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August 2, 2021

VIA EMAIL OR U.S. MAIL

Energy Facility Siting Council
energy.siting@oregon.gov

**Re: OAH Case No. 2019-ABC-02833 - Boardman to Hemingway Transmission Line –
Applicant Idaho Power Company’s Response to Irene Gilbert’s Motion to Remove
Hearing Officer**

Dear Chair Grail and Councilmembers:

Attached for filing in the Boardman to Hemingway Transmission Line matter is Applicant Idaho Power Company’s Response to Irene Gilbert’s Motion to Remove Hearing Officer.

Thank you,

A handwritten signature in blue ink, appearing to read 'Jocelyn Pease'.

Jocelyn Pease

Attachment

cc: Todd Cornett, Oregon Department of Energy
Judge Greene Webster, Senior ALJ, Office of Administrative Hearings
B2H Service List

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 2, 2021, the foregoing Applicant Idaho Power Company's Response to Irene Gilbert's Motion to Remove Hearing Officer was emailed to:

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Alison Greene Webster, Senior Administrative Law Judge
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I further certify that on August 2, 2021, the foregoing Applicant Idaho Power Company's Response to Irene Gilbert's Motion to Remove Hearing Officer was served by First Class Mail or electronic mail as indicated below:

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/s/ Jennifer Miller

Jennifer Miller
Legal Assistant

**BEFORE THE ENERGY FACILITY SITING COUNCIL
OF THE STATE OF OREGON**

In the Matter of the Application for Site
Certificate for the

BOARDMAN TO HEMINGWAY
TRANSMISSION LINE

APPLICANT IDAHO POWER
COMPANY’S RESPONSE TO IRENE
GILBERT’S MOTION TO REMOVE
HEARING OFFICER

OAH Case No: 2019-ABC-02833

I. INTRODUCTION

On July 26, 2021, limited party Irene Gilbert filed a motion (“Gilbert Motion”) to remove Administrative Law Judge (“ALJ”) Greene Webster as Hearing Officer for the contested case regarding Idaho Power Company’s (“Idaho Power” or the “Company”) application for site certificate (“ASC”) for the Boardman to Hemingway Transmission Line Project. In accordance with OAR 345-015-0054(2), Idaho Power submits this response, explaining that the Hearing Officer’s actions challenged in the Gilbert Motion do not demonstrate bias against the limited parties and are consistent with the Energy Facility Siting Council’s (“EFSC” or the “Council”) statutes and rules. Idaho Power also responds specifically to one of Ms. Gilbert’s allegations because Ms. Gilbert misrepresents the record regarding the Hearing Officer’s decision to allow motions for summary determination (“MSD”) in this contested case.

II. ARGUMENT

A. The Actions Challenged in the Gilbert Motion Do Not Demonstrate Bias, Incompetence, or Inability to Conduct the Hearing, and Were Within the Hearing Officer’s Authority Under EFSC’s Governing Statutes and Rules.

The Council may remove a hearing officer if it determines that the hearing officer is demonstrably biased for or against any party, is not competent to conduct the proceeding, or is

1 otherwise unable to conduct the proceeding.¹ However, the Council’s rules grant the Hearing
2 Officer authority to control the proceedings in a contested case so long as the Hearing Officer
3 complies with EFSC’s governing statutes and rules.²

4 In her motion, Ms. Gilbert identifies ten actions that ALJ Greene Webster has taken in the
5 course of this contested case that Ms. Gilbert contends warrant removal.³ However, none of those
6 actions demonstrate bias, incompetence, or an inability to conduct the hearing; nor do they show
7 the Hearing Officer failed to comply with any statutes or rules. For example, several of the actions
8 that Ms. Gilbert challenges are related to contested case procedures and apply equally to all parties,
9 not just the limited parties.⁴ In fact, the Hearing Officer made one of the challenged procedural
10 decisions—the inclusion of MSDs in the contested case schedule—over Idaho Power’s objections
11 after the limited parties argued in favor of MSDs.⁵ It is difficult to understand how a decision
12 granting the limited parties’ request to include MSDs in the schedule could possibly be construed
13 as evidence of bias *against* those limited parties.⁶ In addition, each of the actions Ms. Gilbert
14 challenges is within the authority granted to a Hearing Officer under the Council’s rules.⁷ In fact,
15 some of the actions that Ms. Gilbert alleges to be improper have already been affirmed by the
16 Council in its order on previous appeals to the Council.⁸ Because Ms. Gilbert has failed to

¹ See OAR 345-015-0023(7).

² See, e.g., OAR 345-015-0023(5)(m) (authorizing the Hearing Officer to “[t]ake any other action consistent with the Council’s governing statutes and the Council’s rules”).

³ Gilbert Motion at 2-7.

⁴ See, e.g., Gilbert Motion at 6 (challenging the Hearing Officer’s requirement that all parties submit affidavits authenticating exhibits submitted into the record).

⁵ The Hearing Officer’s decision to include MSDs in the schedule for this contested case is discussed in greater detail below.

⁶ Ms. Gilbert also challenges legal conclusions that the Hearing Officer reached. See, e.g., Gilbert Motion at 7 (stating that the Hearing Officer has issued multiple rulings in Idaho Power’s favor on the Company’s MSDs). Ms. Gilbert appears to disagree with the Hearing Officer’s conclusions, but that disagreement is not evidence of bias.

⁷ Furthermore, at least one of the identified actions—granting full-party status to Idaho Power and the Oregon Department of Energy—is mandated under the Council’s governing statutes and rules. ORS 469.370(5) (“The applicant shall be a party to the contested case.”); OAR 345-015-0080(2) (“The Department must participate in all contested case proceedings conducted by the Council with all the rights of a party.”).

⁸ See, e.g., EFSC Order on Appeals Of Hearing Officer Order on Party Status, Authorized Representatives and Issues at 18 (Nov. 25, 2020) (affirming the Hearing Officer’s order granting limited party status to all petitioners, including the STOP B2H Coalition).

1 demonstrate bias, incompetence, or an inability to conduct the hearing, and the Hearing Officer's
2 actions were all within her authority under the Council's governing statutes and rules, none of the
3 presented actions provides a basis for removing the Hearing Officer.

4 **B. The Hearing Officer Included the MSD Process in the Contested Case Schedule**
5 **Because Ms. Gilbert Insisted That It Must Be Included.**

6 In her motion, Ms. Gilbert asserts that the Hearing Officer improperly included MSDs in
7 this contested case over the limited parties' objections.⁹ However, the Hearing Officer included
8 the MSD process in this contested case *at the request of Ms. Gilbert*, not over her objection.¹⁰

9 On January 5, 2021 (in advance of the January 7, 2021 Pre-Hearing Conference), Idaho
10 Power recommended that the portion of the schedule proposed for the MSDs should be eliminated
11 to provide the most efficient and expeditious resolution of the case, and because, at that time, no
12 party had indicated that they intended to file any such motions.¹¹ At the January 7, 2021 Pre-
13 Hearing Conference, Idaho Power continued to advance this same position, but certain limited
14 parties—particularly Ms. Gilbert—indicated that they intended to file one or more MSDs and
15 argued that the time allocated for filing MSDs *must remain* in the schedule.¹² The Hearing Officer
16 then included MSDs in the schedule in part because, “Ms. Gilbert (with standing on 15 issues)
17 requested to retain the summary determination process on the contested case schedule.”¹³

⁹ Gilbert Motion at 6.

¹⁰ See Order on Case Management Matters and Contested Case Schedule at 13-14 n.4 (Jan. 14, 2021) (“Applicant . . . recommended that the ALJ eliminate the deadlines for filing and responding to [MSDs] from the schedule. . . . However, a number of limited parties, including . . . Ms. Gilbert (with standing on 15 issues) requested to retain the summary determination process on the contested case schedule. Ms. Gilbert expressed her position that at least one, if not more, of the issues on which she has standing involve questions of law and not disputed facts. Therefore, the ALJ opted to retain the deadlines for filing and responding to motions for summary determination in the contested case schedule.”).

¹¹ Letter from Lisa Rackner to ALJ Greene Webster at 1-2 (Jan. 5, 2021) (attached to this Response as Exhibit 1).

¹² See B2HAPP Contested Case Pre Hearing Case Management Conference Recording 01-07-2021 at 2:42:44 (Ms. Gilbert insisting that MSDs remain in the contested case schedule and “guarantee[ing]” that she intends to file an MSD on at least one issue).

¹³ Order on Case Management Matters and Contested Case Schedule at 13-14 n.4.

1 Because Ms. Gilbert requested to include MSDs in the contested case schedule, it is entirely
2 inappropriate that Ms. Gilbert now asserts that the Hearing Officer's inclusion of MSDs in this
3 contested case warrants removal of the Hearing Officer.

4 **III. CONCLUSION**

5 For the foregoing reasons, Idaho Power requests that the Council deny Ms. Gilbert's
6 motion to remove ALJ Greene Webster from her role as Hearing Officer in this contested case.
7 Ms. Gilbert has not provided any valid basis to remove ALJ Greene Webster and the actions
8 Ms. Gilbert challenges were all within the Hearing Officer's authority under the Council's
9 governing statutes and rules.

DATED: August 2, 2021

MCDOWELL RACKNER GIBSON PC



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Exhibit 1

to

**APPLICANT IDAHO POWER COMPANY'S
RESPONSE TO IRENE GILBERT'S MOTION TO
REMOVE HEARING OFFICER**

Letter from Lisa Rackner to ALJ Greene Webster (Jan. 5, 2021)



LISA RACKNER
Direct (503) 595-3925
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January 5, 2020

VIA EMAIL OR U.S. MAIL

Alison Greene-Webster, Senior Administrative Law Judge
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Re: OAH Case No. 2019-ABC-02833 - Boardman to Hemingway Transmission Line

Dear ALJ Greene-Webster:

Idaho Power Company (“Idaho Power”) appreciates Your Honor’s decision to include a Proposed Contested Case Schedule (“Proposed Schedule”) in the Notice of Prehearing Conference. To facilitate discussion of the Proposed Schedule at the upcoming Case Management Conference, Idaho Power offers the following comments:

Idaho Power believes that the Proposed Schedule correctly identifies the key milestones for the contested case and has provided reasonable time intervals for each—with two important exceptions.

First, Idaho Power recommends that the three-and-a-half-month portion of the Proposed Schedule devoted to Motions for Summary Determination be eliminated. Idaho Power does not dispute that Motions for Summary Determination may be appropriate under certain circumstances, subject to the Administrative Law Judge’s discretion. However, in this case, Idaho Power believes that Motions for Summary Determination are not justified, given the significant length of time these motions would add to the contested case schedule and the relatively small number of issues susceptible to resolution through such motions.

This case presents 79 separate contested case issues, the vast majority of which involve issues of contested and material fact. On the other hand, only a handful of the contested case issues arguably would be appropriate for summary determination as being either solely legal in nature or not involving material issues of fact. This means that, even if a very small number of issues can be disposed of on Motions for Summary Determination, this case is nevertheless going to involve a lengthy and voluminous testimony phase on the numerous remaining issues. And any small benefit from resolving those few issues will come at a significant cost to the schedule.

January 5, 2021
Page 2

Therefore, Motions for Summary Determination would do very little, if anything, to promote the efficient progression of this case

Moreover, no party has even indicated that it intends to file a Motion for Summary Determination. Indeed, the only party that has voiced a clear position on Motions for Summary Determination (Irene Gilbert, one of STOP B2H's board members) has argued that such motions are not allowed under the Council's rules.¹ For these reasons, it is inefficient to build three-plus months into the schedule to address Motions for Summary Determination that may never be filed—and even if they were, would be capable of disposing of only a tiny fraction of the issues and only work to extend the timeline for this case.

Importantly, to ensure no parties would be prejudiced from making legal-based arguments akin to those that would otherwise be raised in Motions for Summary Determination, Idaho Power suggests that the Hearing Officer inform the parties that they may brief any and all legal issues in their post-hearing Closing and Response Briefs which are already in the schedule.

Second, Idaho Power believes that the six weeks allotted for the Oregon Department of Energy and Idaho Power to file their rebuttal testimony is insufficient in view of the number of issues in this case. As noted above, there are 79 separate issues presented for this contested case. Additionally, there are 36 separate limited parties raising those issues. Many of the issues are complex and the subject matter highly technical. Given the broad scope of the issues, Idaho Power requests that the final schedule provide eight weeks to prepare rebuttal testimony.

Idaho Power appreciates this opportunity to comment on the Proposed Schedule and looks forward to the Case Management Conference.

Sincerely,



Lisa Rackner

cc. B2H Service List

¹ See e.g., Email from Irene Gilbert to B2H Service List, *Re: OAH Case No. 2019-ABC-02833 - Boardman to Hemingway - Notice of Prehearing Conference* (Dec. 4, 2020, 4:48 PM); Email from Irene Gilbert to B2H Service List, *Re: OAH Case No 2019-ABC-02833 - Boardman to Hemingway - Amended Order on Party Status, Authorized Representatives and Properly Raised Issues for Contested Case* (Dec. 7, 2020, 4:26 AM).

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 5, 2021, the foregoing **APPLICANT IDAHO POWER COMPANY'S LETTER TO ALJ WEBSTER RE SCHEDULE** was emailed to:

Alison Greene-Webster, Senior Administrative Law Judge
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I further certify that on January 5, 2021, the foregoing **APPLICANT IDAHO POWER COMPANY'S LETTER TO ALJ WEBSTER RE SCHEDULE** was served by First Class Mail or electronic mail as indicated below:

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