediator may provide parties with an independent assessment of the issues and potential outcomes, that the assessment is confidential, and the confines of the confidentiality.

**860-002-0090**

**Mediator Evaluation**

(1) The mediator may provide parties with an independent assessment of the issues and potential outcome of the case.

(2) The mediator may provide the confidential assessment orally at the conclusion of a mediation session or, if requested by the parties, in writing to the parties following the session.

(3) The confidential independent assessment will be provided only to the parties and will not be provided to any other person, including any other party at the Commission, including, but not limited to, the Administrative Law Judge presiding over any related complaint or petition for declaratory ruling, the Commissioners, Commission Staff, or Commission Advisors. The assessment may not be admitted into in any legal proceeding unless agreed to in writing by both parties.

Statutory/Other Authority: ORS 756.040, 756.060

Statutes/Other Implemented: ORS 183.502

**RULE SUMMARY:** This rule establishes a case management conference for complaint cases and declaratory ruling proceedings to identify disputed legal and factual issues, establish a schedule of events and filings, and provide discussion of motion practice, discovery process, alternative dispute resolution and other relevant matters.

**860-001-0360**

**Case Management Conferences**

(1) This case management conference rule applies to complaints filed pursuant to ORS 756.500 or OAR 860-029- 0100, or OAR 860-082-0085, or a petition for declaratory ruling filed pursuant to ORS 756.450. These provisions supplement the generally applicable filing and contested case procedures contained in OAR chapter 860, division 001 and in division 029.

(2) Within 14 business days of the filing of a complaint or petition for declaratory ruling, or 10 business days after the answer is filed, whichever date is later, the Administrative Law Judge shall hold a case management conference.

(3) The purpose of the case management conference will be to facilitate the orderly and efficient resolution of the case and to discourage wasteful activities.

(4) At the case management conference, the parties will:

- (a) Make good faith efforts to identify the legal and factual issues in dispute in the case; and
- (b) Establish a schedule for the docket, including dates for testimony, discovery, briefing, submission of exhibits and hearing.

(5) In addition, the parties will discuss the following matters and the ALJ will make or enter such rulings as are appropriate:

- (a) Whether the disputes in the case might be narrowed through motions to dismiss or for summary judgment, and whether schedules for such motion practice may be adopted at that time;
  - (b) Regarding the available modes, timing, and scope of discovery and any other discovery matters raised by the parties;
  - (c) Whether the parties require the assistance of the Commission's mediation services to assist in resolving the matter; and
  - (d) Any other matters that may expedite the orderly conduct and disposition of the proceedings.
- (6) Within 3 business days of the case management conference, the ALJ will issue a case management ruling setting forth a schedule for the case and setting forth all the ALJ's decisions on other matters discussed at the conference.

(7) At any time during the pendency of the docket, any party may request that additional case management conferences be scheduled to address any of the above issues, including the amendment of the case management schedule.

Statutory/Other Authority: ORS 756.040, 756.060

Statutes/Other Implemented: ORS 183,417, 756.040, 756.500-756.575