

Working Session Redline of  
Proposed Final Version of  
RTO West Arbitration Procedural Rules

**Section 1.** ~~Agreement of Parties~~ Application of Arbitration Procedural Rules

These rules and any amendments of them shall apply in the form in effect at the time dispute resolution is initiated by the Parties. Any use of a word in the singular form will also include the plural form and any use of the plural form shall include the singular form.

**Section 2.** ~~Modification of Arbitration Procedural Rules.~~ Defined Terms.

Capitalized terms used in these rules that are not otherwise defined shall have the meanings specified in the RTO West Tariff.

~~The Parties to an arbitration may modify any provision of these rules by agreement of all Parties.~~

**Section 3.** ~~Automatic Denial~~ [This section intentionally left blank.]

~~Any Party failing to file a response to the Statement of Claim is deemed to have denied all claims in the Statement of Claim. Failure to file a response shall not operate to delay the arbitration.~~

**Section 4.** ~~Change of Claim~~ [This section intentionally left blank.]

~~After filing a claim or counterclaim, no Party may file a new or different claim or counterclaim except with the consent of the arbitrator(s) for good cause.~~

**Section 5.** ~~— [This section intentionally left blank.]~~

**Section ~~6~~ 3.** **Fixing of Locale**

The Parties may mutually agree on the locale where the arbitration is to be held. If any Party requests that the hearing be held in a specific locale and the other Party files no objection thereto with fifteen (15) days after notice of the request has been received, the locale shall be the one requested. If a Party objects to the locale requested by the other Party, and the Parties cannot come to an agreement on a specific locale, then the default locale shall be Portland, Oregon.

**Section 7.** ~~— [This section intentionally left blank.]~~

**Section ~~8~~ 4.** **Preliminary Hearing**

(a) At the request of any Party or at the discretion of the arbitrator, the arbitrator may schedule, as soon as practicable, a preliminary hearing with the Parties and Participants. The

preliminary hearing may be conducted by telephone at arbitrator's discretion or upon mutually agreement by the Parties.

(b) During the preliminary hearing, the Parties, any Participants that have requested or been granted rights under Section 123.3.5.6 of the RTO West ~~Tariff Section 13~~ Dispute Resolution Provisions, and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearing and any other preliminary matters.

### **Section 9. — Exchange of Information**

~~At least 10 (ten) days before the hearing, the Parties shall exchange copies of all exhibits they intend to submit and identify all witnesses they intend to call at the hearing.~~

### **Section ~~10~~ 5. Confidentiality of Information**

(a) Any and all information disclosed by ~~either~~ any Party, ~~which that~~ is marked as "Confidential" or with a similar legend, or, in the event of an intangible disclosure, is confirmed in writing as confidential within ten (10) days of disclosure, shall be deemed "Confidential Information," unless the arbitrator rules otherwise or such information falls under one of the exceptions set forth below.

(b) The receiving Party agrees to hold any Confidential Information disclosed to it, or to which it is exposed in connection with the proceeding, in confidence; to cause its employees, agents, and representatives to hold such Confidential Information in confidence; and to use the same standard of care used to protect its own proprietary and confidential information, but not less than a reasonable degree of care, in protecting the Confidential Information from unauthorized disclosure. The receiving Party shall not disclose Confidential Information to its employees, agents, and representatives ~~unless~~ except on a need-to-know basis or use it in connection with the arbitration proceeding and have been advised of the obligation of confidentiality and who have agreed to be bound in like fashion.

(c) The receiving Party agrees not to use any Confidential Information disclosed to it, or to which it is exposed in connection with the proceeding for any purpose other than as needed to participate in the proceeding (and any subsequent appeal).

(ed) Unless the Parties agree otherwise, the receiving Party's obligation of confidentiality and non-use of Confidential Information shall last for five (5) years from the date of disclosure.

(de) Confidential Information shall not include any information which (i) was publicly available at the time of disclosure; (ii) became publicly available after disclosure without breach of these rules by the receiving Party; (iii) was in the receiving Party's possession prior to disclosure, as evidenced by the receiving Party's written records, and was not the subject of an earlier confidential disclosure; (iv) was ~~rightfully~~ lawfully acquired by the receiving Party after disclosure by the disclosing Party from a third party who was lawfully in possession of the information and was under no obligation to the disclosing Party to maintain confidentiality; (v) is

independently developed by the receiving Party's employees, agents or representatives who have not had direct or indirect access to the Confidential Information; or (vi) is subject to disclosure under any statute requiring disclosure of the records of a public agency, provided that the party asserting confidentiality may, at its own expense, pursue any available legal remedy to prevent disclosure of the information.

(e) Upon request of the disclosing Party or upon termination of the proceedings, the receiving Party shall return or destroy all documents, samples or other materials containing Confidential Information and shall retain no copies thereof, unless it is required by statute to retain the documents, samples or other materials. The receiving Party or its representative shall certify destruction of the Confidential Information.

(f) Any Party disclosing information in violation of this Section ~~10~~5 or requirements established by the arbitrator, unless such disclosure is required by federal or state law or by a court order, shall thereby waive any right to introduce or otherwise use such information in any judicial, regulatory, or other legal or dispute resolution proceeding, including the proceeding in which the information was obtained.

#### **Section ~~11~~6. Attendance at Hearings**

The arbitrator shall have the power to require the exclusion of any person, other than a Party, Participant, or other essential person, during the testimony of any witness. With the consent of all of the Parties the arbitrator may permit persons other than Parties and Participants to attend hearings.

#### **Section ~~12~~7. Representation**

Any Party or Participant may be represented by counsel or other authorized representative. A Party or Participant intending to be so represented shall notify ~~the all~~ other Parties and Participants, the arbitrator, and the RTO West Arbitration Committee of the name and address of the representative at least three (3) days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates arbitration or responds for a Party, notice is deemed to have been given.

#### **Section ~~13~~8. Oaths**

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath or affirmation administered by any duly qualified person and, if it is required by law or requested by any Party, shall do so.

#### **Section ~~14~~9. Stenographic Record**

Any Party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other Party and the arbitrator of these arrangements at least three (3) days in advance of the hearing. The requesting Party shall pay the cost of the record. The arbitrator may

require a stenographic record. ~~If the arbitrator requires or the Parties agree to provide for the transcript a stenographic record, is agreed by the Parties, or determined by the arbitrator to it shall~~ be the official record of the proceeding, ~~and its costs of the record~~ shall be shared equally by the Parties. The official record must be provided to the arbitrator and may available to the other Party for inspection, at a date, time, and place determined by the arbitrator. Parties shall bear their own expenses of obtaining copies of the official record.

### **Section ~~15~~ 10. Interpreter**

Any Party or Participant wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

### **~~Section 16. Postponement and Extension of Time~~**

~~The arbitrator may postpone any hearing upon agreement of the Parties. The Parties may modify any period of time specified in these rules or by the arbitrator by mutual agreement.~~

### **Section ~~17~~ 1. Service ~~of~~ Notice**

(a) Any papers, notices, or process ~~necessary or proper for the initiation or continuation of related to~~ an arbitration under these rules, ~~for any court action in connection therewith, or for the entry of judgment on any award made under these rules~~ may be served by first class mail (postage prepaid), overnight delivery, or personal service. ~~Any papers, notices, or process served by mail must be sent to the recipient's last known address, on a Party by mail addressed to the Party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held.~~

(b) ~~The RTO West Arbitration Committee, the arbitrators and the Parties may also use overnight delivery to give the notices required by these rules. Where all Parties and the A Party, Participant, or arbitrator may agree~~ arbitrator agree notices may be transmitted to be served by electronic mail (e-mail), facsimile transmission (fax), or other methods of communication.

(c) Service by mail shall be deemed effective five (5) days after postmark. Service by any other means shall be deemed effective upon confirmation of delivery or of successful transmission.

~~(d)~~ Unless otherwise instructed by the RTO West Arbitration Committee or by the arbitrator, any documents submitted by any Party or Participant to the RTO West Arbitration Committee or to the arbitrator shall simultaneously be provided to the other ~~Party~~ Parties to the arbitration and to all Participants.

### **Section ~~18~~ 2. Arbitration in the Absence of a Party or Representative**

Unless the law provides to the contrary, the arbitration may proceed in the absence of any Party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a Party. The arbitrator ~~shall~~ may require ~~the~~

~~Party~~ any Parties ~~who is~~ present to submit such evidence as the arbitrator ~~ion~~ may require ~~for the making of to make~~ a decision and ~~amount of~~ award.

### **Section ~~19~~ 3. Conduct of Proceedings**

(a) The Party filing the ~~initial~~ statement of claim shall present evidence to support its claim. The Party filing the response shall then present evidence to support its defense. Witnesses for each Party shall also submit to questions from the arbitrator and the adverse Party or its representative. The arbitrator has the discretion to vary this procedure, provided that the Parties are treated with equality and that each Party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the Parties to focus their presentation on issues the decision of which could dispose of all or part of the case.

~~(c) — The Parties may agree to waive oral hearings on any case.~~

### **Section ~~20~~ 14. Evidence**

(a) The Parties may offer such evidence as is relevant and material to the dispute ~~and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute~~. All evidence shall be taken in the presence of arbitrator and the Parties, except where any Party is absent, in default or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant. ~~Conformity to legal rules of evidence shall not be necessary.~~ [NTD — we should think about this and discuss it a little more.]

(c) The arbitrator shall treat as privileged any evidence protected by legal privilege, such as confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any Party or independently.

### **Section ~~21~~ 15. Discovery Procedures**

(a) Each Party shall promptly disclose after selection of the arbitrator all non-privileged documents the Party intends to present as evidence in the proceeding.

(b) In response to the Parties' discovery requests, the ~~The~~ Parties will cooperate in good faith in the voluntary, prompt and informal exchange of all non-privileged documents and other information relevant to the dispute or claim. ~~immediately after commencement of arbitration.~~

(c) At least twenty-one (21) days before the hearing, the Parties shall produce copies of any expert witness reports on which they intend to rely and a summary of any other evidence expected to be presented by an expert witness. At least ten (10) days before the hearing, the Parties shall identify the positions and names of individuals (other than experts) whom they may call as witnesses at the hearing.

~~(b) — It is expected that the Parties will complete an exchange of all non-privileged documents, including copies of all documents in their possession or control on which they rely in support of their positions, names of individuals who they may call as witnesses at the hearing, and names of all experts who may be called to testify at the hearing together with each expert's report which may be introduced at the hearing, within twenty-one (21) days after all pleadings or notice of claims have been received.~~

(ed) Except as otherwise permitted by the arbitrator, Each Party may take one deposition of ~~an~~each opposing Party or of one individual under the control of ~~the~~each opposing Party. The Parties will attempt to agree on the time, location and duration of the deposition, and if the Parties do not agree these issues will be determined by the arbitrator. For good cause and with the arbitrator's permission, Any Party may conduct depositions of its own witnesses which may be introduced as evidence at the hearing if the other Party was given fair opportunity to attend the deposition and cross-examine the witness.

~~(d) — The exchange of information must be completed no later than fourteen (14) days before the hearing.~~

~~(e) — Upon the request of any Party, the arbitrator may conduct a conference for the purpose of establishing an information exchange schedule or determining whether any information should be exchanged, including whether any additional depositions may be taken. If the arbitrator determines that the requesting Party has a reasonable need for the requested information, and that the request is not overly burdensome on the opposing Party, the arbitrator may order the information exchange. The disclosing Party will promptly comply with any directive of the arbitrator by the date specified by the arbitrator which, in no event, will be later than fourteen (14) days before the hearing.~~

(fe) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties remain under a continuing obligation to provide relevant, non-privileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that have not been previously exchanged, or witnesses and experts not previously identified, will not be considered by the Arbitrator(s) at the hearing.

(gf) The Parties will promptly notify the arbitrator when an unresolved dispute exists regarding discovery issues. The arbitrator may attempt to facilitate an informal resolution of the dispute by the Parties themselves. If the dispute is not informally resolved, the arbitrator will decide the dispute. ~~With the consent of all Parties, the arbitrator may appoint a special master to assist in resolving the dispute.~~

~~(h) — A Party shall disclose to other Parties, no later than twenty-eight (28) days before the hearing, the identity of any person who may be used at the hearing to present expert testimony. A witness qualifies as an expert by knowledge, skill, experience, training, or education. This disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the Party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten (10) years; and a listing of any other cases in which the witness has testified as an expert at an arbitration, deposition, or trial within the preceding four (4) years. A Party may depose any person who has been identified as an expert whose opinions may be presented at trial. The Party seeking discovery shall pay the expert a reasonable fee for time spent in responding to discovery under this subsection.~~

~~(ig) An arbitrator may draw an unfavorable, adverse inference or presumption from the failure of a Party to provide discovery.~~

### **~~Section 22. — Evidence by Affidavit and Posthearing Filing of Documents or Other Evidence~~**

~~(a) — The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it is entitled to after consideration of any objection made to its admission.~~

~~(b) — If the Parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall also be submitted to the RTO West Arbitration Committee and the other Party. The other Party shall be afforded an opportunity to examine and respond to such documents or other evidence.~~

### **~~Section 23. — Inspection or Investigation~~**

~~An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the RTO West Arbitration Committee to so advise the Parties. The arbitrator shall set the date and time and the RTO West Arbitration Committee shall notify the Parties. Any Party who so desires may be present at such an inspection or investigation. In the event one or all Parties are not present at the inspection or investigation, the arbitrator shall make a written report to the Parties and afford them an opportunity to comment.~~

### **Section ~~24~~ 16. Interim Measures**

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property.

~~(b) — Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.~~

(e**b**) A request for interim measures addressed by the Party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

### ~~Section 25~~ 17. Closing of ~~Hearing~~ Proceedings

(a) When the arbitrator is satisfied that the Parties have had a reasonable opportunity to present their cases and all Participants and Parties have had a reasonable opportunity to exercise their rights under the RTO West Dispute Resolution Provisions, the arbitrator shall declare the proceedings closed. ~~Thereafter, no party may make any further submissions or arguments or present any evidence unless requested or authorized by the arbitrator.~~

~~(b) — If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section 19 of the RTO West Arbitration Procedural Rules and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be closing date of the hearing. The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the Parties, upon the closing of the hearing.~~

(e**b**) Subject to Section ~~13~~ 12.3.6 of RTO West ~~Tariff~~ Dispute Resolution Provisions the arbitrator shall have thirty (30) days from the closing of the hearing proceedings within which to make an award.

### ~~Section 26.~~ — ~~Reopening of Hearing~~

~~The arbitrator may reopen the hearing for good cause, (on his or her own initiative or upon the application of a Party) at any time before the award is made. If reopening the hearing would prevent the making of the award within the time specified in Section 25(c), the matter may not be reopened unless the Parties agree on an extension of time. The arbitrator may reopen the hearing and shall have thirty (30) days from the closing of the reopened hearing within which to make an award.~~

### ~~Section 27~~ 18. Waiver of Rules

Any Party who proceeds with the arbitration ~~after knowledge that any~~ without objecting to any failure to comply with any provision or requirement of these rules ~~has not been complied with and who fails to promptly state an objection to the arbitrator~~ shall be deemed to have waived the right to objection.

~~Section 28.~~ — ~~[This section intentionally left blank.]~~

~~Section 29.~~ — ~~[This section intentionally left blank.]~~

~~Section 30.~~ — ~~[This section intentionally left blank.]~~

**Section 31.** — ~~[This section intentionally left blank.]~~

**Section ~~32~~ 19. Award upon Settlement**

If the Parties settle their dispute during the course of the arbitration and if the Parties so request, the arbitrator ~~may~~ shall set forth the terms of the settlement in a “consent award.”

**Section 33. — Delivery of Award to Parties**

~~Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof by overnight delivery addressed to the Parties or their representatives at the last known addresses, or in accordance with notice provisions of these rules.~~

**Section ~~34~~ 20. Modification Correction of Award**

Within ~~twenty ten~~ (2010) days after the ~~transmittal date~~ of an award, any Party, upon notice to the other Parties, may request the arbitrator, ~~through the RTO Arbitration Committee,~~ to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other Party shall have ~~be given ten five~~ (105) days following service to respond to the request. The arbitrator shall dispose of the request within ~~twenty five~~ (205) days after service ~~transmittal by the RTO West Arbitration Committee to the arbitrator of~~ of the request and any responses thereto.

**Section ~~35~~ 21. Release of Documents for Judicial Proceedings**

The RTO West Arbitration Committee shall, upon written request of a Party, furnish to the Party, at the Party’s expense, certified copies of any papers in the RTO West Arbitration Committee’s possession that may be required in judicial proceedings related to the arbitration.

**Section 36. — Application to Court and Exclusion of Liability**

(a) — ~~Parties to arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.~~ [move to tariff]

(b) — ~~Neither the RTO West Arbitration Committee nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.~~ [move to tariff]

**Section 37.** — ~~[This section intentionally left blank.]~~

**Section ~~38~~ 22. Summary Disposition** [NTD: Slightly modified from FRCP Rule 56]

- (a) Any Party may at any time after the selection of the arbitrator, move with or without supporting affidavits for a summary disposition in the Party's favor upon all or any part of a claim or counterclaim.
- (b) The motion shall be served at least 10 days before the time fixing for the hearing. The Party opposing the motion, ~~prior to~~ before the day of the hearing, may serve opposing affidavits. The grant of summary disposition shall be rendered forthwith if the ~~S~~ S statement of ~~C~~ C claim, response, ~~evidence~~, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the Party making the motion is entitled to an affirmative ruling as a matter of law.
- (c) A summary disposition may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

~~(d) — If on motion under this Section, a ruling is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the arbitrator at the hearing of the motion, by examining the Statement of Claim, response, and the evidence before him or her and by interrogating the Parties and their representatives, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The arbitrator shall thereupon make a ruling specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further hearings in the action as are just.~~

**Section ~~39~~ 23. Interpretation and Application of Rules**

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's power and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. ~~If there is a conflict between the provision of these rules and the RTO West Tariff, the RTO West Tariff shall apply.~~

**Section 40. — Amendment of Rules**

~~The RTO West Arbitration Committee is authorized to change these rules, from time to time, as it may deem necessary.~~