



# Oregon

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**To:** Oregon Energy Facility Siting Council

**From:** Thomas L. Jackman, Rules Coordinator

**Date:** July 5, 2023

**Subject:** Agenda Item E (Action Item) – Initiation of Contested Case Rulemaking for the July 17-19, 2023 EFSC Meeting

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## STAFF RECOMMENDATION

Staff recommends that the Council initiate informal proceedings on the Contested Case Rulemaking, which was approved for the 2023-2025 Rulemaking Schedule. Staff recommends that Council approve the scope and general direction of the rulemaking as outlined below. Staff also requests that the Council approve the creation of a Rulemaking Advisory Committee (RAC). Staff's recommended makeup of this RAC (by category) is discussed below. Please note that the Council is not being asked at this time to consider proposed rule amendments or the adoption of permanent rules.

## BACKGROUND AND SUMMARY

As part of the 2023-2025 Rulemaking Schedule, the Council directed staff to prioritize work on the Contested Case rulemaking. This project is timely as it is on the heels of three significant contested case proceedings and staff seeks to take the lessons learned from those experiences while they are fresh to improve the process for future contested case proceedings.

## CONTESTED CASE RULEMAKING - SCOPE AND OBJECTIVES

The Contested Case rulemaking is intended to evaluate the contested case process as currently outlined primarily in Division 015 to achieve three main goals:

- 1) Adopt Office of Administrative Hearings (OAH) contested case rules in OAR 137-003-0501 through 137-003-0700, in place of the Attorney General model rules in OAR 137-003-0001 through 137-003-0092.
- 2) Remove Council contested case rules that would not be needed if the OAH rules are adopted.
- 3) Improve the contested case process by, among other things, identifying where the Council's rules can be supplemented, clarified and/or placed in a different order to improve participants' understanding of the process and make the process more efficient.

### Potential Adoption of OAH Rules

Many agencies are obligated to use administrative law judges (ALJs) assigned by OAH for their contested case proceedings.<sup>1</sup> The Council is statutorily exempt from this requirement.<sup>2</sup> Even though Council is not legally obligated to, in recent years Council has appointed ALJs assigned by OAH as hearing officers for

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<sup>1</sup> See ORS 183.635(1).

<sup>2</sup> See ORS 183.635(2)(k).

Council's contested case proceedings.<sup>3</sup> The Council is likewise not required to use OAH rules, nor the model rules for contested case hearings provided by the Attorney General. However, for many years Council contested cases have been governed by the Attorney General model rules supplemented by Council's own rules. A preliminary review of these various rulesets suggests that the Council's contested case process can be improved by adopting the OAH rules in place of the Attorney General model rules and revising or supplementing some of the existing Council rules. This rulemaking will seek to identify which, if any, OAH rules should be adopted.

#### Filling in Gaps / Reducing Inefficiencies / Improving Clarity

Recent contested case proceedings suggest there are several areas where participants are confused about their rights and obligations. Apart from adopting OAH rules and organizing the rules in an order that more closely follows the order/flow of the contested case process, this rulemaking will seek to address other areas that participants in recent contested cases have struggled with, including, but not limited to:

- What is required to participate in a contested case, including whether a prospective party has raised an issue with sufficient specificity
- What it means to be a limited party as opposed to being granted full party status
- Clarifying the duties of the Hearing Officer, including conducting prehearing conferences and issuance of prehearing orders
- What can be appealed directly to Council and what cannot

Staff anticipates that RAC members and members of the public will raise additional areas of concern and confusion that can and should be addressed by this rulemaking.

Staff recommends the Council approve the scope of the Contested Case rulemaking as outlined above.

#### **RAC FORMATION**

At this time, staff recommends the formation of a RAC, which will be relied upon to provide feedback from interested parties about the proposed modifications to the rules. Staff proposes a RAC consisting of 15 members:

- 2 – Investor-owned utilities
- 3 – Independent power producers and their representation
- 5 – Reviewing agencies (which includes the counties, state agencies, and the nine tribal governments)
- 3 – The public
- 2 – Resource interest groups and environmental justice groups

Staff will hold a minimum of two RAC meetings. However, given the potential interest and complexity of this rulemaking, more than two RAC meetings are likely.

Staff expects high interest in this rulemaking given the importance of contested case proceedings to the siting process.

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<sup>3</sup> See ORS 183.625(4), allowing for this option.