

June 25-26, 2020 Energy Facility Siting Council Meeting
Agenda Item F: Rulemaking to Clarify Standard for Contested Case Requests for Type A Amendments
Attachment 3: Staff Summary and Evaluation of Public Comments
Updated June 25, 2020

This document summarizes the significant data, views, and arguments contained in the hearing record and create a record of the Department's recommendations to address the major issues raised therein. Exact copies of the written testimony are included in **Attachment 2**.

NOTE: The deadline for written comments on the proposed rules has been extended to 5:30 pm on July 16, 2020.

Request for Extension of Public Comment Period **Ex. 1**

Issue Summary: Commenters request that the Council postpone the June 25, 2020 deadline for written comments on this proposed rulemaking by at least 21 days, and also postpone the June 26, 2020 date for final deliberation by at least 21 days as provided in ORS 183.335(4).

Staff Recommendation: ORS 183.335(4) requires an agency to postpone the date of a proposed rulemaking action by at least 21 days, and no more than 90 days, "upon request of an interested person received before the earliest date that the rule could become effective after the giving of notice" under ORS 183.335(1). The earliest date that these proposed rules could be effective is the 50th day after staff gave notice to the legislators described under ORS 183.335(1)(d). Staff provided notice to the legislators on May 6, 2020, making the earliest date that the proposed rules could be effective June 25, 2020. Because this request was received before the earliest date that the rule could become effective, Staff recommends Council grant the extension and extend the deadline for written comments to 5:30 PM on Thursday, July 16, 2020.

Commenters request additional information on proposed rules **Ex. 1**

Issue Summary: First, Commenters believe that both the Council and the public do not yet have sufficient information for meaningful review of the proposed rule, and request additional information on Council's interpretation of the current rules, its past application of the current standard for Contested Case Requests under the Type A review, and the legislative history of the proposed rule.

Staff Recommendation: Staff believes both the Council and the Public have sufficient information for meaningful review. We note that the purpose of the notice of proposed rulemaking is to provide the interested public about the proposed rulemaking action and to give the Council the opportunity to receive public comment on the proposed rule. The Rulemaking Notice must summarize the subject matter and purpose of the new or amended rules in sufficient detail to inform a person that their interests may be affected (See ORS 183.335(2)(a)(B)). We are not aware of any requirement for a rulemaking notice to contain a detailed analysis or legislative history supporting the rulemaking action. If an interested person wished to obtain this information, the rulemaking does cite the principal documents the Council relied upon in development of the proposed rules, and informs any interested person that these documents may be obtained from the Department, as required by ORS 183.335(2)(b)(D). Staff also notes that the information was not included in the Staff Report for Agenda Item F of the June 25-26 Council meeting because and the purpose of that Agenda item is to consider

public comments received on the proposed rules, not to reevaluate information provided by staff in previous stages of the rulemaking process. Because Staff believes the information requested by the commenters is already available to them and other interested members of the public, staff recommends no further action is needed.

Commenters Object to Rulemaking Caption & Summary **Ex. 1**

Issue Summary: The Notice of Proposed Rulemaking states that the purpose of the proposed rule amendment is to clarify the Council's standard for determining whether an issue raised in a Type A Amendment Review justifies a Contested Case proceeding. Commenters object the use of the word “clarify” because, they argue, the rule would “modify” the threshold standard for requesting—and determining whether to hold—a contested case.

Staff Recommendation: Staff believes the rulemaking caption and summary included in the Notice of proposed document are accurate, and reasonably identify the subject matter of the Council’s intended action in a manner that is sufficient to inform a person that their interests may be affected. For this reason, staff believes the Notice of Proposed rulemaking substantially complies with the requirements of ORS 183.335(2), but will further evaluate the commenters concerns and requests Council’s authorization to issue a revised Notice if Staff determines revisions are necessary.

Commenters recommend Council reject proposed rules **Ex. 1**

Issue Summary: Commenters recommend Council reject the proposed rules and terminate the rulemaking project. Commenters oppose the proposed rule because:

- The proposed rules would “would put the Council in the awkward position of having to prematurely weigh and adjudicate the merits of specific issues in deciding whether to hold a contested case—yet the merits and likelihood of success on specific issues are supposed to be the subject of the contested case.”
- The proposed rules “would impose new burdens on interested persons to justify a contested case by satisfying a new burden of proof, thus decreasing even further the likelihood that there would ever be a contested case on a proposed site certificate amendment.”
- And because ““it could be impossible for interested persons to satisfy the proposed rule language—for example, situations where satisfying the new burden would depend on evidence that would be produced in the future, *via* a contested case.”

Staff Recommendation: Staff notes that Council has the option to terminate rulemaking at any time. In response to the three bullet points, below is an excerpt from the March 13th 2020 staff report provided to Council regarding this rulemaking.

At its January meeting, the Council clarified that the word “may,” as it is used in OAR 345-027-0371(9), requires Council to find that the person requesting the contested case has

raised an issue that is in some degree likely to affect the Council's determination as to whether the facility complies with applicable laws and Council standards, and that Council will not automatically grant a request for a contested case regarding a proposed order on a site certificate amendment simply because a person has raised an issue that "might," or "could" affect its determination regarding the facility's compliance. Interpreting the word "may" to mean "to be in some degree likely" is consistent with previous practice and the normal dictionary meaning of the word.

Council then moved to issue an order clarifying how the rule would be applied to future requests for reconsideration. The Order was attached to the Order denying the Requests for Reconsideration of Council's decision to deny a Contested Case on Amendment #4 to the Site Certificate for Summit Ridge Wind Farm issued on February 12, 2020 (see Attachment 1.)

Because the order merely clarified Council's existing interpretation of the rule, additional rulemaking is likely not required at this time; however, upon further consideration of the issue staff believes that amending the rule through the formal rulemaking process could provide additional clarity in the process and would provide interested parties an opportunity to submit views on what standard is appropriate.

Staff recommends Council further discuss these issues during final deliberation at its July meeting.

Recommendation that Council allow more access to Contested Cases Oral Testimony

Issue Summary: In oral testimony, a commenter suggested that the Council move toward loosening the standard for contested cases so that the public has greater access to challenging council decisions.

Staff Recommendation: Staff recommends Council further discuss this issue during deliberation at its July meeting.

Recommendation that Council restore previous version of rules Oral Testimony

Issue Summary: In oral testimony, a commenter suggested that the Council restore the version of the rule in place prior to the 2017 Amendment Rulemaking. Staff provides the corresponding section OAR 345-027-0070 rule adopted on by Administrative Order EFSC 1-2000, effective February 2, 2000 for reference:

"(6) To determine that an issue justifies a contested case proceeding under section (7), the Council must find that the request raises a significant issue of fact or law that may affect the Council's determination that the facility, with the change proposed by the amendment, meets an applicable standard. If the Council determines that even if the alleged facts are taken as true the outcome of the Council's determination would not change, but that conditions of performance might need revision, the Council may deny the request and may adopt appropriate conditions. If the Council does not have jurisdiction over the issue raised in the request, the Council shall deny the request."

Staff Recommendation: Staff recommends Council further discuss this issue during deliberation at its July meeting.

Recommendation that Council pend issue until 2022 rulemaking **Oral Testimony**

Issue Summary: In oral testimony, a commenter noted that she was not sure why Council was addressing this issue now, since consideration of other issues related to Division 027 raised in public comments during the 2019 Amendment Rulemaking project were deferred to the rulemaking scheduled for 2021.

Staff Recommendation: Staff recommends Council further discuss this issue during deliberation at its July meeting.