

ORDER NO. 20-273

ENTERED Aug 25 2020

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

AR 629

In the Matter of Rulemaking Regarding  
Alternative Dispute Resolution for Complaint  
Filings and Requests for Declaratory Ruling.

ORDER

DISPOSITION: ADMINISTRATIVE HEARINGS DIVISION'S RECOMMENDATION  
ADOPTED

This order memorializes our decision, made and effective at our August 25, 2020 Regular Public Meeting, to adopt the Administrative Hearings Division's (AHD) recommendation in this matter. The AHD Report with the recommendation is attached as Appendix A.

Made, entered, and effective Aug 25 2020.



**Megan W. Decker**  
Chair



**Letha Tawney**  
Commissioner



**Mark R. Thompson**  
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Circuit Court for Marion County in compliance with ORS 183.484.

**PUBLIC UTILITY COMMISSION OF OREGON  
ADMINISTRATIVE HEARINGS DIVISION REPORT  
PUBLIC MEETING DATE: August 25, 2020**

**REGULAR**      **CONSENT**   **RULEMAKING**   **X**   **EFFECTIVE DATE**

**DATE:**      August 14, 2020

**TO:**          Public Utility Commission

**FROM:**      Nolan Moser    **SIGNED**

**THROUGH:**   Diane Davis

**SUBJECT:**   ADMINISTRATIVE HEARINGS DIVISION: Request to Open a Formal Rulemaking

**RECOMMENDATION:**

The Administrative Hearings Division (AHD) recommends that the Commission issue a notice of proposed rulemaking to adopt the attached proposed rules described below, consistent with any policy direction provided by the Commission.

**DISCUSSION:**

Applicable Law

In Order No. 19-254, issued in docket UM 2000, the Commission opened an informal rulemaking (docket AR 629) to develop dispute resolution processes for conflicts between qualifying facilities (QFs) and electric companies. In that order, the Commission adopted Staff’s recommendation to “Open a rulemaking led by the Administrative Hearings Division to address dispute resolution for PURPA contracts.”<sup>1</sup>

Staff’s recommendation observed that “There are many drawbacks to the current complaint process. A primary concern is the amount of time being devoted to complaints. An effective dispute resolution process will streamline the process, bringing efficiency.”<sup>2</sup>

The Commission’s contested case process are governed by ORS 756.500 through 756.558, the Administrative Procedures Act (APA) set forth in ORS 183.310 *et seq.*, as

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

<sup>2</sup> *Id.* p.4.

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well as rules adopted in OAR 860-001-0300 *et seq.* ORS 756.500 states that any person may file a complaint “against any person whose business or activities are regulated by one or more of the statutes, jurisdictions for the enforcement or regulation of which is conferred upon the commission.”

The APA offers the Commission some flexibility in the conduct of contested cases, but the following standards must be met to provide for fundamental due process. Persons affected by an agency action must be (1) given prior notice of the case, (2) have a fair opportunity to present evidence and argument on issues raised in the proceeding, and (3) are able to respond to all evidence and argument offered by other parties.

Though an ALJ may be delegated Commission authority, the Commission may not delegate to any individual commissioner or named employee the authority to sign an interim or final order after a hearing, sign any order upon any investigation the commission causes to be initiated, or enter orders on reconsideration or following rehearing.<sup>3</sup>

## Analysis

### *Background*

AR 629 was opened on September 11, 2019. The original and primary goal of this rulemaking was to develop dispute resolution processes that reduced burdens on the Commission and parties to Commission proceedings and allow for more effective and efficient resolution of disputes. Shortly following the opening of the docket, AHD issued questions to stakeholders to help frame issues. Stakeholders provided written answers. Workshops were held in the fall and winter, and AHD provided a strawman rulemaking outline in early January. At a late January workshop, stakeholders discussed the strawman concepts, but also recommended expanding this rulemaking to include broader reforms to the PURPA complaint process to allow for resolution of some complaints with less process on a streamlined basis to save party and Commission time and resources.

After the January workshop, AHD provided a modified timeline which included the circulation of draft rules on the alternative dispute resolution process on February 13, 2020, and the submission to the Commission of a scoping memo on the potential of this rulemaking to expand to address streamlined complaint options. AHD put AR 629 rules and scoping questions before the Commission at the March 10, 2020 public meeting. At that public meeting AHD and the Commission discussed continuation of the informal process.

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<sup>3</sup> ORS 756.055

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In the spring and summer of 2020, that informal process continued. Additionally, through order No. 20-076, the Commission directed AHD to offer alternative dispute resolution services (ADR) to stakeholders navigating a policy and 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, which was filed with the Commission.

Subsequent to the completion of the Community Solar ADR process, workshops and draft proposed rule redline exchanges continued. Specifically, AHD hosted stakeholder workshops on June 5, 2020, June 17, 2020, July 17, 2020, and July 30, 2020. Draft rules were circulated and redlined at multiple points throughout the summer. Additionally, a confidential survey was conducted of participants of the Community Solar ADR process, and the responses were summarized and shared with the stakeholders participating in the AR 629 rulemaking.

#### *Summary of Proposed ADR Rules*

Under the proposed rules, participation in an ADR process is not required in order to file or progress with a complaint. Participation is voluntary and must be agreed to by both parties before AHD will offer ADR services.

The proposed rules provide for an ADR process that is led by a mediator appointed by the Chief Administrative Law Judge. The mediator may be an ALJ trained in mediation, an outside party under contract with the Commission, or a third party that is jointly proposed by the two ADR participants. As currently proposed, the rules do not require engagement in the ADR process in order for a party to proceed with a complaint. This issue is discussed in greater detail below.

Under the proposed rules, a petition for ADR may be made by a "party", a term that may apply to a person prior to the filing of a complaint. If the petition is accepted by the respondent, the ADR process formally commences, with a mediation appointment set no later than 14 business days after the receipt of the petition. Two written documents are provided to the appointed mediator – the petition itself, which is limited to 5 pages describing the issues at stake in the dispute along with providing general background information, and a response from the other party, which must be provided 7 business days after the petition.

It is important for the Commission and all stakeholders to recognize that the supporting materials and responses served under the proposed rules will be prepared on short timelines, in some cases before an in-depth review of relevant facts or law can be performed, and the statements made or positions taken in those materials should be considered non-binding and subject to change.

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The mediation appointment allows for time for each party to present their view of the issues, uninterrupted. Staff may, but is not required to, participate in a mediation session.

As structured in the proposed rule, the appointment is a confidential settlement meeting. Accordingly, no content of the conversation may be used or provided as evidence in the underlying complaint. The mediator is required to maintain strict confidentiality with the ALJ assigned to the underlying complaint and the Commissioners. The mediator will only report to the Commission that a settlement has or has not been reached. Finally, at the conclusion of the mediation effort, if no settlement has been reached, the mediator may provide an independent assessment of the issues and potential outcome of the case to the parties only.

Additionally, in the course of rule development, stakeholders identified an opportunity to improve the complaint process as a whole through the development of a “Case Management Conference” rule. With respect to a complaint, this rule allow parties to discuss more than is typically reviewed in a prehearing conference. Parties would be requested to make a good faith effort to identify legal and factual issues in dispute in a case, discuss discovery issues, and review the ADR option. Nothing in these proposed rules supersedes any requirement specified in any other Commission rule, tariff, or agreement to take specific steps prior to filing a complaint.

#### *Stakeholder Positions on Proposed Rules*

Stakeholders have come to general consensus on the core function of the rules, in terms of how the ADR session will be conducted. Additionally, agreement has been reached regarding the value of the proposed Case Management Rule.

There are three rule areas that remain in controversy.

#### *1) Mandatory Participation Requirement*

Throughout this informal phase of rulemaking, the Joint Utilities argued for the inclusion of a participation requirement in the ADR process, or an analogous process, before a party can pursue a complaint. Though AHD has expressed some support for this position, we consistently recommended a voluntary participation model for ADR. In response to AHD’s position, and to address the opposition of the QF Trade Associations (discussed below), the Joint Utilities proposed a new section to the rule, that would create a duty to confer, prior to the filing of a complaint. The Joint Utility proposal reads as follows:

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

**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 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.

The Joint Utilities argue that the purpose of this rulemaking will not be fully realized without some mandatory conference requirement, and that many issues which may be minor and subject to quick settlement might unnecessarily be litigated without such a requirement. In response to opposition from the QF Trade Associations, the Joint

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Utilities proposed that rather than require ADR prior to the filing of a complaint, a short conference requirement could be substituted to address QF concerns.

The QF Trade Associations argue that any requirement which conditions the filing of a complaint is problematic. They argue that such requirements delay access to justice, could become a route to dismissal of a complaint, and create procedural roadblocks. They also argue that a conference or ADR option is always available to utilities and that QFs, in general, welcome a conference prior to the filing of a complaint in order to clarify issues and determine whether or not a complaint is necessary.

The Joint Utilities worked to address these concerns through their conference proposal, attempting to ensure that the requirement upon a potential complainant was light, and that the time necessary to complete the conference was quick. Nonetheless, the QF Trade Associations opposed this addition, for the same reasons outlined above.

In the attached proposed rules, AHD has not included the conference requirement proposal. Consistent with our previous determination, we believe it is important that all traditional complaint participants believe that the rules are fair, in order to ensure that they are most effectively utilized. Accordingly, at this time, we recommend a voluntary participation structure.

## *2) Presumption of Confidentiality*

As proposed, the rules presume confidentiality, consistent with traditional expectations associated with settlement negotiations. This issue has engendered significant discussion and disagreement. The QF Trade Associations argue that confidentially requirements in the rules need revision. They assert that the rules should allow for communications between QF parties regarding the content of negotiations and settlements with utilities, and argue that the confidentiality provisions are not fair, as utilities will, in course of time, participate in multiple ADR processes with multiple parties and will gain an informational advantage, while individual QFs will be prohibited from communicating with each other. They also argue that settlement may produce or affect a policy, and that, in principle, such policy discussions should be made openly. Finally, they argue that strict confidentiality may be functionally unworkable.

The Joint Utilities disagree and argue that failure to ensure confidentiality may result in much less effective negotiations, for fear, of both parties, of releases of negotiation positions.

AHD agrees with the Joint Utilities and has included in the rules clear confidentiality provisions – which may be waived by joint agreement of both party participants to an

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ADR process. The rules are designed to enforce a fairly universal concept of settlement discussions – that the content of settlement discussions should not be used in a subsequent litigated case, that the content of negotiations should not influence the decision maker in that case, and that confidentiality in settlement negotiations should be upheld. AHD communicated to stakeholders that failure to keep the content of negotiations confidential could chill future settlement opportunities by making parties less likely to propose solutions that might prove workable for one docket but which they do not want publicly disclosed.

### *3) Staff Consultation Proposal*

Late in the workshop process this summer, NewSun proposed an addition to the rules that would allow for a Staff consultation, as an alternative to formal ADR. NewSun characterized this proposal as valuable because there are numerous issues that a QF and utility may encounter that could benefit from the review of Staff; and that Staff's perspective may help both parties reach a resolution on such issues.

NewSun's original proposal was outlined as follows:

#### **OAR 860-\_\_\_\_ - \_\_\_\_ Staff Issue Consultations**

(1) **Applicability:** A qualifying facility party may request a consultation with Commission Staff at any time if it believes that a utility is acting inconsistent with applicable tariffs and statutory and regulatory obligations, or failing to act in good faith with respect thereto.

(2) **Content:** Upon such a request, the utility shall participate in the consultation, and Staff shall facilitate such consultation. The qualifying facility shall have the opportunity to present its overview of the applicable issue(s), and educate Staff on their perspective and proposed solutions. The utility and Staff will then each provide their perspectives on the issue and Staff will facilitate discussion of the issue and possible solutions amongst the parties. All parties shall participate in the consultation in good faith.

(3) **Timing:** The consultation shall take place within 14 days of the request, and is reasonably expected to last one to two hours, depending on the scope and complexity of the issues, unless the parties agree otherwise. The consultation shall not be a required prior to filing of a complaint or petition for declaratory ruling, except that a utility shall



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request a similar Staff consultation prior to filing a dispute against a qualifying facility or terminating a contract with a qualifying facility, which the qualifying facility party may not unreasonably deny.

This proposal encountered considerable questions from stakeholders, as it came late in the process and attracted some initial opposition, given the fact the consultation requirement proposed in the rule is not mutual and applied only to the subject Utility. However, after review in a workshop, all stakeholders seemed to see some potential value in this option, and it was decided to hold one more workshop to review an edit of the proposal from AHD. AHD produced the following amended language:

**OAR 860-\_\_\_\_ - \_\_\_\_  
Staff Issue Consultations**

(1) Any party may request in writing a consultation with Commission Staff at any time prior to the filing of a complaint or a petition for alternative dispute resolution, to review statutory or regulatory obligations as well as policy issues.

(2) Upon such a request, both parties to the issue shall participate in the consultation, and Staff shall facilitate such consultation. Both parties shall have the opportunity to present its overview of the applicable issue(s), and educate Staff on their perspective and proposed solutions. All parties shall participate in the consultation in good faith.

(3) The consultation shall take place within 14 days of the request, and is reasonably expected to last one to two hours, depending on the scope and complexity of the issues, unless the parties agree otherwise.

(4) Consistent with OAR 860-\_\_\_\_ - \_\_\_\_\_(2) Staff participating in the consultation will not participate in any related complainant or petition for declaratory ruling.

(5) The confidentiality provisions of OAR 860-\_\_\_\_ - \_\_\_\_\_ shall apply to Staff issue consultations.

Primarily, AHD's edits to NewSun's proposal served to make the consultation opportunity symmetrical, meaning that either the Utility or a QF could request the Staff consultation. At the final workshop NewSun's proposal was the primary subject of discussion. We began the workshop with input from Staff, which would ultimately have some additional duties under the proposal. The Joint Utilities argued against the

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addition of this provision, stating that it would detract from the ADR option. Additionally, the Joint Utilities noted that the provision could create complications regarding Staff's role in both policy cases and complaint proceedings. Finally, the Joint Utilities argued that all parties can request information or discussions with Staff currently, without the addition of a new rule.

The QF Trade Associations and other QF parties expressed support for the additional language. These stakeholders noted that many smaller QFs may not know that discussions with Staff are available to them. They argue that these rules would be enhanced by this option, and that Staff would benefit from participation in controversies at an early stage.

AHD has chosen not to include this proposal in the proposed rules. We recommend that this concept be further explored during the formal phase of this rulemaking to the extent stakeholders are interested in further review of the concept. At this time, we believe there are numerous important questions associated with the proposal that need exploration. Specifically, it is not clear from the proposal how confidentiality would be handled, how Staff would be permitted to work on a policy question associated with a consultation subject, and how in general the consultation option would interact with ADR.

### Conclusion

AHD recommends moving ADR process rules to a formal phase, consistent with policy direction the Commission might provide.

### **PROPOSED COMMISSION MOTION:**

Issue a notice of proposed rulemaking to adopt the attached proposed rules described below.

**Alternative Dispute Resolution for Complaint Filings and Requests for Declaratory Judgment****860-XXX-0000****Applicability of Division XXX**

(1) The rules in this division apply to a complaint 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, division 029, and division 082.

(2) Upon request or its own motion, the Commission may waive any of the division XXX rules for good cause 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 between the same parties. The stay is lifted upon the conclusion of the alternative dispute resolution process.

**860-XXX-0010****Purpose of Division XXX**

(1) OAR chapter 860, division XXX 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 aid parties in reducing the issues presented to the Commission.

**860-XXX-0020****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 860-029-0100 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.

(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 860-029-0100 or OAR 860-082-0085, or a petition for declaratory ruling filed pursuant to ORS 756.450.

### **OAR 860-XXX-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 between a utility 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 to the respondent to participate in the alternative dispute resolution process before the Commission and the respondent 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 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.

### **OAR 860-XXX-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 complainant will serve upon the respondent and the mediator the supporting materials described in OAR 860-XXX-0050.

(4) Within seven 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 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 section may be modified by the agreement of the parties.

#### **OAR 860-XXX-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-XXX-0040. Supporting materials must not exceed five 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-XXX-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.

#### **OAR 860-XXX-0070**

#### **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 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.

#### **OAR 860-XXX-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.

### **OAR 860-XXX-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.

### **OAR 860-XXX-0100**

#### **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;

(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.