

Alternative Dispute Resolution for Electric Company and Qualifying Facility Disputes

860-___ - ____

Applicability of Division ____

(1) The rules in this division apply to a complaint filed pursuant to ORS 756.500 or OAR 860-029-100 or OAR 860-082-0085 or a petition for declaratory ruling filed pursuant to ORS 756.450, regarding any dispute between an electric company, as defined in OAR 860-089-0020, and a qualifying facility, as defined in OAR 860-029-0010. These provisions supplement the generally applicable filing and contested case procedures contained in OAR chapter 860, Division 001, Division 029, and Division 082.

Commented [MRG1]: Propose extending ADR to complaints filed under the dispute resolution rules for negotiated PPAs, complaints filed under the interconnection agreement enforcement rules, and declaratory rulings.

(2) Upon request or its own motion, the Commission may waive any of the Division ____ rules for good cause shown.

(3) Upon filing of a petition for alternative dispute resolution **under these rules**, all procedural deadlines associated with a ~~related an accompanying~~ 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 between the same parties.** The stay is lifted upon the conclusion of the alternative dispute resolution process.

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Purpose of Division ____

(1) OAR chapter 860, ~~Division~~ ____ is intended to facilitate informal resolution of disputes, prevent the litigation of unnecessary complaints, 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 **decreasing the number of** ~~narrowing issues~~ **presented to** ~~put before~~ the Commission.

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Definitions

For purposes of this Division, unless the context requires otherwise

(1) **“complainant”** refers to a party filing a complaint under ORS 756.500 or OAR 860-029-100 or OAR 860-082-0085, or a petition for declaratory ruling under ORS 756.450.

(2) **“party”** in this division refers to either the **petitioner or the respondent** ~~qualifying facility participating in this process, or the electric company identified in the petition for alternative dispute resolution, participating in the alternative dispute resolution process.~~

(3) **“mediator”** in this division refers to the person or persons appointed by the Chief Administrative Law Judge **Judge** to serve as the Commission’s representative to **facilitate** ~~lead~~ the alternative dispute resolution process.

(4) **“petitioner”** refers to the party that files a petition for alternative dispute resolution under these rules.

~~(5) “mediation appointment” in this division refers to a confidential meeting, led by the mediator, at which representatives of both parties attend and participate.~~

(5) “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 860-029-100 or OAR 860-082-0085, or a petition for declaratory ruling filed pursuant to ORS 756.450.

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Requirement to Confer Prior to Filing **Complaint** or Petition for Declaratory Ruling

(1) Except as provided in subsection 4 below, prior to filing a complaint pursuant to ORS 756.500 or a petition for declaratory ruling pursuant to ORS 756.450, regarding any dispute between an electric company, as defined in OAR 860-089-0020, and a qualifying facility, as defined in OAR 860-029-0010, the complainant or petitioner for declaratory ruling must first make a good faith attempt to resolve the issues in dispute using the procedures in this Section.

(2) At least fifteen (15) days before filing a complaint or petition for declaratory ruling, the disputing party shall send the other party a written notice of dispute or claim (“Notice of Dispute”). Such Notice of Dispute must include a brief summary of the matters disputed, including any relevant facts or law and the relief requested. In order to ensure that the appropriate representatives are involved in dispute resolution, the Notice of Dispute should identify whether the matters in dispute concern the terms and conditions of a power purchase agreement, interconnection service, and/or transmission service.

Such dispute or claim shall be referred to a designated senior representative of each party for resolution on an informal basis, and such senior representatives will meet and confer telephonically or in person on the earliest date practicable after the receipt of the Notice of Dispute.

(3) The complainant or petitioner must file a certificate of compliance with this rule at the same time as the complaint or petition is filed. This certificate will be sufficient if it states either that the parties met and conferred telephonically or in person or contains facts showing good cause for a failure to confer.

(4) The parties are relieved of the requirement to confer if they elect to participate in mediation under this Division.

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Applicability of Alternative Dispute Resolution Process

(1) ~~At any time Before or concurrent with the filing of a complaint or petition for declaratory ruling in a dispute between an electric company and of a qualifying facility, the complainant moving party may file a petition for alternative dispute resolution support with the Commission. Before filing such a petition, the petitioner must first contact the respondent and respondent must agree to participate in the alternative dispute resolution process. Once both parties have agreed to participate in the alternative dispute resolution process, the Commission will provide mediation services under these rules. Both parties must agree to the alternative dispute resolution process before the Commission will consent to provide dispute resolution.~~

(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

Commented [MRG2]: Given that Staff is proposing that the ADR is optional, we think it is a good idea to at least require a simple “meet and confer” process.

Commented [MRG3]: The Joint Utilities believe that the respondent should also have the opportunity to request ADR—which would be subject to the Complainant’s agreement.

petition, the respondent must first contact the petitioner and petitioner must agree to participate in the alternative dispute resolution process. Once both parties have agreed to participate in the alternative dispute resolution process, the Commission will provide mediation services under these rules

(3) Before a petition for alternative dispute resolution is filed with the Commission, the petitioning party must have completed the procedures set forth in the applicable electric company's schedule governing power purchase agreements or must demonstrate that continuing to follow those procedures is unreasonable.

Commented [MRG4]: This is similar to a requirement in the dispute resolution for negotiated contracts and we think advisable. In the phase of this rulemaking applying to complaints, we should strongly advocate that this requirement be imposed before complaints can be filed.

~~(a) To aid the mediator in the review of the dispute, parties are encouraged to file unexecuted or partially executed purchase power agreements with a complaint, if a complaint is filed concurrent with the petition for alternative dispute resolution and relates to a power purchase agreement.~~

Commented [MRG5]: We moved these provisions into the section on the contents of submissions.

~~(b) The complaint should describe which terms or values in the unexecuted or partially executed power purchase agreement are disputed and subject to the complaint, if the complaint relates to a power purchase agreement.~~

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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.

Commented [MRG6]: The Joint Utilities suggest that only a "vanilla" petition be filed with the Commission and, given the status of the proceedings as settlement. The supporting documents and response should be served on the mediator and adverse party only.

(2) Within one (1) 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 (1) business day of the appointment of a mediator, the complainant will serve upon the respondent and the mediator the supporting materials described in Section __.

(4) Within seven (7) business days of receiving supporting materials, the respondent ~~The response to a petition for alternative dispute resolution will~~ **must be no later than seven business days following the filing of the petition serve a response on the petitioner and the mediator.**

(5) A mediation session appointment will be set held within 14 business days after the initial petition is filed ~~filling. Subsequent mediation sessions appointments may be scheduled set, if both parties agree.~~

(6) If no agreement is reached in the mediation session appointment and parties do not request additional mediation sessions appointments, then, no later than three (3) business days following the mediation session appointment, 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 hearings division will provide notice in any associated-related complaint docket that the stay on procedural deadlines is lifted.

(8) After the notice is provided, if parties would like to continue discussions outside of the mediation process, the parties may jointly file a motion to delay further complaint proceedings to facilitate further settlement discussion.

Commented [MRG7]: These provisions moved up from below.

(9) Any deadline in this section may be modified by the agreement of the parties.

Commented [MRG8]: A change to these deadlines may be required if the parties wish to engage a mediator other than an ALJ or other Commission-appointed person.

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

Commented [MRG9]: Added highlighted material.

(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 available), 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 section __. Supporting materials must not exceed five pages in length, unless otherwise agreed to by both parties, and

(a) The petition must explain the core issues in the dispute, the relief requested, and provide a summary of background information, and

(b) The petition 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 complaints related to a power purchase agreement. Reference material will not count towards the five-page limitation, but should be limited in nature.

(3) A response to a petition for alternative dispute resolution must 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. Respondents 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.

(4) The parties to alternative dispute resolution and assigned mediator will recognize that the supporting materials and responses served under these rules are prepared on short timelines, in some cases before an in-depth review of relevant facts or law can be performed, and therefore the statements made or positions taken in these materials are non-binding and subject to change.

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Assignment of a Mediator

(1) For each request for alternative dispute resolution, the Chief Administrative Law Judge must appoint a mediator to facilitate lead 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 and the underlying complaint proceeds after the completion of the alternative dispute resolution, the mediator will not preside over any associated complaint.

(b) An Administrative Law Judge that acts as mediator for a dispute is not permitted to **disclose** ~~discuss or review~~ 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 underlying ~~related~~ **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** ~~report~~ the terms of the agreement if authorized by ~~the~~ **both** parties or ~~the fact that no agreement was reached.~~

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Confidentiality and Use of Statements, Proposals, or Materials in Complaints

(1) 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 shall~~ ~~statements, documents prepared for settlement purposes, and offers made during the alternative dispute resolution process 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 shall 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.

(3) Parties are encouraged to agree in writing that the information exchanged exclusively within the context of any settlement discussion is confidential.

~~(2) Statements, documents prepared for settlement purposes, and offers are deemed confidential and may not be admitted into the record of any associated complaint, unless agreed to in writing by both parties.~~

~~OAR 860-____-____~~

Alternative Dispute Resolution Timeline and Effect on Avoided Cost Determinations

~~(1) The response to a petition for alternative dispute resolution must be filed no later than seven business days following the filing of the petition.~~

~~(2) A mediation appointment will be set held 14 business days after the initial petition filing. Subsequent mediation appointments may be set, if both parties agree.~~

~~(3) If no agreement is reached in the mediation appointment and parties do not request additional mediation appointments, then, no later than three business days following the mediation appointment, the mediator will file a statement that no agreement was reached.~~

~~(4) Upon being informed that no agreement was reached, the hearings division will provide notice in any associated complaint docket that the stay on procedural deadlines is lifted.~~

~~(5) After the notice is provided, the parties may jointly file a motion to delay further complaint proceedings to facilitate further settlement discussion.~~

Commented [MRG10]: Timelines moved below.

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Alternative Dispute Resolution Mediation **Session Appointment**

(1) Unless otherwise agreed to by the parties, **no more than four persons for each party may attend the mediation session** ~~participants from each party are limited to four persons.~~ **Only the parties and the mediator may attend the mediation session.**

(2) The mediation ~~session appointment~~ is led by the mediator. The mediator will begin the **session appointment** by introducing parties, reviewing the protocol for the **session appointment**, and stating the goals for the **session appointment**.

(a) At the outset of the mediation, each party will be given time to present their view of the dispute without interruption.

~~(b) The mediator and the parties may ask questions of each other to clarify issues, needs, and concerns.~~

~~(c) The mediator will periodically communicate back the key questions, issues, and describe and summarize any impasses.~~

(3) Where appropriate, the ~~session appointment~~ 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 appointment for presentation at a subsequent appointment.

(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 outline** ~~specific settlement terms or draft a settlement agreement.~~

(4) Through presence at the mediation ~~session appointment~~, parties are deemed to be making a good faith effort to resolve issues in controversy.

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Mediator Evaluation

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

(2) The mediator may provide the **confidential** assessment verbally at the conclusion of a mediation ~~session appointment~~ **or in writing to the parties following the session appointment.**

(3) The **confidential** independent assessment will be provided only to the parties **and** ~~The assessment~~ 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 the underlying complaint or petition for declaratory ruling, the Commissioners, Commission Staff, or Commission Advisors.** **Furthermore, the assessment** may not be admitted into **evidence in any legal proceeding** ~~the record of any associated complaint,~~ unless agreed to in writing by both parties.

Commented [MRG11]: While these are all appropriate actions, we don't think it is necessary to include them all in the rules.

Commented [MRG12]: There is a concern over whether material prepared by an ALJ can be kept confidential by the Commission, even when the ALJ is acting as a mediator for a confidential ADR process. Therefore, we question whether this clause should be removed and the ALJ provide only verbal comments to the parties.