

**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]:** This language is inconsistent with our understanding that Staff is now proposing that this division will apply to all complaints filed at the Commission.

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

(3) Upon the agreement of the parties, 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 between the same parties. The stay is lifted upon the conclusion of the alternative dispute resolution process.

**Commented [MRG2]:** The Joint Utilities' propose that the deadlines be automatically suspended during the ADR process. One of the primary purposes of ADR is to reduce the expense and administrative burden of litigation. It is highly unlikely that any of the utilities (who are most likely the respondent in a complaint proceeding) would be willing to engage in ADR while forced to commence discovery and preparation of their answer.

860-\_\_ - \_\_\_\_

**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 reducing the issues presented to the Commission.

860-\_\_ - \_\_\_\_

**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" refers to either the petitioner or respondent identified in the petition for alternative dispute resolution.

**Commented [MN3]:** Not limiting language

(3) "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.

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

(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.

**OAR 860-\_\_\_ - \_\_\_**

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

(1) Except as provided in subsection 4 or 5 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 ~~seven~~<sup>seventeen</sup> (7~~15~~<sup>17</sup>) 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.

**Commented [MRG4]:** In response to concerns voiced by the developer community, the Joint Utilities propose to reduce the interval between the obligation to confer and filing of the complaint.

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 Commission may waive the requirement to confer upon request of the Complainant for good cause shown. A complainant or petitioner requesting such waiver may file such request with its Complaint. If such waiver is not granted, the Commission will stay all deadlines associated with the complaint or petition until the parties have conferred.~~

**Commented [MRG5]:** This addition allows the complainant to request waiver without risk of having its complaint dismissed if the waiver is denied.

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

**Commented [MN6]:** At this time, I don't plan on recommending a conference requirement to the Commission. Right now, I think that the best way to further the purpose of the rules is to develop rules that inviting to parties, and including compulsory elements may not achieve this goal. Ultimately all resolutions must be voluntary. I do think we can continue to review and discuss ways to ensure basic conference between parties regularly occurs – and the case management conference rules (included here) can help achieve that in some cases, and we can continue to look at other options to achieve this result.

**OAR 860-\_\_\_ - \_\_\_**

**Initiation Applicability 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 between ~~an electric company~~<sup>public utility</sup> and another party, the moving party may petition for alternative dispute resolution with the Commission. Before filing such a petition, the petitioner must first ~~provide a written request contact to~~<sup>provide a written request to</sup> the respondent ~~to participate in the alternative dispute resolution process before the Commission~~<sup>to participate in the alternative dispute resolution process before the Commission</sup> and respondent must ~~confirm in writing its agreement~~<sup>confirm in writing their agreement</sup> to participate in the alternative dispute resolution process. Once both parties have ~~confirmed in writing their agreement~~<sup>agreed</sup> to participate in the alternative dispute resolution process, the Commission will provide mediation services under these rules. ~~A party receiving a request for meditation services must promptly advise whether it agrees to alternate dispute resolution under these rules or not.~~

**Commented [MRG7R6]:** Given that Staff is proposing that ADR be voluntary only, the Joint Utilities continue to believe that a requirement to confer is critical to the parties' goal of reducing litigation. The Joint Utilities have attempted to respond to the developers' concerns with the revisions noted below.

(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, contact 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 have confirmed their agreement-agreed 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 subsection (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 statement in aid of mediation as provided in these rules.

**Commented [MRG8]:** The Joint Utilities suggest that the communications re ADR all be in writing to prevent misunderstandings.

OAR 860-\_\_\_ - \_\_\_

#### **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 (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 (7) business days of receiving supporting materials, the respondent 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 (3) 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 hearings division will provide notice in any associated complaint docket that the stay on procedural deadlines is lifted.

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

(9) 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 staydelay further complaint proceedings to facilitate further settlement discussion. Thereafter, either party may provide notice that will end the staydelay.

**Commented [MRG10]:** Wording changed for consistency.

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

OAR 860-0\_\_\_ - \_\_\_

### 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 section \_\_\_\_\_. Supporting materials must not exceed 5 pages 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 complaints related to a power purchase agreement. Reference material will not count towards the five-page limitation, but should be limited in nature.

(3) The respondent's statement in aid of mediation 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. 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.

OAR 860-\_\_\_\_ - \_\_\_\_

### 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.

**Commented [MRG11]:** The Joint Utilities proposed the following language, which has not been included:

**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.**

This language was included given the short interval allowed for preparing these ADR materials, and to encourage candor and openness on an expedited timeline. The Joint Utilities are curious as to why this provision has not been included in Staff's draft.

OAR 860-\_\_\_\_-\_\_\_\_

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

(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 shall 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).

**Commented [MRG12]:** Language added to ensure there is no disagreement about whether any party has waived confidentiality.

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

**Commented [MRG13]:** Certain of the Joint Utilities are engaged in litigation with certain developers in more than one state and/or in more than one forum. Given the fact that the Commission has stated its inability to enforce confidentiality outside of the OPUC, the Joint Utilities believe that the parties should be encouraged to enter into NDAs, to provide additional protection of information shared in the ADR process.

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

OAR 860-\_\_\_\_-\_\_\_\_

### 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.

**Commented [MN14]:** Though of course we can continue to discuss this issue, at this time I believe that consistent with the general expectations associated with ADR everywhere, the process should be confidential by default, and that a confidential process is most likely to achieve the goals of this rule.

(2) If agreed, parties may request that Commission Staff participate in a mediation. The hearings division will assess whether or not it is possible for Commission Staff to participate in an individual mediation. Any appointed Staff are not permitted to participate in any related complaint or petition for declaratory ruling, and are 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.

**Commented [MN15]:** Language allowing the participation of Commission Staff in a mediation.

(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 appointment mediation session for presentation at a subsequent appointment 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.

OAR 860-\_\_\_\_-\_\_\_\_

### 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~~verbally at the conclusion of a mediation session or, ~~if requested by the parties,~~ in writing to the parties following the session.

**Commented [MRG16]:** Specify oral, as opposed to in writing.

(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.

**Commented [MRG17]:** The Commission has indicated that it might be unable to protect its own work product from a Public Records Request, so the revision ensures that a written evaluation will be provided only if the parties are willing to take the risk that it could be released.

TBD

#### OAR 860-\_\_-\_\_

#### Case Management Conferences

(1) This case management conference rule applies to complaints 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 and in Division 029.

**Commented [MN18]:** Given the general applicability of the potential rule, I plan to notify a broader group of its inclusion in this rulemaking, so they can be prepared to follow and participate in the formal rulemaking phase.

(2) Within \_\_ 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.

**Commented [MRG19]:** This language struck consistent with the proposal for broader applicability of the rule.

(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 hearing, 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~~ ~~Whether discovery issues should be addressed, or on discovery motions or~~ other discovery matters raised by the parties;

**Commented [MRG20]:** The Joint Utilities believe that the appropriate discovery is something that should be discussed by the parties at the prehearing conference. Staff dropped the reference to "limitations on discovery" proposed by the Joint Utilities and the Joint Utilities have therefore attempted to provide a more neutral phrasing of the issue.

(c) Whether the parties require the assistance of the Commission's mediation services to assist in resolving the matter;

(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 order 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.