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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

AR 379

In the Matter of a Rulemaking Proceeding	)	
to Amend OAR 860-016-0050 Relating to	)	ORDER
Enforcement of Interconnection Agreements.	)	

**DISPOSITION: RULE AMENDED; TEMPORARY RULE REPEALED**

On February 8, 2000, the Public Utility Commission of Oregon (Commission), opened this docket to consider amending OAR 860-016-0050. This amendment would allow the consolidation of two rules (temporary OAR 860-016-0051 and OAR 860-016-0050) which provide procedures for resolving disputes regarding interconnection agreements between telecommunications providers.

On February 9, 2000, the Commission filed a Notice of Proposed Rulemaking with the Oregon Secretary of State. Copies of the proposed rule and Statement of Need and Fiscal Impact were sent to interested parties. A hearing was neither requested nor held. On March 21, 2000, written comments were timely filed by the Western States Competitive Telecommunications Coalition.

The Commission considered this matter at its Public Meeting on April 25, 2000. The Commission adopted the amendments to the rule, which are set forth in Appendix A.

**Background**

On September 21, 1999, the Commission adopted a temporary rule for complaints against telecommunications utilities under Oregon Laws 1999, Chapter 1093, Section 38 (SB 622) in Order No. 99-538 (AR 363). On October 18, 1999, the Commission issued Order No. 99-631 (AR 359), adopting procedural rules for handling actions to enforce interconnection agreements approved by the Commission under the Telecommunications Act of 1996. On February 8, 2000, the Commission issued Order No. 00-066 (AR 381), adopting temporary rule OAR 860-016-0051 to take the place of temporary OAR 860-013-0080 (AR 363), which expired on March 18, 2000. The purpose for amending OAR 860-016-0050 is to provide a single permanent rule for both prohibited practices and enforcement of interconnection agreements, to improve readability, and to make the rules more effective.

## **The Proposed Amendments**

The Western States Competitive Telecommunications Coalition (Coalition) was the only entity to submit written comments. These comments are summarized below. We also added some language to assist us in processing these cases.

### **(1) Ambiguity issues:**

(a) The Coalition claims that the reference to expedited proceedings in Subsection (11) of Subparagraph (1) is unclear. Its recommended changes, however, suggest that the Coalition did not understand the meaning of the proposed language. The purpose of the Subparagraph (1) language is to refer the reader to Subsection (11) for the procedural timelines imposed on a complaint alleging “that telecommunications utilities have engaged in prohibited acts under ORS 759.455.” The Coalition’s suggested language that Subsection (11) apply exclusively to SB 622 complaints would not leave the possibility of using this procedure in a complaint not involving SB 622. The proposed language of the rule is clear and need not be changed.

(b) The Coalition further recommends that Subsection (3)(b) be amended to clarify any ambiguity caused by the words “deliver” and “serve.” While the confusion may be minimal, the recommendation is valid. The first sentence of Subsection (3)(b) is amended to read as follows:

Complainant must serve a copy of the complaint for enforcement on defendant the same day the complaint is filed with the Commission.

(c) Subsection (4)(c) of the proposed rule states that: “The answer must contain a statement of the facts or a statement of the law supporting defendant’s position.” The Coalition argues that this language gives the defendant a choice of providing either facts or law in all cases. However, the remainder of the subsection makes clear what the defendant must provide in its answer. The recommendation of the Coalition is not adopted.

### **(2) Substantive issues:**

(a) Subsection (2)(a) states that a complaint must contain:

A statement of specific facts demonstrating that the complainant telecommunications provider conferred with defendant in good faith to resolve the dispute, and that despite those efforts the parties failed to resolve the dispute;

The Coalition contends that *attempting* to confer with the defendant, as long as the attempt is made in good faith, should be sufficient. The Commission believes that the parties should talk with each other prior to the filing of a complaint. The language we adopt, however,

is broad enough to allow the defendant to present facts showing that a conversation between the parties was not possible.

(b) Subsection (10)(c) as written states that an expedited procedure may be appropriate “if the complainant shows that its ability to provide telecommunications services will be substantially harmed unless the Commission acts promptly.” The Coalition contends that this threshold sets too high a standard and is ambiguous. It is appropriate that the standard remain as written to differentiate between an expedited proceeding and a regular proceeding. The language will remain as written.

(c) Finally, the Coalition requests that the rules provide for a “direct and expeditious interlocutory appeal to the Commission” when an ALJ denies expedited procedures and the complainant believes the denial of such procedures will result in irreparable harm to the complainant. Such a procedure would tend to lengthen, rather than expedite, the proceedings. We do not see the benefits of allowing an interlocutory appeal.

**(3) Procedural issues:**

(a) The Coalition suggests that placing a hard copy of the complaint in overnight mail should not be required if filing is done by fax. The Commission sees too many instances where faxes are incomplete or are not received. It is simply prudent to follow a fax filing with a hard copy of the complaint.

(b) The Coalition claims that all proceedings should be subject to the expedited procedures set forth in ORS 759.455 and outlined in Subparagraph (11) of these rules. The Coalition is correct that filings under ORS 759.455 require the use of Subparagraph (11) procedures. However, other filings may not need to be expedited. The Commission needs to monitor its resources and use discretion as to which cases need to be expedited.

The Coalition also raises issues about modified discovery schedules. It is best left to the Administrative Law Judge (ALJ) to determine whether a modified discovery schedule is appropriate in a particular case. The proposed rule remains as drafted.

**(4) Redundancy issues:**

(a) The Coalition disagrees with eliminating Subparagraph (10) regarding the powers of the ALJ. The removal of this Subparagraph does not in any way limit the powers of the ALJ. Rather, the elimination of the language prevents overlap with another rule, OAR 860-012-0035.

(b) The Coalition also disagrees with the removal of Subparagraph (A) through (C) of Subsection (10)(c), stating that these paragraphs should be retained for clarity in understanding the circumstances in which expedited procedures should be used. These are repetitive of the requirements imposed by the Telecommunications Act and as such are unnecessary.

**(5) Processing issues:**

In trying to anticipate how these rules will work under ORS 759.455, we thought that some additional procedures would help us manage these cases. Therefore, the 10-day notice should be served on both the defendant and the Commission as set forth in Subsection (3)(a) of the rule. If the complainant anticipates asking for temporary or injunctive relief, that must be included in the 10-day notice. We have also added that requests for temporary or injunctive relief must be clearly marked and submitted as a motion. Finally, since these complaints can be rather voluminous, the complainant must submit an executive summary, not to exceed eight pages, which outlines the issues and relief requested. Our rationale is that these matters are processed quickly, and these procedures should aid us in providing a fast response.

**Summary**

In summary, we conclude that the amended rule, along with the modifications made in this order, will establish a more effective and efficient procedure for processing interconnection agreement complaints. It should be adopted.

**ORDER**

IT IS ORDERED that:

1. Proposed amended rule OAR 860-016-0050, Complaints for Enforcement of Interconnection Agreements, is adopted as set forth in Appendix A.
2. Temporary OAR 860-016-0051 is repealed on the effective date of the amended rule.
3. The amended rule will be effective upon filing with the Oregon Secretary of State.

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

BY THE COMMISSION:

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**Vikie Bailey-Goggins**  
Commission Secretary

A party may petition the Commission for the amendment or repeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.

860-016-0050

**Petitions-Complaints for Enforcement of Interconnection Agreements**

(1) **Purpose of rule.** This rule specifies the procedure for a telecommunications provider, as defined in OAR 860-032-0001, to file a petitioncomplaint for the enforcement of an interconnection agreement that was previously approved by the Commission. For purposes of this rule, the term “interconnection agreement” ~~encompasses~~ is an agreements executed pursuant to the Telecommunications Act of 1996 (the Act). This includes interconnection agreements, resale agreements, agreements for the purchase or lease of unbundled network elements (UNEs), or statements of generally available terms and conditions (SGATs), whether those agreements were entered into through negotiation, mediation, arbitration, or adoption of a prior agreement or portions of prior agreements. Subsection (11) of this rule specifies procedures for complaints alleging that telecommunications utilities have engaged in prohibited acts under ORS 759.455.

(2) **The petitioncomplaint.** A petitioncomplaint for enforcement of an interconnection agreement must contain the following:

(a) A statement of specific facts demonstrating that the petitioningcomplainant telecommunications provider conferred with respondentdefendant in good faith to resolve the dispute, and that despite those efforts the parties failed to resolve the dispute;

(b) A copy of a written notice to the respondentdefendant telecommunications provider indicating that the petitionercomplainant intends to file a petitioncomplaint for enforcement of the interconnection agreement, as described in section (3)(a) below;

(c) A copy of the interconnection agreement or the portion of the interconnection agreement that the petitionercomplainant contends was or is being violated. If a copy of the entire interconnection agreement is provided, petitionercomplainant must specify which provisions ~~are~~ are at issue ~~and their location in the agreement~~. If the interconnection agreement adopted a prior agreement or portions of prior agreements, the petitioncomplaint must also indicate which agreements were adoptedthe provisions adopted in those agreements; and

(d) A statement of the facts or a statement of the law demonstrating respondent’sdefendant’s failure to comply with the agreement and petitioner’scomplainant’s entitlement to relief. The statement of entitlement to relief must indicate that the remedy sought is consistent with anythe dispute resolution provisions in the agreement, if any. Statements of facts must be supported by written testimony or one or more affidavits, made by persons competent to testify and having personal knowledge of the relevant facts. Statements of law must be supported by appropriate citations. If exhibits are attached to the affidavits, the affidavits must contain the foundation for the exhibits;

(e) The petitioncomplaint may designate one additional person to receive copies of other pleadings and documents; and

(f) PetitionerComplainant shall also file with the petitioncomplaint, as a separate document, any ~~motion petitioner wishes to file that seeks~~ motions for affirmative relief.

Motions for injunctive or temporary relief must be clearly marked. Nothing in this subsection shall preclude petitionercomplainant from filing a motion subsequent to the filing of the petitioncomplaint if the motion is based upon facts or circumstances unknown or unavailable to petitionercomplainant at the time the petitioncomplaint was filed.;

(g) Complainant shall also file with the complaint, as a separate document, an executive summary outlining the issues and relief requested. Such summary shall be no more than eight pages.

(3) **Service of the petitioncomplaint.** The petitioncomplaint for enforcement must be served as follows:

(a) At least ten days prior to filing a petitioncomplaint for enforcement with the Commission, petitionercomplainant must give written notice to respondentdefendant and the Commission that petitionercomplainant intends to file a petitioncomplaint for enforcement. The notice must identify the contract provisions petitionerprovisions in the agreement that complainant alleges were or are being violated and the specific acts or failure to act that caused or is causing the violation and whether the complainant anticipates requesting temporary or injunctive relief. The notice must be served in the same manner as set forth in subsections (b) and (c) below, except that petitionercomplainant must also serve the notice on all persons designated in the interconnection agreement to receive notices;

(b) PetitionerComplainant must deliverserve a copy of the petitioncomplaint for enforcement toon respondentdefendant the same day the petitioncomplaint is filed with the Commission. Service may be by fax or overnight mail, provided the petitioncomplaint arrives at respondent'sdefendant's location on the same day the petitioncomplaint is filed with the Commission. Service by fax must be followed by a hard copy the next day in overnight mail; and

(c) PetitionerComplainant must serve a copy of the petitioncomplaint for enforcement on respondent'sdefendant's authorized representative, attorney of record, or designated agent for service of process.

(4) **The answer.** An answer must comply with the following:

(a) The answer must contain a statement of specific facts demonstrating that the responding telecommunications provider conferred with petitionercomplainant in good faith to resolve the dispute, and that despite those efforts the parties failed to resolve the dispute.;

(b) The answer must respond to each allegation set forth in the petitioncomplaint and must set forth all affirmative defenses.;

(c) The answer must contain a statement of the facts or a statement of the law supporting respondent'sdefendant's position. Statements of facts must be supported by written testimony or one or more affidavits, made by persons competent to testify and having personal knowledge of the relevant facts. Statements of law must be supported by appropriate citations. If exhibits are attached to the affidavits, the affidavits must contain the foundation for the exhibits.;

(d) The answer may designate one additional person to receive copies of other pleadings and documents.;

(e) Any allegations raised in the petitioncomplaint and not addressed in the answer are deemed admitted.;

(f) RespondentDefendant shall file with the answer, as a separate document, a response to any motion filed by petitionercomplainant, and any motion respondentdefendant wishes to file that seeks affirmative relief. Nothing in this subsection shall preclude respondentdefendant from filing a motion subsequent to the filing of the answer if the motion is based upon facts or circumstances unknown or unavailable to respondentdefendant at the time the answer was filed.

(5) **Service of the answer.** The answer must be served as follows:

(a) ~~Respondent~~ Defendant must file a copy of the answer with the Commission within ten business days after service of the petition/complaint for enforcement;

(b) ~~Respondent~~ Defendant must deliver a copy of the answer to petitioner/complainant the same day the answer is filed with the Commission, in the manner set forth in sections (3)(b) and (3)(c) above; ~~Service may be made by fax or overnight mail, provided the answer arrives at petitioner's location on the same day the answer is filed with the Commission.~~

(c) ~~Respondent~~ Defendant must serve a copy of the answer on the petitioner's/complainant's attorney, as listed in the petition/complaint, or the person who signed the petition/complaint, if petitioner/complainant has no attorney.

(6) The reply. Petitioner/Complainant must file a reply to an answer that contains affirmative defenses within five business days after the answer is filed. The reply must be served in the manner set forth in sections (3)(b) and (3)(c) above. If the reply contains new facts or legal issues not raised in the petition/complaint, the reply must also comply with section (2)(d) above.

(7) Cross-complaints or counterclaims. A cross-complaint or counterclaim shall be answered within the same ten-day time frame allowed for answers to petitions/complaints.

(8) Conference. The Commission will conduct a conference regarding each petition/complaint for enforcement of an interconnection agreement.

(a) The ~~presiding officer~~ Administrative Law Judge (ALJ) will schedule a conference within five business days after the answer is filed, to be held as soon thereafter as is practicable. At the discretion of the ~~presiding officer~~ ALJ, the conference may be ~~scheduled at an earlier point in time, or the conference may be~~ conducted by telephone;

(b) Based on the petition/complaint and the answer, all supporting documents filed by the parties, and the parties' oral statements at the conference, the ~~presiding officer~~ ALJ will determine whether the issues raised in the petition/complaint can be determined on the pleadings and submissions without further proceedings or whether further proceedings are necessary. If ~~the presiding officer determines that~~ further proceedings are necessary, the ~~presiding officer~~ ALJ will establish a procedural schedule. The procedural schedule ~~shall~~ may include a mandatory mediation session. Either party may request that ~~an administrative law judge or~~ another person ~~other~~ than the ~~presiding officer~~ ALJ preside over the mediation. Nothing in this subsection is intended to prohibit the bifurcation of issues where appropriate;

(c) In determining whether further proceedings are necessary, the ~~presiding officer~~ ALJ will consider, but is not limited to, the positions of the parties; the need to clarify evidence through the examination of witnesses; ~~whether the issues are largely factual, legal, or involve mixed questions of fact and law;~~ the complexity of the ~~factual and legal~~ issues; the need for ~~speedy prompt~~ resolution; and the completeness of the information presented;

(d) The ~~presiding officer~~ ALJ may make oral rulings on the record during the conference on ~~interlocutory~~ all matters relevant to the conduct of the proceeding, ~~including procedural matters, discovery matters, the submission of briefs or other documents, and so forth. Oral rulings shall be on the record or subsequently reduced to writing;~~

—(e) ~~The conference may include a discussion of one or more of the following matters:~~

—(A) ~~Whether the issues can be narrowed;~~

—(B) ~~The need for additional pleadings or evidentiary submissions, including further affidavits or exhibits;~~

—(C) ~~Whether discovery is necessary, and if so, the type, scope, and schedule for such discovery;~~

- ~~—(D) The prospects for obtaining stipulations of fact;~~
- ~~—(E) The prospects for settlement of some or all of the issues;~~
- ~~—(F) The need for written legal memoranda or briefs;~~
- ~~—(G) The establishment of a procedural schedule; and~~
- ~~—(H) Other matters that may aid in the disposition of the case.~~

(9) **Discovery**. A party may file with the petition/complaint or answer a request for discovery, stating the matters to be inquired into and their relationship to matters directly at issue. ~~Upon motion of a party, the presiding officer may alter the discovery time lines in OAR Chapter 860, Division 014. A discovery schedule may be established during the conference if necessary.~~

~~—(10) Powers of the presiding officer. In any proceeding to enforce the provisions of an interconnection agreement, the presiding officer has broad discretion to conduct the proceeding in a manner that best suits the nature of the petition. The presiding officer may, for example:~~

- ~~—(a) Limit the record to written submissions or schedule an evidentiary hearing;~~
- ~~—(b) Limit the number of exhibits and witnesses and the time for their presentation;~~
- ~~—(c) Require the parties to submit additional information appropriate for a full, fair, and expeditious resolution of the case; or~~
- ~~—(d) Require the parties to submit at an early stage in the proceeding a joint statement listing what facts, if any, have been stipulated to, what facts remain in dispute, what legal issues are in dispute, and a brief summary of the position of the parties on each issue.~~

~~Nothing in this section is intended to supercede OAR 860-012-0035.~~

(10) **Expedited procedure**. When warranted by the facts, the petitioner or respondent/complainant or defendant may file a motion requesting that an expedited procedure be used. The movant/moving party shall file a proposed expedited procedural schedule along with its motion. The presiding officer/ALJ will schedule a conference to be held as soon after the motion is filed as is practicable, to determine whether an expedited schedule is warranted, ~~and if so, to establish an expedited procedural schedule.~~

(a) The presiding officer/ALJ ~~shall determine whether an expedited procedure is warranted. In making that determination, the presiding officer~~ shall consider whether the issues raised in the petition/complaint or answer involve a risk of imminent, irrevocable harm to a telecommunications provider and to the public interest;

(b) If a determination is made that an expedited procedure is warranted, the presiding officer/ALJ shall establish a procedure that ensures a prompt resolution of the merits of the dispute, consistent with due process, ~~the need for speed, and the Commission's other obligations/relevant considerations~~. The presiding officer/ALJ shall consider, but is not bound by, the movant's/moving party's proposed expedited procedural schedule;

(c) ~~In general, a~~ An expedited procedure may be appropriate if the complainant shows that dispute involves the ability of a telecommunications provider:

- ~~—(A) To interconnect with another telecommunications provider; or~~
- ~~—(B) To provide or obtain resold services; or~~
- ~~—(C) To provide or obtain UNEs; and~~
- ~~—(D) The telecommunications provider's its ability to provide telecommunications services is thereby will be substantially harmed unless the Commission acts promptly.~~

—~~(d)~~ In general, the Commission will not entertain a motion for expedited procedure where the dispute solely involves the payment of money. ~~The examples in section (11)(c) above are not exclusive, but are intended only to provide guidance to telecommunications providers considering a motion for expedited procedure.~~

**(11) Procedures for complaints alleging violation of ORS 759.455.**

**(a) An answer under subsection (4) of this rule shall be filed with the Commission and served on the defendant within ten calendar days after service of the complaint;**

**(b) A reply under subsection (6) of this rule shall be filed with the Commission and served on the defendant within five calendar days after the answer is filed;**

**(c) The ALJ shall schedule a conference to be held in person or by telephone not later than 15 calendar days after the complaint is filed;**

**(d) If requested, a hearing shall begin no later than 30 days after the complaint is filed;**

**(e) The ALJ may consult with the Commission Staff in the manner set forth in OAR 860-016-0030(6).**

Stat. Auth.: ORS Ch. 183 & 756

Stats. Implemented: ORS 756.040, 756.518, 759.030(1), **ORS 759.455, Ch. 1093, OR Laws of 1999,** & 47 USC § 252

Hist.: PUC 7-1999, f. & ef. 10-18-99 (Order No. 99-631)