



On September 9, 2004, a response was sent to Legislative Counsel indicating that the offending phrase would be taken out. To accommodate the realities of case management, we would use the legal doctrine of waiver. Waiver is the intentional relinquishment of a known right. *State v. Hunter*, 316 Or 192, 199-202 (1993); *Brown v. Portland School Dist*, 291 Or 77, 84 (1981). The circumstances of each case must be examined to see whether the waiver was intentional. *Hunter*, 316 Or at 201. The court has also looked to see if a party has made a "clear, unequivocal or decisive act showing a purpose to waive" a particular right. *Brown*, 291 Or at 84.

In practice, in the prehearing conference, the administrative law judge confers with the parties to determine the schedule and scope of issues in a case. Parties often propose a schedule, which is adapted to accommodate all calendars, then adopted by the administrative law judge. If the parties do not propose a hearing, which they know they are entitled to under the statute, they may be deemed to have waived the hearing. The parties may also be implied to have waived their right to a hearing if the parties withdraw the complaint or settle the dispute. In each of these situations, the parties must take an affirmative action, such as propose a schedule, file a stipulation, or move to withdraw a complaint. While not prejudging any particular case, each of those actions could be considered a waiver of the right to hearing under the statute.

For these reasons, the proposed rule, attached, will better comport with the statute, without changing the practice of the Commission.

**PROPOSED COMMISSION MOTION:**

A rulemaking be initiated to amend OAR 860-016-0050(11)(d).

**860-016-0050**

**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 complaint for the enforcement of an interconnection agreement that was previously approved by the Commission. For purposes of this rule, the term "interconnection agreement" is an agreement 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 complaint. A complaint for enforcement of an interconnection agreement must contain the following:

(a) 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;

(b) A copy of a written notice to the defendant telecommunications provider indicating that the complainant intends to file a complaint 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 complainant contends was or is being violated. If a copy of the entire interconnection agreement is provided, complainant must specify provisions at issue. If the interconnection agreement adopted a prior agreement or portions of prior agreements, the complaint must also indicate the provisions adopted in those agreements;

(d) A statement of the facts or a statement of the law demonstrating defendant's failure to comply with the agreement and complainant's entitlement to relief. The statement of entitlement to relief must indicate that the remedy sought is consistent with the 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 complaint may designate one additional person to receive copies of other pleadings and documents; and

(f) Complainant shall also file with the complaint, as a separate document, any motions for affirmative relief. Motions for injunctive or temporary relief must be clearly marked. Nothing in this subsection shall preclude complainant from filing a motion subsequent to the filing of the complaint if the motion is based upon facts or circumstances unknown or unavailable to complainant at the time the complaint 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 complaint. The complaint for enforcement must be served as follows:

(a) At least ten days prior to filing a complaint for enforcement with the Commission, complainant must give written notice to defendant and the Commission that complainant intends to file a complaint for enforcement. The notice must identify the provisions 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 complainant must also serve the notice on all persons designated in the interconnection agreement to receive notices;

(b) Complainant must serve a copy of the complaint for enforcement on defendant the same day the complaint is filed with the Commission. Service may be by fax or overnight mail, provided the complaint arrives at defendant's location on the same day the complaint is filed with the Commission. Service by fax must be followed by a hard copy the next day in overnight mail; and

(c) Complainant must serve a copy of the complaint for enforcement on defendant'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 complainant 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 complaint and must set forth all affirmative defenses;

(c) The answer must contain a statement of the facts or a statement of the law supporting defendant'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 complaint and not addressed in the answer are deemed admitted; and

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

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

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

(b) Defendant must deliver a copy of the answer to complainant the same day the answer is filed with the Commission, in the manner set forth in sections (3)(b) and (3)(c) above;

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

(6) The reply. 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 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 ten-day time frame allowed for answers to complaints.

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

(a) The 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 ALJ, the conference may be conducted by telephone;

(b) Based on the complaint and the answer, all supporting documents filed by the parties, and the parties' oral statements at the conference, the ALJ will determine whether the issues raised in the complaint can be determined on the pleadings and submissions without further proceedings or whether further proceedings are necessary. If further proceedings are necessary, the ALJ will establish a procedural schedule. The procedural schedule may include a mandatory mediation session. Either party may request that a person other than the 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 ALJ will consider, but is not limited to, the positions of the parties; the need to clarify evidence through the examination of witnesses; the complexity of the issues; the need for prompt resolution; and the completeness of the information presented;

(d) The ALJ may make oral rulings on the record during the conference on all matters relevant to the conduct of the proceeding.

(9) Discovery. A party may file with the complaint or answer a request for discovery, stating the matters to be inquired into and their relationship to matters directly at issue.

(10) Expedited procedure. When warranted by the facts, the complainant or defendant may file a motion requesting that an expedited procedure be used. The moving party shall file a proposed expedited procedural schedule along with its motion. The 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.

(a) The ALJ shall consider whether the issues raised in the 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 ALJ shall establish a procedure that ensures a prompt resolution of the merits of the dispute, consistent

with due process and other relevant considerations. The ALJ shall consider, but is not bound by, the moving party's proposed expedited procedural schedule;

(c) 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. In general, the Commission will not entertain a motion for expedited procedure where the dispute solely involves the payment of money.

(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 a party requests a hearing, a~~ 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); PUC 7-2000, f. & ef. 5-3-00 (Order No. 00-221); PUC 21-2002, f. & ef. 12-9-02 (Order No. 02-837)