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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 345
DEPARTMENT OF ENERGY
ENERGY FACILITY SITING COUNCIL

FILED

06/04/2024 4:28 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Updating Energy Facility Siting Council's Contested Case rules for greater efficiency, clarity, and consistency.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 07/22/2024 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S)

The legislature established the Energy Facility Siting Council (EFSC) to oversee a comprehensive program for the siting, monitoring and regulation of energy facilities in Oregon. To this end, the Council must establish rules and standards to ensure that the siting, construction and operation of energy facilities is accomplished in a manner consistent with the protection of public health and safety and in compliance with Oregon's energy, land use, and environmental protection policies.

This rulemaking is being done to increase the clarity and efficiency of EFSC's contested case process, by, among other items, updating language to add additional detail where needed, reordering the rules so they track the sequence of a contested case, moving the rules to a later block of Division 15 of OAR 345, and reducing the extent of interlocutory appeals that may be brought to EFSC during a contested case. Updated rules also reflect the adoption by the Council of the Attorney General's Office of Administrative Hearings model rules for contested cases.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Staff Report and Supporting Materials for Agenda Item E of the July 18, 2023 Energy Facility Siting Council Meeting, available from: <https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Council-Meetings.aspx>

Staff Report and Supporting Materials for Agenda Item B of the February 23, 2024 Energy Facility Siting Council Meeting, available from: <https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Council-Meetings.aspx>

Staff Report and Supporting Materials for Agenda Item G for the May 30-31, 2024 Energy Facility Siting Council Meeting, available from:

[|https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Council-Meetings.aspx](https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Council-Meetings.aspx)

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

The adoption and amendment of the rules herein are intended to increase the clarity and readability of the energy siting process related rules. It is not clear that this rulemaking would have a direct impact on racial equity in this state.

Energy facilities subject to the Council's jurisdiction are typically located in rural areas east of the Cascade Mountain Range. While these areas generally have similar demographics as the statewide population, some Counties that have seen significant levels of energy development, such as Wasco, Jefferson, Umatilla, and Klamath Counties also contain tribal lands and, according to 2021 data from the US Census Bureau Population Estimates Program, have higher percentages of people who identify as American Indian than the statewide population. Some counties which contain numerous energy facilities, including Morrow and Umatilla Counties, also have a higher percentage of people that identify as Hispanic or Latino than the statewide population.

FISCAL AND ECONOMIC IMPACT:

Stakeholders (energy developers, prospective site certificate applicants, and members of the public) consulted agreed there would be no fiscal impact as these changes are designed to be non-substantive in nature. These changes are primarily about making the rules that govern the contested case process for the Energy Facility Siting Council clearer. The rules are thus not expected to create additional expenditures or revenues for state agencies or units of local government. Efficiencies created by these changes could reduce application costs for some applicants, but these reduced costs are hard to estimate at this time.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

These rules will apply to persons applying for an energy facility site certificate. Typically, applicants and certificate holders include electric and natural gas utilities, independent power producers, and energy developers. Because the analysis under the proposed rules is substantively the same as that required under the current rules, there is no anticipated cost increase, and indeed there is potentially a cost savings as a result of having rules that are easier to follow.

No direct fiscal impacts or administrative costs to state agencies or units of local government are expected to result from these rules.

Based on comments made by the Fiscal Impact Advisory Committee appointed for this rulemaking, we estimate that there may be approximately 12-15 energy developers operating in Oregon that have 50 or fewer employees, although to our understanding, many of these companies utilize parent companies or affiliates as a core part of their business model and thus may not qualify as small businesses. However, assuming they all qualify as small businesses, and assuming all were to apply for a site certificate in the future (which is not expected), our best estimate is that there are potentially 12-15 small businesses that could be affected by the proposed rules.

If a small business were to apply for a site certificate in the future, the impacts would be identical to those experienced by other applicants and certificate holders. Such impacts are not expected to be significant nor disproportionately affect small businesses as compared to other businesses because the impact of the rules is not related to the size of the business proposing a project but to the size and location of the project being proposed.

The expected reporting, recordkeeping and administrative activities and other costs required to comply with the rules would be similar to those required under the current rules. We note that as part of the siting process, applicants must demonstrate that they have the ability to design, construct and operate the proposed facility in compliance with site certificate conditions and in a manner that protects public health and safety as well as the ability to restore the site to a useful, non-hazardous condition. We note that a business that has this ability, or access to the technical expertise needed to demonstrate this ability, should not be disproportionately burdened by this rule regardless of its size. Because the proposed rules would only potentially affect a small number of small businesses, would only result in relatively small changes in costs of compliance, and would affect large and small energy developers equally, we do not expect the proposed rules to have an adverse impact on small businesses.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small businesses were not specifically consulted during the development of these rules.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

345-001-0005, 345-015-0001, 345-015-0012, 345-015-0014, 345-015-0016, 345-015-0018, 345-015-0022, 345-015-0023, 345-015-0024, 345-015-0038, 345-015-0043, 345-015-0046, 345-015-0051, 345-015-0054, 345-015-0057, 345-015-0059, 345-015-0062, 345-015-0080, 345-015-0083, 345-015-0085, 345-015-0200, 345-015-0220, 345-015-0230, 345-015-0400, 345-015-0403, 345-015-0405, 345-015-0410, 345-015-0415, 345-015-0420, 345-015-0425, 345-015-0430, 345-015-0435, 345-015-0440, 345-015-0445, 345-015-0450, 345-015-0455, 345-015-0460, 345-015-0465, 345-015-0470, 345-015-0475, 345-015-0480, 345-021-0100

AMEND: 345-001-0005

RULE SUMMARY: Updating adoption of model rules to Office of Administrative Hearings model rules for contested cases.

CHANGES TO RULE:

345-001-0005

Uniform and Model Rules ¶

(1) Except as described in this rule, the Energy Facility Siting Council adopts and incorporates by reference in this chapter the following rules from the Attorney General's Uniform and Model Rules (~~July~~December 2014~~23~~): OAR 137-001-0005 through 137-001-0100, 137-002-0010 through 137-002-0060, 137-003-~~005~~01 through 137-003-~~002~~700, and 137-005-0010 through 137-005-0070.¶

(2) Notwithstanding the provisions of OAR 137-003-~~005~~660(1), following the issuance of notice of a contested case, the Department of Energy shall enter into the record the substance of any significant contact between a Council member and any Department staff from that point forward, concerning facts in the record.¶

(3) In any conflict between the model rules and Council rules, the Council shall apply its own rules.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 469.490

AMEND: 345-015-0001

RULE SUMMARY: Removing redundant language, as proposed rule 345-015-0400 now contains the language about the adopted rules governing the contested case proceeding.

CHANGES TO RULE:

345-015-0001

Purpose and Authority ¶

The rules in this division, authorized by ORS 469.040, 469.470 and 469.440, establish procedures governing Department of Energy and ~~Council review processes, including contested case hearings. The Council shall apply the Attorney General's Uniform and Model Rules, as specified in OAR 345-001-0005, for contested case proceedings and collaborative dispute resolution~~Energy Facility Siting Council review processes, including contested case proceedings.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.310-550, ORS 469.040, ORS 469.370, ORS 469.405, ORS 469.440

REPEAL: 345-015-0012

RULE SUMMARY: Moving and updating rule as OAR 345-015-0410.

CHANGES TO RULE:

~~345-015-0012~~

~~Filing and Service of Documents in a Contested Case~~

~~(1) The hearing officer shall specify permissible means of filing and service of any pleading or document. The methods of filing with the Council or its hearing officer and service upon any party or limited party, may include, but are not limited to personal delivery, first class or certified mail (properly addressed with postage prepaid), facsimile or other electronic means.¶¶~~

~~(2) A party or limited party shall file a pleading or document with the Council accompanied by as many copies as required by the Council or its hearing officer and a certificate of service stating the names and addresses of the persons upon whom a true copy of the document was served and the date of service.¶¶~~

~~(3) Upon motion by any party or limited party, the hearing officer may waive requirements for serving parties who are no longer actively participating in the proceeding and may modify the requirements for serving a limited party consistent with such party's limited interest.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440~~

REPEAL: 345-015-0014

RULE SUMMARY: Amending and moving rule to OAR 345-015-0403.

CHANGES TO RULE:

~~345-015-0014~~

~~Contested Case Notices ¶¶~~

~~(1) The Department must issue contested case notices for Council contested case proceedings as provided in OAR 137-003-0001. The notices, at a minimum, must include:¶¶~~

~~(a) A caption with the name of the person or agency to whom the notice is issued;¶¶~~

~~(b) A short and plain statement of the issues to be considered under OAR 345-015-0016, and a reference to the particular sections of the statute and rules involved;¶¶~~

~~(c) A statement of the party's right to be represented by counsel and that legal aid organizations may be able to assist a party with limited financial resources;¶¶~~

~~(d) A statement of the party's rights to participate in the hearing as a party or limited party;¶¶~~

~~(e) A statement of the agency's authority and jurisdiction to hold a hearing on the issues; and¶¶~~

~~(f) A statement of the time and place of the hearing; and¶¶~~

~~(g) A statement that active duty servicemembers have a right to stay proceedings under the federal Servicemembers Civil Relief Act as described in ORS 183.415(3)(g); and¶¶~~

~~(2) The Department must send a contested case notice by registered or certified mail to the applicant or certificate holder, and to each party or limited party to the contested case.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415~~

REPEAL: 345-015-0016

RULE SUMMARY: Moving and updating rule as OAR 345-015-0415

CHANGES TO RULE:

~~345-015-0016~~

~~Requests for Party or Limited Party Status in Contested Cases on Applications for a Site Certificate ¶¶~~

~~(1) Notwithstanding OAR 137-003-0005(2), a person requesting to participate as a party or limited party in a contested case proceeding must submit a petition to the hearing officer by the date specified in the Department's notice issued under OAR 345-015-0230.¶¶~~

~~(2) Persons who have an interest in the outcome of the Council's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties.¶¶~~

~~(3) Except as described in section (4) of this rule, only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0220 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, 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 ORS 469.370(2) or (3) or unless the action recommended in the proposed order described in OAR 345-015-230, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, 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 public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer may not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue.¶¶~~

~~(4) Following a Council decision to grant a contested case hearing under OAR 345-015-0310, only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0320 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, 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. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer may not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue.¶¶~~

~~(5) In a petition to request party or limited party status, the person requesting such status must include:¶¶~~

~~(a) The information required under OAR 137-003-0005(3);¶¶~~

~~(b) A short and plain statement of the issue or issues that the person desires to raise in the contested case proceeding; and¶¶~~

~~(c) A reference to the person's comments at the public hearing showing that the person raised the issue or issues at the public hearing.¶¶~~

~~(6) The hearing officer's determination on a request to participate as a party or limited party is final unless the requesting person submits an appeal to the Council within seven days after the date of service of the hearing officer's determination.~~

~~Statutory/Other Authority: ORS 469.373, 469.470~~

~~Statutes/Other Implemented: ORS 469.370, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0018

RULE SUMMARY: Repealing this rule as unnecessary given adoption of OAR 137-003-0555.

CHANGES TO RULE:

~~345-015-0018~~

~~Authorized Representative~~

~~An authorized representative may represent a party or limited party, other than a state agency, participating in a contested case proceeding before the Council as provided in OAR 137-003-0008. An authorized representative may represent a state agency participating in a contested case as a party, limited party or interested agency subject to the requirements of ORS 183.450(7) and (8).~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0022

RULE SUMMARY: Moving and updating rule as OAR 345-015-0420.

CHANGES TO RULE:

~~345-015-0022~~

~~Petition for Indigent Status~~

~~(1) By petition to the hearing officer in a contested case submitted before the time of the prehearing conference, a party or limited party may request to be treated as an indigent. In the petition, the petitioner shall state in detail the facts demonstrating that the petitioner is indigent in the context of the financial burdens associated with full participation as a party or limited party in the contested case and the reasons why the petitioner would be prejudiced if indigent status were not granted.¶¶~~

~~(2) The hearing officer shall issue a determination on a petition for indigent status in writing and shall state the grounds for the determination. The hearing officer's determination is final unless the petitioner submits an appeal to the Council within seven days after the date of service of the determination.¶¶~~

~~(3) The hearing officer may excuse a person granted indigent status from such requirements of the rules of this division as the hearing officer determines appropriate. As determined by the hearing officer, the Council may provide for the cost of service of pleadings and other documents, reasonable travel expenses of witnesses and copies of the record necessary to enable a person granted indigent status to participate fully in the contested case.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

CHANGES TO RULE:

~~345-015-0023~~

~~Duties of Hearing Officer~~

- ~~(1) The Council shall appoint a hearing officer to conduct a contested case proceeding on behalf of the Council or to compile the record and recommend resolution of objections to the record of a local land use proceeding held pursuant to ORS 469.503(2)(a). The Council may appoint a Council member, an employee of the Department of Energy, or some other person or persons as it sees fit.¶¶~~
- ~~(2) A hearing officer shall take all necessary action to:¶¶~~
- ~~(a) Ensure a full, fair and impartial hearing;¶¶~~
 - ~~(b) Facilitate presentation of evidence;¶¶~~
 - ~~(c) Comply with statutory time limits on Council decisions;¶¶~~
 - ~~(d) Maintain order; and¶¶~~
 - ~~(e) Assist the Council in making its decision.¶¶~~
- ~~(3) At the commencement of a contested case hearing, the hearing officer shall explain the issues involved in the hearing and the matters that the parties must either prove or disprove.¶¶~~
- ~~(4) The hearing officer shall maintain a complete and current record of all motions, rulings, testimony and exhibits during the course of the hearing. The hearing officer shall keep the Council informed regularly on the status of the contested case.¶¶~~
- ~~(5) The hearing officer is authorized to carry out the responsibilities assigned in this rule, including but not limited to the authority to:¶¶~~
- ~~(a) Administer oaths and affirmations;¶¶~~
 - ~~(b) Rule on offers of proof and receive evidence;¶¶~~
 - ~~(c) Order depositions and other discovery to be taken and to issue subpoenas;¶¶~~
 - ~~(d) Order and control discovery, as provided in OAR 137-003-0025, and all other aspects of the contested case hearing, the order of proof, and the conduct of the participants;¶¶~~
 - ~~(e) Dispose of procedural matters and rule on motions;¶¶~~
 - ~~(f) Call and examine witnesses;¶¶~~
 - ~~(g) Hold conferences, including one or more prehearing conferences as provided in OAR 137-003-0035, before or during the hearing for settlement, simplification of issues, or any other purpose the hearing officer finds necessary. The hearing officer may limit the issues of the contested case including, for a contested case proceeding on an application for a site certificate, determining those issues that have been raised with sufficient specificity in the public hearing;¶¶~~
 - ~~(h) Continue the hearing from time to time;¶¶~~
 - ~~(i) Issue protective orders in accordance with the standards of Rule 36(C) of the Oregon Rules of Civil Procedure.¶¶~~
 - ~~(j) At the request of the Council, or upon motion of a party or limited party for good cause shown as provided in OAR 345-015-0062, and with reasonable notice to all parties, reopen the hearing for reception of further evidence on issues identified in the notice at any time prior to final decision by the Council;¶¶~~
 - ~~(k) Within the hearing officer's discretion, or at the request of the Council, certify any question to the Council for its consideration and disposition;¶¶~~
 - ~~(l) Prepare and serve upon the parties a proposed order addressing those issues enumerated in the request for contested case hearing and any additional issues approved by the hearing officer, including findings of fact, findings of ultimate fact and conclusions of law; and¶¶~~
 - ~~(m) Take any other action consistent with the Council's governing statutes and the Council's rules.¶¶~~
- ~~(6) Notwithstanding the provisions of OAR 137-003-0055(1), following the issuance of a notice of contested case, the hearing officer shall enter into the record the substance of any significant contact with Department staff or the parties from that point forward concerning facts in the record.¶¶~~
- ~~(7) The Council may, on its own motion or upon the motion of a party or limited party, remove a hearing officer if it determines that the hearing officer is not competent to conduct the proceeding, is demonstrably biased for or against any party, or is otherwise unable to conduct the proceeding.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0024

RULE SUMMARY: Moving and updating rule as OAR 345-015-0435.

CHANGES TO RULE:

~~345-015-0024~~

~~Suspension of Hearing and Exclusion of a Party~~

~~(1) If any person engages in conduct that interferes with the hearing officer's duty in connection with any aspect of a contested case proceeding or fails to obey an order of the hearing officer, the hearing officer may suspend the hearing or order such person excluded from the hearing temporarily or permanently. Conduct that interferes with the hearing officer's duties includes, but is not limited to, conduct impeding discovery, hearing schedules or the conduct of the contested case hearing.~~

~~(2) If the hearing officer issues an order permanently excluding a party, limited party, or legal counsel from further participation in a contested case proceeding, the hearing officer shall issue the order in writing and shall state in the order the grounds for the order. The order is final unless the person subject to the order submits an appeal to the Council within seven calendar days of service of the order.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0038

RULE SUMMARY: Repealing as duplicative of newly incorporated OAR 137-003-0525(c).

CHANGES TO RULE:

~~345-015-0038~~

~~Separate Hearings~~

~~The Council or its hearing officer may order separate hearings on particular matters at issue in a contested case to conduct the entire proceeding expeditiously.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0043

RULE SUMMARY: Moving and updating rule as OAR 345-015-0445.

CHANGES TO RULE:

~~345-015-0043~~

~~Evidence: Testimony Submitted in Writing~~

~~A hearing officer may require parties or limited parties to submit to the hearing officer, in writing, the qualifications and direct testimony of each witness whom a party or limited party proposes to call and all exhibits that a party or limited party proposes to introduce in conjunction with the testimony of a witness. Parties and limited parties shall send to all other parties and limited parties copies of all written materials submitted to the hearing officer under this rule.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0046

RULE SUMMARY: Moving and updating rule as OAR 345-015-0450.

CHANGES TO RULE:

~~345-015-0046~~

~~Evidence: Official Notice~~

~~(1) In a contested case proceeding, the hearing officer may take official notice of the following:¶~~

~~(a) All facts of which the courts of the State of Oregon may take judicial notice;¶~~

~~(b) Administrative rulings and reports of the Council and other governmental agencies;¶~~

~~(c) Facts contained in permits and licenses issued by the Council or any other government agency;¶~~

~~(d) The factual results of the hearing officer's or the Council's personal inspection of physical conditions involved in the contested case; and¶~~

~~(e) General, technical or scientific facts within the specialized knowledge of the Council or the Department of Energy.¶~~

~~(2) The hearing officer shall notify parties of facts officially noticed and shall allow parties an opportunity to contest the facts so noticed.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0051

RULE SUMMARY: Removing as unnecessary given incorporation of OAR 137-003-0610.

CHANGES TO RULE:

~~345-015-0051~~

~~Evidence: Resolutions of Cities, Counties and Tribes~~

~~Upon the request of a governing body of a city, county or tribe, the Department of Energy shall offer, and the hearing officer shall receive in evidence, a certified copy of a resolution of the governing body. The hearing officer shall receive such resolutions subject to rebuttal as to the authenticity of the resolution or the circumstances surrounding its procurement. The hearing officer shall receive such resolutions only for the purpose of showing the expression of official action of the resolving body with respect to matter contained in the resolution. Such resolutions are not proof of facts related to the subject of the resolution.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0054

RULE SUMMARY: Moving and updating rule as OAR 345-015-0455.

CHANGES TO RULE:

~~345-015-0054~~

~~Motions~~

~~(1) All parties, including limited parties, shall submit any motions in a contested case to the hearing officer. Unless a motion is made orally on the record during a contested case hearing, or unless the hearing officer directs otherwise, the moving party shall submit the motion in writing and shall state with particularity the grounds and relief sought. The moving party shall submit with the motion any brief, affidavit or other document relied on, and, as appropriate, a proposed form of order. The moving party shall serve the motion on all parties and limited parties to the contested case.¶~~

~~(2) Within seven calendar days after the date of service of a written motion, or such other period as the hearing officer may prescribe, a party or limited party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party shall have no right to reply, except as permitted by the hearing officer.¶~~

~~(3) The parties shall not have oral argument on a motion unless permitted by the hearing officer. The hearing officer shall dispose of motions by written order served on all parties and limited parties or read into the hearing record.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0057

RULE SUMMARY: Moving and updating rule as OAR 345-015-0460.

CHANGES TO RULE:

~~345-015-0057~~

~~Prohibitions on Interlocutory Appeals to Council~~

~~(1) Except as otherwise specifically provided for in the rules of this division, a party or limited party may not take an interlocutory appeal to the Council from a ruling of the hearing officer unless such ruling would terminate that party's right to participate in the contested case proceeding.¶¶~~

~~(2) A party or limited party shall submit an appeal involving that party's right to participate in a contested case proceeding, with supporting arguments and documents, to the Council within seven calendar days after the date of the ruling of the hearing officer.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0059

RULE SUMMARY: Moving and updating rule as OAR 345-015-0465.

CHANGES TO RULE:

~~345-015-0059~~

~~Prohibitions on Stays~~

~~Unless otherwise ordered by the hearing officer, neither the filing of a motion nor the certification of a question to the Council stays a contested case proceeding or extends the time for the performance of any act.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0062

RULE SUMMARY: Moving and updating rule as OAR 345-015-0470.

CHANGES TO RULE:

~~345-015-0062~~

~~Reopening Record Prior to Decision~~

~~The Council or its hearing officer, on its own motion or for good cause shown, may reopen the hearing record for the taking of additional evidence while the proceeding is under advisement with the hearing officer or the Council.~~

~~In addition to good cause, the moving party or limited party shall show that:~~

~~(1) The evidence is material to the proceeding; or~~

~~(2) The evidence would substantially affect the outcome of the proceeding.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0080

RULE SUMMARY: Moving and updating rule as OAR 345-015-0425.

CHANGES TO RULE:

~~345-015-0080~~

~~Participation by Government Agencies ¶¶~~

~~(1) Any state or local government agency other than the Department may request participation in a contested case as a party, limited party or interested agency, subject to the limitations described in OAR 345-015-0016. For a contested case on a site certificate application, the agency must submit the request to the hearing officer in writing by the date specified in the Department's public notice issued under OAR 345-015-0230(3). For a contested case on a site certificate amendment, the agency must submit the request to the Department by the date specified in the notice of the opportunity to request a contested case issued under OAR 345-027-0371(4). ¶¶~~

~~(2) The Department must participate in all contested case proceedings conducted by the Council with all the rights of a party.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

REPEAL: 345-015-0083

RULE SUMMARY: Moving and updating rule as OAR 345-015-0430.

CHANGES TO RULE:

~~345-015-0083~~

~~Prehearing Conference and Prehearing Order ¶¶~~

~~(1) The hearing officer may cancel or reschedule any previously noticed prehearing conference.¶¶~~

~~(2) The hearing officer may conduct one or more prehearing conferences for the purposes and in the manner described in OAR 137-003-0035. At the conclusion of the conferences, the hearing officer must issue a prehearing order stating the issues to be addressed in the contested case hearing and, in a contested case on an application for a site certificate, limiting parties to those issues they raised on the record of the public hearing described in OAR 345-015-0220. The hearing officer may not receive evidence or hear legal argument on issues not identified in the prehearing order.¶¶~~

~~(3) Failure to raise an issue in the prehearing conferences for the contested case hearing on an application for a site certificate constitutes a waiver of that issue.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

CHANGES TO RULE:

~~345-015-0085~~

~~Hearing Officers Proposed Contested Case Order~~

- ~~(1) The hearing officer shall allow any party, including any limited party, to propose site certificate conditions that the party believes are necessary or appropriate to implement the policy of ORS 469.310 or to meet the requirements of any other applicable statute, administrative rule or local government ordinance. Parties shall submit proposed site certificate conditions to the hearing officer in writing according to a schedule set by the hearing officer.¶¶~~
- ~~(2) In a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, any party or limited party may present evidence relating to the appropriateness, scope or wording of any other party's proposed site certificate conditions and may present written proposed findings of fact, briefs and other argument concerning proposed conditions.¶¶~~
- ~~(3) After the hearing in a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, the hearing officer shall issue a proposed contested case order stating the hearing officer's findings of fact, conclusions of law, and recommended site certificate conditions on the issues in the contested case. The hearing officer shall serve the proposed order on all parties and limited parties. In the proposed order, the hearing officer shall include recommended resolutions of objections to the local land use record, if any. The hearing officer's recommendations are part of the decision record for the application but are not part of the Council's order.¶¶~~
- ~~(4) After the hearing in a contested case proceeding on any matter other than an application for a site certificate or proposed site certificate amendment, the hearing officer shall issue a proposed order stating the hearing officer's findings of fact and conclusions of law. The hearing officer shall serve the proposed order on all parties and limited parties.¶¶~~
- ~~(5) Parties and limited parties may file exceptions to the proposed order within the time set by the hearing officer, not to exceed 30 days after the hearing officer issues the proposed order. A party filing exceptions shall serve a copy of the exceptions on all other parties and limited parties. In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.¶¶~~
- ~~(6) Parties and limited parties may file responses to exceptions within the time set by the hearing officer, not to exceed 15 days after the time set for filing exceptions. A party filing responses to exceptions shall serve a copy of the responses to exceptions on all other parties and limited parties.¶¶~~
- ~~(7) After the period for filing responses to exceptions, the Council shall issue a final order. The Council may adopt, modify or reject the hearing officer's proposed order.¶¶~~
- ~~(8) Following a contested case proceeding on an application for a site certificate, the Council, in its final order, shall either grant or deny issuance of a site certificate. If the Council grants issuance of a site certificate, the Council shall issue a site certificate. The site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.¶¶~~
- ~~(9) Following a contested case proceeding on a proposed site certificate amendment, the Council, in its final order, shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate. The amended site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.¶¶~~
- ~~(10) The Council shall issue a site certificate or amended site certificate in duplicate counterpart originals and each counterpart, upon signing, will have the same effect.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992~~

AMEND: 345-015-0200

RULE SUMMARY: Updating rule reference to conform to other rule changes.

CHANGES TO RULE:

345-015-0200

Notice to Agencies that the Application is Complete ¶¶

(1) After receiving notification from the Department that the application is complete, the applicant must prepare an application supplement that includes all amendments to the preliminary application and all additional information requested by the Department before the determination of completeness.¶¶

(2) The applicant must submit to the Department, two printed copies of the application supplement, and an electronic version of the application supplement in a non-copy-protected format acceptable to the Department. The applicant must submit additional printed copies of the application supplement to the Department upon request.¶¶

(3) After receiving the application supplement, the Department must determine a distribution date and prepare a distribution list that includes, but is not limited to, the reviewing agencies for the application.¶¶

(4) Except as described in OAR 345-015-0310, and unless the Department directs otherwise, the applicant must mail or email an electronic copy of the application supplement to each person on the distribution list provided by the Department on or before the distribution date. The applicant must provide a printed copy of all or part of the application supplement to a person on the mailing list upon request.¶¶

(5) If the Department determines it is necessary to present the amendments and additional information described in section (1) of this rule clearly, the Department may require the applicant to provide a complete revision of the preliminary application in place of the application supplement under sections (2) and (4) of this rule.¶¶

(6) After the date of filing, the Department must prepare a notice for distribution. In the notice, the Department must:¶¶

(a) State the date of filing;¶¶

(b) Explain that if a person intends to raise an issue in the contested case, the person must raise the issue in the manner described in OAR 345-015-0016415;¶¶

(c) State a date by which the Department and the applicant must receive the reports described in sections (d) through (f) below;¶¶

(d) Request an agency report containing the following information:¶¶

(A) The agency's recommendations regarding any applications for permits administered by the agency that are applicable to construction or operation of the proposed facility;¶¶

(B) Issues significant to the agency;¶¶

(C) The agency's conclusions concerning the proposed facility's compliance with state statutes, administrative rules or ordinances administered by the agency;¶¶

(D) A list of site certificate conditions recommended by the agency; and¶¶

(E) Any other information that the reviewing agency believes will be useful to the Council in reviewing the site certificate application.¶¶

(e) Request a report from the affected local government regarding the proposed facility's compliance with the applicable substantive criteria for a land use decision under ORS 469.504(1)(b).¶¶

(f) Request a report from the affected local government that describes any land use decisions made under ORS 469.504(1)(a).¶¶

(g) Explain that the reports described in sections (d) through (f) above are part of the decision record for the application for a site certificate.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.350

AMEND: 345-015-0220

RULE SUMMARY: Updating rule language to conform to other rule change (See newly adopted OAR 345-015-0415).

CHANGES TO RULE:

345-015-0220

Public Hearing and Notice on the Draft Proposed Order ¶¶

(1) After the issuance of the draft proposed order described in OAR 345-015-0210, the Energy Facility Siting Council or its hearing officer must conduct at least one public hearing on the draft proposed order in the vicinity of the site of the proposed facility. The public hearing is not a contested case hearing. If there is more than one public hearing, the "close of the record of the public hearing" means the close of the record of the final public hearing.¶¶

(2) The Department must, at least 20 days before the hearing:¶¶

(a) Submit notice for publication in a newspaper of general circulation available in the vicinity of the proposed facility; and¶¶

(b) Send notice of the hearing by mail or email to:¶¶

(A) Persons on the Council's general mailing list as defined in OAR 345-011-0020;¶¶

(B) Persons on any special mailing list set up for the proposed project; and¶¶

(C) The property owners listed in Exhibit F of the application, as updated by the applicant upon the request of the Department.¶¶

(D) The land management agency or organization with jurisdiction over the protected areas identified in the application.¶¶

(3) In the notices described in subsections (2)(a) and (2)(b), the Department must include:¶¶

(a) The date, time and location of the public hearing;¶¶

(b) A description of the facility and the facility's general location;¶¶

(c) The name, address, email address, and telephone number of the Department's representative to contact for additional information;¶¶

(d) The addresses of locations where the public may inspect copies of the complete application and the website where the application may be found;¶¶

(e) The website where the draft proposed order may be found;¶¶

(f) The deadline for the public to submit written comments to be included in the record of the public hearing and a statement that such comments should be submitted to the presiding officer in care of the Department;¶¶

(g) A statement that to raise an issue on the record of the public hearing, a person must raise the issue in person at the public hearing or in a written comment submitted after the date of the notice and received by the Department before the deadline;¶¶

(h) A statement that failure to raise an issue in person or in writing on the record of the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue precludes consideration of the issue in a contested case;¶¶

(i) A statement that to raise an issue with sufficient specificity, at the public hearing, the person must present facts that support the person's position on the issue, have identified the recommended findings of fact, conclusions of law, or conditions of approval to which they object, specified the Council standard or other applicable state and local requirements on which their objection is based, and presented facts or statements supporting that objection on the record of the draft proposed order; and¶¶

(j) A statement that the Council will not accept or consider any further public comment on the site certificate application or on the draft proposed order after the close of the record of the public hearing.¶¶

(4) During the public hearing, the Department must explain the application process, including the means and opportunities for the general public to participate in the process. The Department may provide this explanation by a written handout.¶¶

(5) At the commencement of the public hearing, the presiding officer must state that:¶¶

(a) A person who intends to raise any issue that may be the basis for a contested case must raise the issue in person at the hearing or in a written comment submitted to the Department before the deadline stated in the notice of the public hearing; and¶¶

(b) A person who intends to raise any issue that may be the basis for a contested case must raise the issue with sufficient specificity to afford the Council, the Department, and the applicant an adequate opportunity to respond, including a statement of facts that support the person's position on the issue.¶¶

(6) At the public hearing, any person may present information regarding the pending application without administration of an oath. The presiding officer must record all presentations made during the public hearing. The presentations are part of the decision record for the application and may be rebutted in the contested case proceeding.

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.370

AMEND: 345-015-0230

RULE SUMMARY: Updating rule reference to conform with other rule changes. Updating notice requirements to specify it needs to include deadlines for responding to a petition for party status.

CHANGES TO RULE:

345-015-0230

Council Review and the Department of Energys Proposed Order ¶

(1) Following the close of the record of the public hearing conducted under OAR 345-015-0220, the Energy Facility Siting Council must review the draft proposed order. In accordance with ORS 469.370(3), when the Council meets to review a draft proposed order, the Council may not permit the applicant, reviewing agencies or the public to comment on any issue that may be the basis for a contested case.¶

(2) Following the Council's meeting to review the draft proposed order, the Department must issue a proposed order in accordance with ORS 469.370(4), taking into consideration the comments of the Council, any public comments made at a public hearing, written comments received before the close of the record of the public hearing, and agency consultation. In the proposed order, the Department must recommend either granting a site certificate with conditions or denying a site certificate for the proposed facility.¶

(3) Following issuance of the proposed order, the Department must issue a public notice of the proposed order, subject to the following:¶

(a) The public notice of the proposed order must include:¶

(A) A description of the facility and the facility's general location;¶

(B) A summary of the recommendations included in the Proposed Order;¶

(C) A description of the process and deadline for requests to participate as a party or limited party in the contested case under OAR 345-015-0016415;¶

(D) The date of the prehearing conference, if any;¶

(E) The date of the hearing; and¶

(EF) The date of the hearing deadline for the Department and the applicant or certificate holder to respond to petitions for party status; and¶

(b) The Department must send the notice by mail or email to:¶

(A) All persons on the Council's general mailing list;¶

(B) All persons on any special mailing list set up for the proposed project;¶

(C) All persons who commented in person or in writing on the record of the public hearing conducted under OAR 345-015-0220; and¶

(D) The property owners listed in Exhibit F of the site certificate application, as updated by the applicant upon the request of the Department; and.¶

(E) The land management agency or organizations with jurisdiction over the protected areas identified in the proposed order.¶

(4) On the same date as notice is issued under section (3) of this rule, the Department must notify the applicant that the applicant must notify the hearing officer and the Department of any issues the applicant intends to raise in the contested case proceedings by the date established in paragraph (3)(a)(C) of this rule.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.370

ADOPT: 345-015-0400

RULE SUMMARY: New rule to specify governing provisions for EFSC's contested case process.

CHANGES TO RULE:

345-015-0400

Governing Provisions

(1) All contested case proceedings before the Council shall be conducted in accordance with OAR 137-003-0501 through 137-003-0700 (as of December 31, 2023), referred to herein as the Office of Administrative Hearing rules.¶

(2) The rules in this Division addressing contested cases (OAR 345-015-0400 through 345-015-0475) are intended to supplement the Office of Administrative Hearing rules by providing additional procedures governing requests for and the conduct of Energy Facility Siting Council contested cases.¶

(3) In any conflict between the Office of Administrative Hearing rules and Council rules, the Council shall apply its own rules.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440

ADOPT: 345-015-0403

RULE SUMMARY: This rule was previously found at OAR 345-015-0014. Removed language as unnecessary given the proposed adoption of OAR 137-003-0505, which serves the same function.

Specifying how notice must be served and that parties must state how they are requesting to participate in a contested case proceeding.

Explicitly noting that law representation is available to all parties.

CHANGES TO RULE:

345-015-0403

Contested Case Notices

The Department must issue contested case notices for Energy Facility Siting Council contested case proceedings as provided in OAR 137-003-0505. The notices will be served personally or by registered or certified mail to persons who commented in person or in writing on the record for a Draft Proposed Order as described in OAR 345-015-0220 and provided a mailing address. The notices must also include:

(1) A statement that persons requesting a contested case should state whether they are requesting to participate as a party or limited party.

(2) The deadline for the Department and applicant or certificate holder to respond to petitions for party or limited party status.

(3) A statement that active-duty service members have a right to stay a contested case proceeding under the federal Servicemembers Civil Relief Act as described in ORS 183.415(3)(g); and

(4) A statement that, notwithstanding OAR 137-003-0505(1)(h), both full and limited parties may use lay representation.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415

ADOPT: 345-015-0405

RULE SUMMARY: Moved rule language to optimize organization and amended language to increase clarity and consistency with other rules and statutes and also to reflect the incorporation of the Attorney General's Office of Administrative Hearings model rules for contested cases. This includes removing some rule language that is duplicative of model rules.

CHANGES TO RULE:

345-015-0405

Appointment and Duties of Hearing Officer

- (1) The Energy Facility Siting Council shall appoint a hearing officer to conduct a contested case proceeding on behalf of the Council or to compile the record of the contested case proceeding and recommend resolution of objections to the record of a local land use proceeding held pursuant to ORS 469.503(2)(a). The Council may refer a contested case to the Office of Administrative Hearings for appointment of a hearing officer, or Council may appoint some other person or persons as it sees fit.¶
- (2) A hearing officer shall take all necessary action to:¶
 - (a) Ensure a full, fair, impartial, and efficient proceeding;¶
 - (b) Facilitate presentation of evidence;¶
 - (c) Comply with statutory time limits on Council decisions;¶
 - (d) Maintain order; and¶
 - (e) Assist the Council in making its decision.¶
- (3) The hearing officer shall keep the Council informed regularly on the status of the contested case and maintain a complete and current record of the contested case proceeding, including:¶
 - (a) All pleadings, motions, and intermediate rulings;¶
 - (b) Evidence received or considered;¶
 - (c) Stipulations;¶
 - (d) A statement of matters officially noticed;¶
 - (e) Questions and offers of proof, objections, and rulings thereon;¶
 - (f) Information about any ex parte communication with the hearing officer that must be made part of the record under OAR 137-003-0625(2);¶
 - (g) Proposed findings and exceptions; and¶
 - (h) The proposed contested case order.¶
- (4) The hearing officer is authorized to carry out the responsibilities assigned in this rule, including the authority to:¶
 - (a) Administer oaths and affirmations;¶
 - (b) Rule on offers of proof and receive evidence pursuant to the hearing officer's established schedule;¶
 - (c) Consider petitions for, authorize, and limit depositions, as provided in OAR 137-003-0572;¶
 - (d) Order and control discovery, as provided in OAR 137-003-0568, and all other aspects of the contested case proceeding, the order of proof, and the conduct of the participants;¶
 - (e) Dispose of procedural matters and rule on motions;¶
 - (f) Call and examine witnesses;¶
 - (g) Hold conferences, including one or more prehearing conferences as provided in OAR 137-003-0575, before or during the hearing for settlement, for the simplification of issues or any other purpose the hearing officer finds necessary. For a contested case proceeding on an application for a site certificate or for an amendment to a site certificate, the hearing officer shall review and rule on petitions for party or limited party status consistent with the requirements of OAR 345-015-0415, including limiting the issues to the issues that have been raised with sufficient specificity in the public hearing;¶
 - (h) Continue the contested case proceeding from time to time;¶
 - (i) Issue protective orders in accordance with the standards of Rule 36(C) of the Oregon Rules of Civil Procedure.¶
 - (j) At the request of the Council, or upon motion of a party or limited party for good cause shown as provided in OAR 345-015-0470, and with reasonable notice to all parties, reopen the contested case proceeding for reception of further evidence on issues identified in the notice at any time prior to final decision by the Council;¶
 - (k) Within the hearing officer's discretion, or at the request of the Council, certify any question to the Council for its consideration and disposition;¶
 - (l) Prepare and serve upon the parties a proposed order addressing those issues enumerated in the request for contested case hearing and any additional issues approved by the hearing officer, including findings of fact, findings of ultimate fact and conclusions of law; and¶
 - (m) Take any other action consistent with the Council's governing statutes and the Council's rules.¶

(5) The Council may, on its own motion or upon the motion of a party or limited party, remove a hearing officer if it determines that the hearing officer is not competent to conduct the proceeding, is demonstrably biased for or against any party, or is otherwise unable to conduct the proceeding.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0410

RULE SUMMARY: Formerly OAR 345-015-0012. Modifying language for clarity. Removing filing requirement language (formerly OAR345-015-0012(2)) as it was not needed. Specifying that the hearing officer may modify service requirements in certain situations.

CHANGES TO RULE:

345-015-0410

Filing and Service

(1) The hearing officer shall specify permissible means of filing and service of any pleading or document. The methods of filing with the hearing officer and service upon any party or limited party, may include, but are not limited to: personal delivery, first class or certified mail (properly addressed with postage prepaid), facsimile, or electronic mail.

(2) The hearing officer may waive requirements for serving parties who are no longer actively participating in the proceeding upon consent by the party or limited party.

(3) The hearing officer may modify the requirements for serving a limited party consistent with such party's limited interest.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440

ADOPT: 345-015-0415

RULE SUMMARY: Formerly OAR 345-015-0016. Updating rule for clarity. Specifying that the Department and applicant or certificate holder are full parties to a contested case proceeding.

Clarifying and calling out definition of "sufficient specificity" re: adequately raising an issue in the draft proposed order phase of an application for a site certificate. Noting that as defined in statute there are times when a party need not raise an issue with sufficient specificity during the draft proposed order to participate in a contested case proceeding.

Clarifying what the difference is between a party and a limited party.

CHANGES TO RULE:

345-015-0415

Requests for Party or Limited Party Status

(1) The Department and applicant or certificate holder are parties to the contested case proceeding, with the right to participate on all issues in the contested case proceeding. Notwithstanding OAR 137-003-0535(2) and (3), other persons requesting to participate as a party or limited party in a contested case proceeding must submit a petition to the hearing officer and provide copies to the agency and the site certificate applicant by the date specified in the Department's notice issued under OAR 345-015-0230 and OAR 345-015-0014. Petitions received after the deadline will not be considered unless the hearing officer determines that good cause has been shown for failure to submit the petition by the required date.¶

(2) Except as described in sections (3) and (4) of this rule, only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0220 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Energy Facility Siting 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 ORS 469.370(2) or (3) or unless the action recommended in the proposed order described in OAR 345-015-230, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences.¶

(3) Subject to the exceptions in ORS 469.370(5), if a person has not raised an issue at the public hearing with sufficient specificity to afford the Council, the Department and the applicant an adequate opportunity to respond to the issue, the hearing officer may not consider the issue in the contested case proceeding.¶

(4) To have raised an issue with sufficient specificity, the person must have:¶

(a) identified the recommended findings of fact, conclusions of law, or conditions of approval to which they object;¶

(b) specified the Council standard or other applicable state and local requirements on which their objection is based; and¶

(c) presented facts or statements supporting that objection on the record of the draft proposed order.¶

(5) The requirements in (2), (3), and (4) also apply to a Council decision to grant a contested case proceeding under OAR 345-015-0310 (Request for Expedited Review of Special Criteria Facilities), with the exception that a person must have commented in person or on the record of the public hearing described in OAR 345-015-320 as opposed to the public hearing described in OAR 345-015-0220.¶

(6) In a petition to request party or limited party status, the person requesting such status must include:¶

(a) The information required under OAR 137-003-0535(4);¶

(b) A short and plain statement for each issue that the person desires to raise in the contested case proceeding; the statement should be worded the way the person requests the issue be worded for the contested case proceeding; and¶

(c) A reference to the person's comments on the record of the draft proposed order showing that the person raised the issue or issues on the record of the draft proposed order.¶

(7) The applicant, the Department, or the certificate holder may submit written responses to petitions to request party or limited party status to the hearing officer by the date specified for such responses in the Department's notice issued under OAR 345-015-0230, providing copies to one another and the person who submitted the petition for party or limited party status.¶

(8) In ruling on petitions to participate as a party or a limited party, the Hearing Officer shall consider the criteria described in OAR 137-003-0535(8). A limited party is a person, other than the Department, an applicant, or the certificate holder, who requests to participate in the contested case and who the hearing officer determines raised

one or more issues with sufficient specificity as described in subsections (3) and (4), but did not raise all the issues to be addressed in the contested case, as established by the hearing officer in the prehearing order on party status described in OAR 345-015-0430.

(9) Subject to the exceptions in ORS 469.370(5) and OAR 345-015-0445(3), a limited party may participate in the contested case only on the issues they raised with sufficient specificity, including related proposed site certificate conditions.

Statutory/Other Authority: ORS 469.373, ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 469.370, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0420

RULE SUMMARY: Formerly OAR 345-015-0022. Updating rule language for greater clarity by defining what "indigent" means.

CHANGES TO RULE:

345-015-0420

Petition for Indigent Status

(1) By petition to the hearing officer in a contested case submitted before the time of the prehearing conference, a party or limited party may request to be treated as an indigent. In the petition, the petitioner shall state in detail the facts demonstrating that the petitioner is indigent in the context of the financial burdens associated with full participation as a party or limited party in the contested case and the reasons why the petitioner would be prejudiced if indigent status were not granted.¶

(2) "Indigent" means the person has an income level at or below 125 percent of the United States poverty level as defined by the most recently revised poverty income guidelines published by the U.S. Department of Health and Human Services for the person's household/family size, unless the hearing officer makes a determination as to the person's ability to pay for the cost to participate in the pending case based on other factors. In making the determination as to a person's ability to pay costs to participate in the case, the hearing officer shall consider not only the person's income, but also the availability of any assets, including, but not limited to, cash, stocks, bonds, and any other property that may be applied to the satisfaction of judgments, other financial obligations the person bears, and the nature and complexity of the case.¶

(3) The hearing officer shall issue a determination on a petition for indigent status in writing and shall state the grounds for the determination. The hearing officer's determination is final unless the petitioner submits an appeal to the Energy Facility Siting Council within seven days after the date of service of the determination.¶

(4) The hearing officer may excuse a person granted indigent status from such requirements of the rules of this division as the hearing officer determines appropriate. As determined by the hearing officer, the Council may provide for the cost of service of pleadings and other documents, reasonable travel expenses of witnesses and copies of the record necessary to enable a person granted indigent status to participate fully in the contested case. Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0425

RULE SUMMARY: Formerly OAR 345-015-0080. Updating rule reference to match rule update and improved clarity of rule language .

CHANGES TO RULE:

345-015-0425

Participation by Government Agencies

(1) Any state or local government agency other than the Department may request participation in a contested case as a party, limited party or interested agency, subject to the limitations described in OAR 345-015-0415. For a contested case on a site certificate application, the agency must submit the request to the hearing officer in writing by the date specified in the Department's public notice issued under OAR 345-015-0230(3). For a contested case on a site certificate amendment, the agency must submit the request to the Department by the date specified in the notice of the opportunity to request a contested case issued under OAR 345-027-0371(4).¶

(2) The Department must participate in all contested case proceedings conducted by the Energy Facility Siting Council with all the rights of a party.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0430

RULE SUMMARY: Formerly OAR 345-015-0083.

Updating rule language for greater clarity and to streamline the contested case process by:

Better describing how the prehearing conference works.

Clarifying that that party status is set after the prehearing conference(s).

Making it clear that an amended order is required if party status is granted as the result of an appeal of party status.

Making it clear how waiver of an issue occurs.

Limiting interlocutory appeals to the Energy Facility Siting Council on a party status ruling to circumstances where the ruling would terminate the petitioner's ability to participate in the contested case proceeding.

CHANGES TO RULE:

345-015-0430

Prehearing Conference and Prehearing Order

- (1) The hearing officer may hold one or more prehearing conferences to address petitions for party or limited party status and issues. The hearing officer shall consider which issues, if any, the person may participate in by considering the applicable provisions in OAR 345-015-0415 and OAR 137-003-0535(8).¶
- (2) The hearing officer may also conduct one or more prehearing conferences for the purposes and in the manner described in OAR 137-003-0575.¶
- (3) At the conclusion of the prehearing conference(s) described in (1) and (2), the hearing officer must issue a prehearing order or orders stating the issues to be addressed in the contested case hearing, the parties or limited parties who may participate on each issue, the contested case procedures, and the schedule.¶
- (4) The hearing officer's order on a request to participate as a party or limited party is final and may not be appealed to Energy Facility Siting Council unless the ruling would terminate the petitioner's ability to participate in the contested case proceeding.¶
- (5) The hearing officer may cancel or reschedule any previously noticed prehearing conference.¶
- (6) If an appeal to Council of a hearing officer's ruling on party status described in subsection (1) results in the granting of party status, the hearing officer shall issue an amended order.¶
- (7) Failure to raise an objection regarding suggested procedures to be followed in the contested case or a proposed description of an issue during the prehearing conference when such procedures and issues are being discussed and established by the hearing officer constitutes waiver of that issue.¶
- (8) Failure to raise an issue in the prehearing conferences for the contested case hearing on an application for a site certificate constitutes a waiver of that issue.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0435

RULE SUMMARY: Formerly OAR 345-015-0024. Moved and updated language for greater clarity.

CHANGES TO RULE:

345-015-0435

Suspension of Hearing and Exclusion of a Party

(1) If any person engages in conduct that interferes with the hearing officer's duty in connection with any aspect of a contested case proceeding or fails to obey an order of the hearing officer, the hearing officer may suspend the contested case proceeding or order such person excluded from the proceeding temporarily or permanently. Conduct that interferes with the hearing officer's duties includes conduct impeding discovery, conduct impeding schedules, or disruptive conduct during the contested case hearing.

(2) If the hearing officer issues an order permanently excluding a party, limited party, or legal counsel from further participation in a contested case proceeding, the hearing officer shall issue the order in writing and shall state in the order the grounds for the order. The order is final unless the person subject to the order submits an appeal to the Energy Facility Siting Council within seven calendar days of service of the order.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0440

RULE SUMMARY: Adopting new rule to codify ORS 183.450(2), making it clear where the burden of presenting evidence lies.

CHANGES TO RULE:

345-015-0440

Burden of Presenting Evidence

In a contested case regarding an application for a site certificate or amendment to a site certificate, each party or limited party bears the burden of presenting evidence in support of facts that party or limited party alleges and/or positions they take on any issue they submitted a petition for party or limited party status and on which the hearing officer determines they may participate.

Statutory/Other Authority: ORS 183.341, ORS 183.417, ORS 469.370(5), ORS 183.417(2), ORS 469.470

Statutes/Other Implemented: ORS 183.450

ADOPT: 345-015-0445

RULE SUMMARY: Formerly OAR 345-015-0043. Moved and updated language for greater clarity, including the fact that parties can only participate in a contested case proceeding to the extent that they timely raised issues with sufficient specificity. Noting that parties to a contested case do have the ability to address material changes to site certificate conditions.

Note -- subsection (4) was formerly OAR 345-015-0083(2).

CHANGES TO RULE:

345-015-0445

Submission of Evidence and Proposed Site Certificate Conditions

(1) The hearing officer may require parties or limited parties to submit to the hearing officer, in writing, the qualifications and direct testimony of each witness whom a party or limited party proposes to call and all exhibits that a party or limited party proposes to introduce in conjunction with the testimony of a witness. Parties and limited parties shall send to all other parties and limited parties copies of all written materials submitted to the hearing officer under this rule per the schedule and means set forth by the hearing officer.¶

(2) The hearing officer shall allow any party, including any limited party, to propose site certificate conditions related to issues for which they have been permitted to participate in the contested case and to present evidence related to any such conditions. Parties shall submit proposed site certificate conditions to the hearing officer in writing according to a schedule set by the hearing officer, which shall occur no later than the deadline for the submission of direct evidence.¶

(3) In a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, any party or limited party may address material changes to actions to be taken under site certificate conditions that are suggested during the contested case proceeding.¶

(4) The hearing officer may not receive evidence or hear legal argument on issues not identified in the prehearing order.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0450

RULE SUMMARY: Formerly OAR 345-015-0046. Moved and updated language for greater clarity.

CHANGES TO RULE:

345-015-0450

Official Notice of Evidence

(1) In a contested case proceeding, the hearing officer may take official notice of the following:¶

(a) All facts of which the courts of the State of Oregon may take judicial notice;¶

(b) Administrative rulings and reports of the Energy Facility Siting Council and other governmental agencies;¶

(c) Facts contained in permits and licenses issued by the Council or any other government agency;¶

(d) The factual results of the hearing officer's or the Council's personal inspection of physical conditions involved in the contested case; and¶

(e) General, technical, or scientific facts within the specialized knowledge of the Council or the Department of Energy.¶

(2) The hearing officer shall notify parties of facts officially noticed and shall allow parties an opportunity to contest the facts so noticed.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.605, ORS 469.405, ORS 469.440, ORS 469.615, ORS 469.992

ADOPT: 345-015-0455

RULE SUMMARY: Formerly OAR 345-015-0054. Moved and updated language for greater clarity.

CHANGES TO RULE:

345-015-0455

Motions

All parties, including limited parties, shall submit any motions in a contested case to the hearing officer. All motions are subject to OAR 137-003-0630 and the following requirements:¶

(1) Unless a motion is made orally on the record during a contested case hearing, or unless the hearing officer directs otherwise, the moving party shall submit the motion in writing and shall state with particularity the grounds and relief sought. The moving party shall submit with the motion any brief, affidavit or other document relied on, and, as appropriate, a proposed form of order. The moving party shall serve the motion on all parties and limited parties to the contested case.¶

(2) Within seven calendar days after the date of service of a written motion, or such other period as the hearing officer may prescribe, a party or limited party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party shall have no right to reply, except as permitted by the hearing officer.¶

(3) The parties shall not have oral argument on a motion unless permitted by the hearing officer. The hearing officer shall dispose of motions by written order served on all parties and limited parties or read into the record of the contested case proceeding.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0460

RULE SUMMARY: Formerly OAR 345-015-0057.

Removing reference to "except as otherwise specifically provided for in the rules of this division" as there is no longer an exception to this provision. There is no interlocutory appeal for denial of party status by the hearing officer unless such ruling would terminate that party's right to participate in the contested case proceeding.

CHANGES TO RULE:

345-015-0460

Interlocutory Appeals to Council

(1) A party or limited party may not take an interlocutory appeal to the Energy Facility Siting Council from a ruling of the hearing officer unless such ruling would terminate that party's right to participate in the contested case proceeding.

(2) A party or limited party shall submit an appeal involving that party's right to participate in a contested case proceeding, with supporting arguments and documents, to the Council within seven calendar days after the date of the ruling of the hearing officer.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0465

RULE SUMMARY: Formerly OAR 345-015-0059. Moved and updated language for greater clarity.

CHANGES TO RULE:

345-015-0465

Stays

(1) The hearing officer has the power to stay a proceeding for good cause, including to ensure a full, fair, and impartial proceeding.

(2) Neither the filing of a motion nor the certification of a question to the Energy Facility Siting Council stays a contested case proceeding or extends the time for the performance of any act.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0470

RULE SUMMARY: Formerly OAR 345-015-0062. Moved and updated language for greater clarity.

CHANGES TO RULE:

345-015-0470

Reopening Record Prior to Decision

The Energy Facility Siting Council or its hearing officer, on its own motion or for good cause shown, may reopen the contested case proceeding record for the taking of additional evidence while the proceeding is under advisement with the hearing officer or the Council. In addition to good cause, the moving party or limited party shall show that:

(1) The evidence is material to the proceeding; or

(2) The evidence would substantially affect the outcome of the proceeding.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.605, ORS 469.615, ORS 469.992, ORS 469.405, ORS 469.440

ADOPT: 345-015-0475

RULE SUMMARY: Formerly OAR 345-015-0085. Moved and updated language for greater clarity, specifically moved what was (1) and (2) to 345-015-0445, where it better fits the subject matter.

Adding language to describe who is allowed to file responses to exceptions.

Splitting off the second half of this rule into a new rule for better clarity.

CHANGES TO RULE:

345-015-0475

Hearing Officer's Proposed Contested Case Order

(1) After the completion of a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, the hearing officer shall issue a proposed contested case order stating the hearing officer's findings of fact, conclusions of law, and recommended site certificate conditions on the issues in the contested case. The hearing officer shall serve the proposed contested case order on all parties and limited parties. In the proposed contested case order, the hearing officer shall include recommended resolutions of objections to the local land use record, if any. The hearing officer's recommendations are part of the decision-making record for the application but are not part of the Energy Facility Siting Council's order unless adopted by Council.¶

(2) After the hearing in a contested case proceeding on any matter other than an application for a site certificate or proposed site certificate amendment, the hearing officer shall issue a proposed contested case order stating the hearing officer's findings of fact and conclusions of law. The hearing officer shall serve the proposed contested case order on all parties and limited parties.¶

(3) Parties and limited parties may file exceptions to the proposed contested case order with the Council within the time set by the hearing officer, not to exceed 30 days after the hearing officer issues the proposed order. A party filing exceptions shall serve a copy of the exceptions on all other parties and limited parties. In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceeding on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.¶

(4) Parties and limited parties may file responses to exceptions within the time set by the hearing officer, not to exceed 15 days after the time set for filing exceptions. A party filing responses to exceptions shall serve a copy of the responses to exceptions on all other parties and limited parties.¶

(5) For limited parties, the filings described in (3) and (4) are only allowed to the extent they relate to issues on which the hearing officer has determined they may participate.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.605, ORS 469.615, ORS 469.992, ORS 469.405, ORS 469.440

ADOPT: 345-015-0480

RULE SUMMARY: Formerly OAR 345-015-0085. Moved and updated language for greater clarity and to be more consistent with statute. Took the second half of that rule and split it off from the new OAR 345-015-0475 to form this rule.

Adding language to clarify how the Council uses the exceptions and the hearing officer's proposed contested case order when issuing its own final order.

CHANGES TO RULE:

345-015-0480

Councils Final Order and Issuance of a Site Certificate

(1) After the period for filing responses to exceptions to the proposed contested case order described in OAR 345-015-0475 (3) and (4), the Council shall:

(a) Evaluate the exceptions and responses to the proposed contested case order;

(b) Review the hearing officer's proposed contested case order;

(c) Review the Department's proposed order; and

(d) Issue a final order. The final order may adopt, modify, or reject the hearing officer's proposed order and also the Department's proposed order.

(2) In its final order, the Council shall either approve or deny the application. If the Council approves the application, the Council shall issue a site certificate. The site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.

(3) Following a contested case proceeding on a proposed site certificate amendment, the Council, in its final order, shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate. The amended site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.

(4) The Council shall issue a site certificate or amended site certificate in duplicate counterpart originals and each counterpart, upon signing, will have the same effect.

Statutory/Other Authority: ORS 469.470, ORS 469.370(5), ORS 183.417(2)

Statutes/Other Implemented: ORS 183.415, ORS 469.370, ORS 469.605, ORS 469.615, ORS 469.992, ORS 469.405, ORS 469.440

REPEAL: 345-021-0100

RULE SUMMARY: Removed as duplicative, see OAR 345-015-0440, which deals with the burden of proof.

CHANGES TO RULE:

~~345-021-0100~~

~~Contested Case Proceeding on the Application -- Burden of Proof~~

~~(1) After the issuance of a notice of contested case as described in OAR 345-015-0230, the hearing officer shall conduct a contested case proceeding on the application according to the provisions of OAR chapter 345, division 15.~~

~~(2) The applicant has the burden of proving, by a preponderance of the evidence in the decision record, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances.~~

~~Statutory/Other Authority: ORS 469.470~~

~~Statutes/Other Implemented: ORS 469.370~~