



# Oregon

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**To:** Energy Facility Siting Council

**From:** Kellen Tardaewether, Senior Siting Analyst

**Date:** September 15, 2023

**Subject:** Agenda Item B: Boardman to Hemingway Transmission Line, Request for Site Certificate Amendment 1, Council Decision on Requests for Contested Case, and Possible Material Change Hearing and Public Notice of Hearing to Adopt Final Order (ORS 469.370(7)) for the September 22, 2023 EFSC Meeting

**Attachments:** Attachment 1: Request for Contested Case I. Gilbert and Stop B2H 2023-09-08  
Attachment 2: Request for Contested Case I. Gilbert 2023-09-08  
Attachment 3: Request for Contested Case J. Williams 2023-09-08

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## SUMMARY OF CONTESTED CASE REQUESTS AND NEXT STEPS

On the record of the Draft Proposed Order (DPO) Public Hearing for Request for Amendment 1 of the Boardman to Hemingway Transmission Line Site Certificate (June 14 through July 18, 2023), 5 individuals and organizations commented and preserved their right to submit a request for contested case on the Proposed Order. The Oregon Department of Energy (ODOE or Department) issued Notice of the Proposed Order and Opportunity to Request a Contested Case on August 7, 2023; the notice identified September 8, 2023 as the deadline for eligible individuals to submit a contested case request.

The Department received three contested case requests, by eligible individuals, on September 8, 2023. Irene Gilbert filed contested case requests, on behalf of herself and Stop Boardman to Hemingway (B2H) Coalition (STOP B2H), for two issues: non-compliance with the Forest Practices Act (FPA), and the adequacy of the retirement bond to restore the site; Ms. Gilbert also filed another request as an individual for the issue of failure to notify the public of the ability to comment on proposed site certificate condition revisions. John Williams filed a contested case request on the issue of the availability of cultural resource mapping.

The Department recommends the Energy Facility Siting Council (EFSC or Council) review the issues raised in the contested case requests, consolidating review of duplicate issues filed by Ms. Gilbert and Stop B2H, and then separately consider distinct issues raised by Mr. Williams and Ms. Gilbert. Table 1: *Summary of DPO Comments, Certificate Holder Responses, Council*

*Review, Proposed Order, and ODOE Evaluation of Requests for Contested Case Requests*, in this staff reports provides the evaluation and staff recommendations for on whether issues raised warrant granting a contested case proceeding.

For the reasons provided in Table 1, the Department recommends Council find that none of the issues raised in the requests raise a significant issue of fact or law that is reasonably likely to affect the Council’s determination on whether the facility, with the changes proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24; and therefore, a contested case is not justified.<sup>1</sup> The Department recommends Council deny the contested case requests and adopt the proposed order based on the considerations described in OAR-345-027-0375 and subject to the existing, and recommended new and amended site certificate conditions.<sup>2</sup>

The requests for contested case are provided as attachments to this staff report (via hyperlink). Some contain a significant number of pages of information. However, as identified in Table 1, below, most of the information submitted with the requests was not provided on the record of the DPO, and since the record closed on July 19, 2023, this information is not appropriate to consider in a request for contested case. Under OAR 345-027-0367(5)(b), a person who intends to raise an issue that may be the basis for granting a contested case proceeding must raise that issue on the record of the DPO public hearing with sufficient specificity to afford the Council, the Department, and the certificate holder an adequate opportunity to respond to the issue. To raise an issue with sufficient specificity, a person must present facts, on the record of the public hearing, that support the person’s position on the issue. Providing information after the record of the DPO public hearing closes in a request for contested case does not afford the Council, the Department, and the certificate holder an adequate opportunity to respond to the issue.

## **APPLICABLE LEGAL STANDARDS FOR REVIEWING CONTESTED CASE REQUESTS**

Only those persons, including the certificate holder, who commented in person or in writing on the record of the DPO public hearing (June 14 through July 18, 2023) may request a contested case proceeding on the Proposed Order on Request for Site Certificate Amendment 1.

To properly raise an issue in a request for a contested case proceeding on the proposed order for an amendment, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the DPO public hearing,

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<sup>1</sup> OAR 345-027-0371(9).

<sup>2</sup> Scope of Council's Review applicable to Request for Amendment 1 (RFA1):

1. That the portion of the facility within the area added to the site boundary by the amendment complies with all laws and Council standards applicable to an original site certificate application;
2. The amount of the bond or letter of credit required under OAR 345-022-0050 is adequate; and,
3. The facility, with proposed RFA1 changes, complies with the applicable laws or Council standards that protect a resource or interest that could be affected by the proposed RFA1 changes.

unless the Department did not follow the requirements of OAR 345-027-0367, or unless the action recommended in the proposed order differs materially from the DPO, including any recommended conditions of approval, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences. If a person has not raised an issue at the DPO public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the Council may not grant a contested case proceeding for that issue. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support that person's position on the issue.<sup>3, 4</sup>

Contested case requests must include:<sup>5</sup>

- The person's name, mailing address and email address and any organization the person represents;
- A short and plain statement of the issue or issues the person desires to raise in a contested case proceeding;
- A statement that describes why the Council should find that the requester properly raised each issue, including a specific reference to the person's prior comments to demonstrate that the person raised the specific issue or issues on the record of the public hearing, if applicable;
- A statement that describes why the Council should determine that each identified issue justifies a contested case, under the evaluation described in OAR 345-027-0371(9);
- Name and address of the person's attorney, if any;
- A statement of whether the person's request to participate in a contested case is as a party or a limited party, and if as a limited party, the precise area or areas in which participation is sought;

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<sup>3</sup> OAR 345-027-0371(5).

<sup>4</sup> OAR 345-015-0016(3). Council does not consider a commenter's incorporation by reference statements made by other persons, (whether they are comments on the DPO, raised by other commenters for this or past proceedings, comments on another agency proceeding, or other external references) to meet the sufficient specificity requirement under ORS 469.370(3) and OAR 345-015-0016(3). Blanket incorporations by reference do not afford the Department, Council or certificate holder an adequate opportunity to respond to each issue as required under ORS 469.370(3) because they typically do not specify which portion(s) of the other person(s) comments are to be incorporated or how those comments relate to any alleged shortcoming in the subject DPO. Attempts to incorporate by reference comments made regarding a matter being considered by another agency do not inform the Council, Department or certificate holder of any alleged error in the subject DPO sufficient to allow for a response. Further, incorporations by reference of another person's comments on the subject DPO, no matter how specific, are procedurally inefficient because they could result in multiple persons presenting evidence, examining witnesses, etc. regarding the same issue in a contested case. Council also maintains that this position is consistent with the reasons why it is appropriate to limit the participation of persons seeking to participate in a contested case to the issues each properly raised in their respective DPO comments, which is summarized further in this order.

<sup>5</sup> OAR 345-027-0371(6).

- If the person seeks to protect a personal interest in the outcome of the proceeding, a detailed statement of the person's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding;
- If the person seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the person's qualifications to represent such public interest; and
- A statement of the reasons why others who commented on the record of the public hearing cannot adequately represent the interest identified in OAR 345-027-0371(6)(h) or (i).

Requests for contested case will be evaluated at the September 22, 2023 Council meeting. Under OAR 345-027-0371(7), before considering whether an issue justifies a contested case proceeding, the Council must determine that the person requesting a contested case commented in person or in writing on the record of the DPO public hearing and properly raised each issue included in their request. To determine that a person properly raised each issue included in their request, the Council must find that:

- The person making the contested case request raised the issue on the record of the DPO public hearing described in OAR 345-027-0367 with sufficient specificity to afford the Council, the Department, and the certificate holder an adequate opportunity to respond to the issue;
- If the issue was not raised on the record of the DPO, that the commenter identified that the Department did not follow the procedural requirements of OAR 345-027-0367; or
- If the issue was not raised on the record of the DPO, that the commenter identified that the issue is based on material changes presented in the Proposed Order.

Pursuant to OAR 345-027-0371(8), if the Council finds that the person requesting a contested case failed to comment in person or in writing on the record of the DPO public hearing or failed to properly raise any issue, as described above, the Council must deny that person's contested case request. If the Council finds that the person requesting a contested case commented in person or in writing on the record of the DPO public hearing and properly raised one or more issues, the Council's determination of whether an issue justifies a contested case must be limited to those issues the Council finds were properly raised.

After identifying the issues properly raised the Council must determine whether any properly raised issue justifies a contested case proceeding. To determine that an issue justifies a contested case proceeding, **the Council must find that the request raises a significant issue of fact or law that is reasonably likely to affect the Council's determination on whether the facility, with the changes proposed by the amendment, meets the applicable laws and Council**

**standards included in chapter 345 divisions 22, 23 and 24.** If the Council does not have jurisdiction over the issue raised in the request, the Council must deny the request.<sup>6</sup>

The Council must take one of the following actions when determining if issues raised in request(s) justify a contested case proceeding:

1. If the Council finds that the request identifies one or more properly raised issues that justify a contested case proceeding, the Council must conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to 345-015-0014 and 345-015-0018 to 345-015-0085. The parties to a contested case proceeding must be limited to those persons who commented on the record of the public hearing and who properly raised issues in their contested case request that the Council found sufficient to justify a contested case, except that the certificate holder is an automatic party to a contested case.<sup>7</sup> The issues a party to a contested case proceeding may participate on must be limited to those issues that party properly raised in its contested case request that the Council found sufficient to justify a contested case, except that the certificate holder may participate on any issue the Council found sufficient to justify a contested case proceeding.<sup>8</sup>
2. If the Council finds that the request identifies one or more properly raised issues that an amendment to the proposed order, including modification to conditions, would settle in a manner satisfactory to the Council, the Council may deny the request as to those issues and direct the Department to amend the proposed order and send a notice of the amended proposed order to the same persons who received notice of the proposed order and opportunity to request a contested case.<sup>9</sup>
3. If the Council finds that the request does not identify a properly raised issue that justifies a contested case proceeding, the Council must deny the request. In a written order denying the request, the Council must state the basis for the denial. The Council must then adopt, modify or reject the proposed order based on the considerations described under the Council's Scope of Review in OAR-345-027-0375.<sup>10</sup>

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<sup>6</sup> OAR 345-027-0371(9)

<sup>7</sup> On this issue, the Oregon Supreme Court ruled that EFSC is expressly authorized to limit the participation of a party as a limited party – i.e., to treat a person as a limited party even if they requested full party status, based on the issues the eligible individual properly raised in their DPO comments, as identified in their petition. *Stop B2H Coalition v. EFSC*, 792 Or 801-804, 815 (2023).

<sup>8</sup> OAR 345-027-0371(10)(a)

<sup>9</sup> OAR 345-027-0371(10)(b)

<sup>10</sup> OAR 345-027-0371(10)(c)

## **EVALUATION OF CONTESTED CASE REQUESTS**

Below, Table 1: *Summary of DPO Comments, Certificate Holder Responses, Council Review, Proposed Order, and ODOE Evaluation of Requests for Contested Case Requests*, was derived from Proposed Order Table A-1 which described the comments received on the record of the DPO, responses from the certificate holder, Council comments, and Department recommended revisions in proposed order, if applicable. Table 1 provides the DPO comment summary, final disposition in the proposed order, a summary of contested case request issues, and Department evaluation and recommendations of the requests.

**Table 1: Summary of DPO Comments, Certificate Holder Responses, Council Review, Proposed Order, and ODOE Evaluation of Requests for Contested Case Requests**

| Draft Proposed Order Phase  |  | Proposed Order Phase  | Requests for Contested Case   |   |  |  |
|---|--|---|---|---|--|--|
| Commenter   | DPO Comment Summary and Facts/Evidence Submitted on Record   | Certificate Holder DPO Comment Response Summary   | Recommendations, Responses, and Location in Proposed Order  | Issue Statement in Request for Contested Case | Issue Properly Raised in Request for Contested Case* (Yes/No)  | Does the request raise a significant issue of fact or law that is reasonably likely to affect the Council's determination whether the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24; and therefore, justifies a contested case? (Yes/No)  |
| <b>Issue/Requestor: Forest Practices Act (FPA) - STOP B2H and Irene Gilbert</b> |  |   |   |   |  |  |
| STOP B2H – 07-18-2023 Written Comments  | <p>DPO comments related to the FPA:</p> <ul style="list-style-type: none"> <li>• New OARs for the Oregon Dept. of Forestry (ODF), apply to the facility,</li> <li>• Setbacks from streams and waterways apply to the facility,</li> <li>• Standards for roads in forest areas,</li> <li>• Evaluation of and impacts to avian and wildlife species not consistent with FPA,</li> <li>• Reforestation practices apply to the facility,</li> <li>• Plan for an Alternate Practice,</li> <li>• Conditions in the Site Certificate conflict with and waive requirements of FPA.</li> </ul> <p><u>Facts/Evidence to Support Issue:</u></p> <ol style="list-style-type: none"> <li>1. DPO Comment Attachment 1: Office of Governor Kate Brown memo regarding</li> </ol> | <p>Comments are outside the scope of the Council's review because the Council has chosen not to assert jurisdiction over the application of the FPA for the facility, as amended. Certificate holder will work directly with ODF regarding compliance with FPA requirements, including its Plan for an Alternate Practice</p> | <p>Department and Council concur with certificate holder responses that, in the Final Order on ASC, Council did not assert jurisdiction of the FPA and stated certificate holder should work directly with ODF but the certificate holder nonetheless must comply with applicable provisions of FPA, including but not limited to the Plan of Alternate Practice.</p> <p>Pursuant to Council direction at the RFA1 DPO hearing, the proposed order includes a statement asserting that Council has not established jurisdiction over the FPA. See Section III.R., <i>Other Applicable</i></p> | <p>Failure to Comply with FPA</p>             | <p>Yes, as raised in DPO comments*</p> <p>*Additional arguments and facts provided in Ms. Gilbert's request were not properly raised on the record.</p> <p><u>Facts/Evidence to Support Issue that <i>Cannot be Considered</i>:</u></p> <ol style="list-style-type: none"> <li>1. Oregon Forest Resources Institute, Oregon Forest Protection Laws Illustrated Manual; Third Edition;</li> <li>2. Letter from ODF regarding ODF's review of the ApASC and compliance with edits with the FPA. ODOE - B2HAPPD0c13-5 ASC Reviewing Agency Comment ODF_Tokarczyk 2018-11-15;</li> <li>3. 2022 Private Forest Accord, (presented to the Oregon Legislature,</li> </ol> | <p>No.</p> <p>Compliance with FPA is not an issue within Council jurisdiction and therefore is not relevant to whether the changes proposed in the amendment request comply with an applicable Council standard, statute or rule. The second amended project order for the facility does not identify the FPA ORS/OAR as applicable to this facility.<sup>11, 12</sup> Further, as discussed in the Final Order on ASC and by Council at its July 19, 2023 review of the DPO on RFA1, Council did not assert jurisdiction of the FPA and continues not to assert jurisdiction of the FPA for RFA1. For these reasons, the Department recommends Council deny the request.</p> <p>The Department recommends Council find that the responses to this issue as provided in Proposed Order Table A-1 are sufficient and no amendments to the Proposed Order are necessary.</p> |

<sup>11</sup> B2HAPPD0c15 ApASC Second Amended Project Order 2018-07-26. Page 11 of 29. The second amended project order continues by stating, "If the removal of trees would be necessary as part of the proposed project development, and such removal is part of a commercial operation, that activity may be subject to the Oregon Forest Practices Act." As designated in the 2021 ODF FPA rule guidance document, an activity must meet the ODF rule definitions of "operation," "forestland," "forest tree species," and "commercial" go together with ODF policy guidance in determining Forest Practices Act jurisdiction over an activity. Generally, the FPA jurisdiction relates to activities that are intended to profit from the harvesting of trees. <https://www.oregon.gov/odf/Documents/workingforests/fpa-guidance-division-600-definitions.pdf>.

<sup>12</sup> A project order is the document that establishes the state statutes and administrative rules containing standards or criteria that are applicable to the facility. OAR 345-015-0160(1).

**Table 1: Summary of DPO Comments, Certificate Holder Responses, Council Review, Proposed Order, and ODOE Evaluation of Requests for Contested Case Requests**

| Draft Proposed Order Phase               |  | Proposed Order Phase                            |  | Requests for Contested Case                   |   |   |
|--|--|---|--|---|---|---|
| Commenter                                | DPO Comment Summary and Facts/Evidence Submitted on Record   | Certificate Holder DPO Comment Response Summary | Recommendations, Responses, and Location in Proposed Order   | Issue Statement in Request for Contested Case | Issue Properly Raised in Request for Contested Case* (Yes/No)   | Does the request raise a significant issue of fact or law that is reasonably likely to affect the Council’s determination whether the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24; and therefore, justifies a contested case? (Yes/No) |
|  | <p>Private Forest Accord implementation.</p> <p>2. DPO Comment Attachment 2: Forest Practices Act Rule Revisions. As an outcome of Senate Bills 1501 and 1502 and House Bill 4055 and the Private Forest Accord Report dated February 2, 2022, the Board of Forestry adopted the following administrative rules on October 26, 2022.</p> |   | <p><i>Regulatory Requirements Under Council Jurisdiction</i>, which summarizes Council’s prior position in the Final Order on ASC regarding the FPA.</p> |   | <p>Oregon Governor Kate Brown, and the Oregon Board of Forestry on February 2, 2022);</p> <p>4. Forest Practices Rule Guidance, December 17, 2021;</p> <p>5. Oregon Department of Land Conservation and Development – DLCD, 2018/2019 Oregon Farm and Forest Land Use Report, November 15, 2020;</p> <p>6. Forest Practices Technical Guidance Waiver of Statutory Written Plan,</p> <p>7. Letter from ODF regarding ODF’s review of the ASC and compliance and minor edits with the FPA, February 19, 2019</p> |   |
| Irene Gilbert – 07-17-2023 Oral Comments | DPO comments related to the Oregon FPA:  | Same as provided above.                         | Same as provided above.  | Same as provided above.                       | Same as provided above.   | No. Same evaluation as provided above.  |



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|  | Same as provided above.<br><br><u>Facts/Evidence to Support Issue:</u><br>None   |   |  |   |   |   |
| <b>Issue/Requestor: Bond Adequacy – Stop B2H and Irene Gilbert</b> |  |   |  |   |   |   |
| STOP B2H – 07-18-2023 Written Comments                             | Re-evaluation of the required bond is necessary. OAR 345-027-0375 requires EFSC to complete a full review of the issue of whether the bond amount complies with the requirement under OAR 345-022-0050 including determining the costs of restoring the site and requiring a bond of an amount, “satisfactory to the Council to restore the site.” Council determined that the cost to restore the site of the transmission line and supporting structures would be \$140 million (First Amended Site Certificate OPR-RT-01, Page 65.) EFSC must require IPC to provide a bond that is “adequate to restore the site.” | STOP B2H’s arguments were already litigated in the EFSC contested case proceeding for the ASC, and EFSC found that the estimated cost of restoration was reasonable and certificate holder provided sufficient information about its financial capability to demonstrate that it could obtain a bond or letter of security to cover required decommissioning and restoration costs. While STOP B2H focuses on ongoing wildfire litigation related to PacifiCorp and | No revisions to Proposed Order made.<br><br>PacifiCorp is not the certificate holder for the facility. Stop B2H’s comments related to concerns about liability in the event of a wildfire are outside the scope of the Retirement and Financial Assurance standard and RFA1, and not supported by facts. Certificate holder response sufficient. | The bond amount and flexibility fails to provide for the protection of landowners, citizens, and public agencies from being required to assume the costs of site restoration in the event the developer abandons the transmission line, refuses to do so, declares bankruptcy or some other reason fails to restore the site. | Yes, as raised in DPO comments*<br><br>*Additional arguments and facts provided in Request for Contested Case but not within DPO comments, are not considered properly raised.<br><u>Facts/Evidence to Support Issue that <i>Cannot be Considered</i>:</u><br>1. OPUC Docket No. PCN 5 Exhibit Accompanying Rebuttal Testimony of Rick T. Link, B2H Term Sheet Dated January 18, 2022. March 2023. Contract No. 22TX-17207, | No.<br><br>The changes proposed in RFA1 do not warrant a re-evaluation of the approach or mechanics established in the conditions adopted and imposed by Council to address the standard.<br><br>OAR 345-027-0375(2)(e), requires that, for all requests for amendment, the Council must find that the amount of the bond or letter of credit required under OAR 345-022-0050 is adequate.<br><br>As described in the Proposed Order on RFA1, the proposed road and transmission line segment alternatives are similar to the infrastructure (tower foundations, transmission towers, road construction, road |

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|                            | <p>The bond amount and flexibility currently included in the site certificate fails to provide for the protection of landowners, residents, ratepayers, and public agencies, from the liability that will occur in the event IPC abandons the transmission line or declares bankruptcy without restoring the site. The current ownership of the transmission line by IPC and PacifiCorp increases the likelihood that the transmission line may be abandoned without restoration because PacificCorp may be at risk of filing for bankruptcy due to ongoing and potential future wildfire-related litigation that may result in millions and potentially billions of dollars owed.</p> <p><u>Facts/Evidence to Support Issue:</u></p> <ol style="list-style-type: none"> <li>Reference to PacificCorp and Idaho Power Contract No. 22TX17207, Page 24 and 26. No contract or excerpts provided.</li> <li>Reference to an article, “Pacific Power may want customers to pay fire liability,”</li> </ol> | <p>implies that PacifiCorp is at risk of filing for bankruptcy, IPC—as the certificate holder—is responsible for the bond to cover the decommissioning and restoration costs associated with retirement of the facility per Retirement and Financial Assurance Conditions 2 through 5. Moreover, as stated above, EFSC has already concluded that IPC is financially capable of obtaining a bond in the amount necessary to restore the facility site to a useful non-hazardous condition. Finally, if there are any changes that would require adjustment of the bond amount, Retirement and Financial Assurance Condition 5 requires certificate holder to provide EFSC and ODOE a report every five years</p> |  |   | <ol style="list-style-type: none"> <li>FERC News Release. FERC Orders PacifiCorp to Respond to Allegations of Reliability Violations, April 15, 2021, Docket No. IN21-6-000,</li> <li>News article, Courthouse News Service. Feds Blame PacifiCorp for Oregon Wildfire, Tuesday, April 11, 2023,</li> <li>Contested Case Request, PDF page 6-8 of 629 lists “Other Documentation and references cited,” as Exhibits 1 through Exhibit 20. Several of the references are to documents and EFSC meeting recordings, which are already part of the record. The above-listed documents were the only documents filed with the request; the other Exhibits were not provided with request. However, is not an appropriate time to add evidence or arguments to the record, as the record is</li> </ol> | <p>width, etc.) approved in the 2022 Final Order on ASC, therefore, restoring the site to a useful, nonhazardous condition for the transmission line route alternatives and roads proposed in RFA1 would be based on the same assumptions and involve the same activities that was approved in the Final Order on ASC. Approximately one year ago, in September 2022, Council adopted and imposed Condition PRE-RT-01 based on a determination that that \$140 million was a satisfactory amount to restore the site to a useful, nonhazardous condition. In this condition, Council adopted a phased approach where the bond or letter of credit (LOC) would be provided in 1/16<sup>ths</sup>, starting at preconstruction, to continue increasing by 1/16<sup>th</sup> every quarter for four years. Once the transmission line is in operation, the bond or letter of credit would then be reduced from the full \$140 million to \$1 dollar combined with a 5-year review, or more frequently if requested by Council, of IPC’s financial status and risk. The condition allows for Council to require an increased bond or LOC at any time.</p> <p>As explained in the Proposed Order on RFA1, the transmission line alternatives proposed in RFA1 are not additive, meaning that either an approved ASC route or an alternative route</p> |

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|----------------------------|--|---|--|---|---|---|
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|                            | by: Jashayla Pettigrew. No article provided.               | on: (a) the physical condition of the facility; (b) any evolving transmission or electrical technologies that could impact the continued viability of the facility; (c) the facility’s performance in the context of the larger Northwest power grid; and (d) the certificate holder’s financial condition, including the certificate holder’s credit rating at that time. Importantly, under the condition, EFSC may request the report on an off-cycle year if requested. Moreover, the condition allows EFSC to consider whether the approach towards the financial assurance instrument remains appropriate and would account for unforeseen shifts in the power grid or the Idaho Power’s financial condition. |  |   | closed for public comments.                                   | <p>would be constructed, operated, and retired. If the certificate holder selected to construct, operate and retire the alternatives proposed in RFA1, there would be approximately 1.8 miles of additional transmission line infrastructure to retire. Since this would be less than 0.1% change in the total length of the facility, the type of facility is the same, and the actions to restore the site would be the same, the previously approved \$140 million, remains sufficient to retire the facility, as amended.</p> <p>For these reasons, the Department recommends Council find that the contested case request on this issue does not raise a significant issue of fact or law that is reasonably likely to affect the Council’s determination whether the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24; (Specifically OAR 345-027-0375(2)(e) and OAR 345-022-0050); and therefore, it does not justify a contested case proceeding.</p> <p>The Department recommends Council find that the responses to this issue as provided in Proposed Order Table A-1 are sufficient and no amendments to the Proposed Order are necessary.</p> |

**Table 1: Summary of DPO Comments, Certificate Holder Responses, Council Review, Proposed Order, and ODOE Evaluation of Requests for Contested Case Requests**

| Draft Proposed Order Phase                                      |   | Proposed Order Phase   |   | Requests for Contested Case  |   |   |
|---|---|--|---|--|---|---|
| Commenter   | DPO Comment Summary and Facts/Evidence Submitted on Record  | Certificate Holder DPO Comment Response Summary  | Recommendations, Responses, and Location in Proposed Order                          | Issue Statement in Request for Contested Case  | Issue Properly Raised in Request for Contested Case* (Yes/No)   | Does the request raise a significant issue of fact or law that is reasonably likely to affect the Council’s determination whether the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24; and therefore, justifies a contested case? (Yes/No) |
| Irene Gilbert – 07-18-2023 Oral Comments                        | Ms. Gilbert argues that the bond amount is not reasonable to address restoration costs, and that the \$140 million should be the total that’s carried for the bond for the life of the facility to protect the public from unforeseen circumstances. Furthermore, Ms. Gilbert argues that the site certificate conditions regarding the bond are not flexible enough as they do not address unforeseen conditions, such as a tornado or company declaring bankruptcy because of costs associated with wildfire litigation liability. Ms. Gilbert specifically references ongoing litigation of PacifiCorp regarding the Labor Day fires and a negotiated settlement specific to Idaho Power.<br><br><u>Facts/Evidence to Support Issue:</u><br>None | Same as provided above.  | Same as provided above.   | Same as provided above.  | Same as provided above.   | Same as provided above.   |
| <b>Issue/Requestor: Procedural Notice Issue - Irene Gilbert</b> |   |  |   |  |   |   |
| Irene Gilbert – 07-17 and 18-2023 Oral Comments                 | Unaware that she could comment on recommended amended site certificate conditions. Requested a time extension to review and provide comments on the record of the DPO specific to revised site  | Ms. Gilbert’s comment conflates two distinct plans. The Vegetation Management Plan describes the methods in which vegetation along | No revisions to Proposed Order made.<br><br>Certificate holder response sufficient. | ODOE failed to inform the public and Council that they had an opportunity to comment and request Contested | Yes, as raised during the record of the hearing on the DPO.*<br><br>*At the July 17 and 18 in-persons hearings on the DPO, Ms. Gilbert raised the concern | No.<br><br>Ms. Gilbert requests a contested case based on Division 27 procedural requirements and does not raise “a significant issue of law or fact that may affect the Council’s  |

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|                            | <p>certificate conditions. Ms. Gilbert explained that the notice was not clear that she could comment on conditions and possible implications for the revisions for the entire facility, because of the Scope of Council’s Review assessing the areas added to the site boundary.</p> <p>One revised site certificate condition causing me concern is this condition saying that the vegetation management plan is finalized. I have not reviewed the Vegetation Management Plan. I know that during the previous activities related to this, this plan is required to comply with OAR 345-025-0016. The plan does not provide for assuring that noxious weeds do not impact wildlife habitat; it’s limited in the area that they are going to cover; does not provide for monitoring for the life of the development.</p> | <p>the transmission line will be managed during operation of the Project. The measures certificate holder will undertake to control noxious and invasive-plant species and prevent the introduction of these species within the Project site boundary are discussed in the Noxious Weed Plan. Ms. Gilbert raised these same challenges regarding the adequacy of certificate holder’s Noxious Weed Plan in the contested case and these issues were fully litigated. In the Final Order, the Council adopted the Hearing Officer’s conclusion that the “Noxious Weed Plan is adequate to serve its intended purpose of establishing the measures the applicant will take to control noxious weed species and prevent the</p> | <p>The Noxious Weed Plan addresses weeds and would need to be finalized prior to construction (Fish and Wildlife Condition 3), this condition is not recommended to be amended. During its review of the DPO for RFA1, the Department reiterated the findings in the DPO related to the recommended revision. While the Vegetation Management Plan may need to be amended in the future, the plan is currently final. In addition, the plan includes requirements that apply during O&amp;M and therefore the condition does not need to require that the plan be finalized, prior to construction, or implemented prior to operations.</p> | <p>Cases on Amendment 1 changes to the site certificate conditions. (This Contested Case Request is Regarding a failure of the Oregon Department of Energy (ODOE) to notify the Energy Facility Siting Council (EFSC) and in turn their responsibility to notify the public of the opportunity to comment on the Amendment I changes to site certificate conditions to participate in Contested Cases on those changes.</p> <p>Failure to comply with OAR 345-027-0375 (4) which requires the Department to explain the amendment process, including the means</p> | <p>that she was unaware that she could provide comments on the recommended amended conditions within the DPO and in Attachment 1 to the DPO. At the July 18 hearing on the DPO, Ms. Gilbert raised this issue and requested a time extension from Council to be able to respond to revised site certificate conditions, stating that because the Department provided the Scope of Council’s Review was to focus on the areas added to the site boundary in the Notice, she was not aware that she could comment on recommended amended conditions.</p> <p>*Additional arguments and facts provided in Request for Contested Case but not within DPO comments, are not considered properly raised.</p> <p><u>Facts/Evidence to Support Issue that Cannot be Considered:</u></p> <ol style="list-style-type: none"> <li>References and discussion of specific site certificate conditions not included in comments on the DPO</li> </ol> | <p>determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24.”</p> <p>Ms. Gilbert’s request for contested case is unclear on whether she is raising an issue with the notice of the DPO or the presentation at the DPO hearing. In either manner, the Department maintains that it did not make a procedural error with notifying the public of its opportunities to comment on the DPO, including recommended amended site certificate conditions for the reasons provided below. Notwithstanding this response, Department recommends Council find that that this issue does not raise “a significant issue of law or fact that may affect the Council’s determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24,” for the reasons provided herein.</p> <p><u>Notice of DPO:</u><br/>Page 1 of the Notice of the DPO summarizes RFA1, ending with (c) amendment of site certificate language to support implementation and interpretation, and on</p> |

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|                            |  | introduction of these species during construction and operation of the project.” |  | and opportunities for the public to participate in the process.<br><br>(note that these OAR references were not provided on the record of the DPO) | beginning on request for contested case page 4-5, and 10-12.<br>2. Exhibit 7—email to Council which to my knowledge, still has not been forwarded to them.<br>3. Information submitted with contested case request that is already part of the record:<br>4. Exhibit 2, Memo from Kellen Tardaewether to Energy Facility Siting Council, July 5, 2023 giving staff recommendations and scope of review for Amendment 1.<br>5. Exhibit 3 – Boardman to Hemingway Transmission Line – Draft Proposed Order on Request for Amendment 1 June 14, 2023<br>6. Exhibit 5 – Public Notice Boardman to Hemingway Transmission Line – Proposed Order on Site Certificate Amendment 1 | Page 2 of the Notice states, “RFA1 also seeks approval to modify condition language for several conditions (see RFA1 Attachment 6-1).”<br><br><u>Draft Proposed Order:</u><br>The DPO Cover page summarizes RFA1 and states, “Several site certificate conditions are proposed to be amended.” DPO Section II.B.1, II.B.1., <i>Recommended Amended and New Site Certificate Condition Summary</i> , describes where to locate recommended amended site certificate conditions. Several areas in the DPO direct readers to review DPO Attachment 1: draft amended site certificate, which contains all the recommended amended conditions in redline format. Finally, in each DPO section where conditions are recommended to be revised, there is a description of the reason for the revision and the condition itself is provided in red font/strikethrough to track and see the recommended amended revisions. These are easily viewed upon review of the DPO and because the comment period is on the DPO and the RFA1, any contents of both are open for comment.<br><br><u>Presentation at DPO Hearing:</u><br>Under OAR 345-027-0371(5)...To properly raise an issue in a request for a contested |

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|                            |  |   |  |   | <p>and Opportunity to Request a Contested Case.</p> <p>7. Exhibit 6 –Public Notice Boardman to Hemingway Transmission Line, Request for Comments on the Complete Request for Amendment 1 and Draft Proposed Order.</p> | <p>case proceeding on the proposed order for an amendment, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department did not follow the requirements of OAR 345-027-0367, where OAR 345-027-0367(4), requires that during the public hearing, the Department must explain the amendment process, including the means and opportunities for the general public to participate in the process. During both presentations in advance of DPO hearings, the Department provided an EFSC process overview which identified the opportunities for the public to comment, including 3 slides titled “Public Participation at the DPO phase,” the presiding officer Kent Howe also reiterated the requirements to comment on the record of the DPO. Further, the 5th slide in the presentation provided an overview of the RFA1, which included a statement that RFA1 includes “Amend site certificate language to support implementation and interpretation.”</p> <p><u>EFSC Review of Gilbert Request to Extend Record at DPO Hearing:</u><br/>                     During the July 18, 2023 hearing on the DPO for RFA1, Ms. Gilbert raised this concern and requested that the record remain open for</p> |

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|   |   |  |  |  |  | <p>her to be able to comment on condition revisions. Council reviewed this request, including the language in the Notice of DPO, and determined that there was not “good cause” to extend the record and that the Notice provided sufficient information for members of the public to understand they could comment on the DPO, the RFA1 and any recommended amended site certificate conditions.</p> <p>The Department recommends Council find that it has sufficiently reviewed this issue at the hearing on the DPO and in this review of the contested case request and that no amendments to the Proposed Order are necessary.</p> |
| <b>Issue/Requestor: Adequacy of Cultural Resource Mapping - John Williams</b> |   |  |  |  |  |   |
| John Williams   | <p>Mr. Williams raised concerns about impacts to cultural resource 8B2H-DM-52 and 8B2H-DM-47. SHPO guidance strongly recommends a 30-meter buffer between any construction and an archaeological site.</p> <p>Mr. Williams also raised concerns that he has not received all results of surveys conducted by Idaho Power on his property.</p> | <p>Mr. Williams’ comments regarding the impacts of the placement of transmission towers on his property are outside the scope of RFA1 as no modifications to tower locations are proposed in RFA1 on Mr. Williams’ property.</p> | <p>No revisions to Proposed Order made.</p> <p>As indicated by certificate holder, these resources are associated with the previously approved site boundary and facility components. These resources are associated with previously inaccessible areas from the</p> | <p>Certificate holder has not provided Mr. Williams with sufficient maps or written reports from the surveys that have been done on his property to be able to discern which cultural resources will be protected, destroyed, or</p> | <p>Yes, as raised in DPO comments*</p> <p>*Comments on the DPO referenced specific cultural resource ID’s however, these specific resources are not listed in the contested case request. Presumably, Mr. Williams contends that he has not received the survey results that may have information on these</p> | <p>No.</p> <p>Mr. Williams requests a contested case based on Division 21 requirements and does not raise “a significant issue of law or fact that may affect the Council’s determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24.”</p>   |



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|                            | Mr. Williams contended the amendment and project are not in compliance with OAR 345-021-0010(1)(5). | Certificate holder and its contractors have indeed completed surveys in the 2023 season. These reports are still being finalized and once the data is processed and compiled, a property-specific survey memorandum will be provided to Mr. Williams that will indicate what surveys were performed and the results of those surveys. | ASC and have since been surveyed as part of Phase 2 surveys (surveys conducted once certificate holder gains access) and then resources are processed in the Section 106 review, summarized from Final Order on ASC. As discussed in the Final Order on ASC and in the DPO for RFA1, the Council’s Historic, Cultural, and Archaeological Resources standard under OAR 345-022-0090(1)(a) requires the Council to evaluate impacts to and mitigation for resources that are listed or likely to be listed on the National Register of Historic Places (NRHP). SHPO is the agency in Oregon that assists in making determinations of eligibility. If a project has a federal nexus, a project is regulated by the Section 106 process led by the lead federal agency. Section | mitigated for. Maps associated with RFA1 are incomplete. | resources. Mr. Williams also cites an inaccurate Division 21 OAR, presumably the OAR was intended to cite Division 21 application requirements for Exhibit C, requirements for mapping. OAR 345-021-0010(1)(c). | As described in the Proposed Order Table A-1, which included the summary response from the certificate holder and Department (provided in this table for convenient reference), the resources and tower locations raised in his DPO comments area associated with the site boundary evaluated in the ASC, which is outside of the scope for RFA1.<br><br>Mr. Williams request for contested case indicated that he was unable to find information regarding the site boundary addition 1/160 (not specifically referenced in DPO comments).<br><br>As a courtesy, the Department provides the following response to Mr. Williams concerns. This site boundary addition is a small road modification associated with previously approved road UN-236 and can be seen on B2HAMD1 RFA1 Figure 7-18 Site Boundary Changes Access Cultural Survey Status 2023-06-08, Map 15; and B2HAMD1 RFA1 Figure 4-2 Site Boundary Changes Access 2023-06-08, Map 15. Both mapsets meet the minimum requirements of OAR 345-021-0010(1)(c). To the extent that Mr. Williams contends that information on cultural and archaeological resources should be illustrated on maps provided publicly, pursuant to ORS 192.345(11), information concerning the |

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|                            |  |   | 106 includes detailed consultation with affected Tribes and applicable state SHPO's. Council previously found that under ORS 469.370(13), for facilities that are subject to review by a federal agency under the National Environmental Policy Act (NEPA), the Council shall conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review. Council previously imposed Historic, Cultural, and Archaeological Resources Condition 2, which requires that prior to construction of the facility, the certificate holder would submit updates to the Historic Properties Management Plan which includes NRHP eligibility determinations derived from the Section 106 |   |   | location of archaeological sites or objects is exempt from public disclosure and is kept confidential. Further, as indicated by the certificate holder in their responses to DPO comments, the area associated with road segment addition 1/160 was associated with cultural surveys conducted as part of pre-construction compliance and preparation for RFA1. And that these reports are still being finalized and once the data is processed and compiled, a property-specific survey memorandum will be provided to Mr. Williams that will indicate what surveys were performed and the results of those surveys. Department highlights that the Council's Historic, Cultural and Archaeological Resources standard under OAR 345-022-0090 and the previously approved site certificate conditions do not require the certificate holder to provide landowners with survey report data and conclusions, and that this matter would be negotiated between the certificate holder and landowners.<br><br>The Department recommends Council find that the responses to this issue as provided in Proposed Order Table A-1 are sufficient and no amendments to the Proposed Order are necessary. |

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|                            |  |   | review for new survey data from previously unsurveyed areas and based upon the final design of the facility. Based upon NRHP eligibility and agreed upon avoidance and mitigation measures from the Section 106 review, final avoidance and mitigation measures such as buffer distances, will be determined as an outcome of Section 106 and filed with Department prior to construction of the facility in that area. |   |   |   |

**Attachments:**

Attachment 1: Request for Contested Case I. Gilbert and Stop B2H 2023-09-08

Attachment 2: Request for Contested Case I. Gilbert 2023-09-08

Attachment 3: Request for Contested Case Williams 2023-09-08