



Oregon

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To: Oregon Energy Facility Siting Council

From: Maxwell Woods, Senior Policy Advisor

Date: August 14, 2020

Re: Agenda Item I (Action Item): Applicable Procedural Rules in EFSC Contested Cases when administered by an Office of Administrative Hearings Administrative Law Judge - for the August 21, 2020 EFSC Meeting

Energy Facility Siting Council contested case procedural rules are a combination of Model Rules of Procedure for Contested Cases (OAR 137-003-001 through 137-003-0092) and specific rules adopted by EFSC (OAR 345, Division 15). This is aligned with the statutory directive to EFSC in ORS 469.370(5) that Council conduct contested case hearings "...in accordance with the applicable provisions of ORS chapter 183 and any procedures adopted by the council." ORS 183 is the Oregon Administrative Procedures Act, which, amongst other requirements, directs the Attorney General (AG) and Department of Justice (DOJ) to adopt model rules of procedure for use by state agencies, including model rules of procedure for conducting contested case proceedings. The AG and DOJ have adopted such model rules at OAR 137, Division 003.

The model rules for contested cases are located at OAR 137-003-0000 to -0092; EFSC has adopted by reference the model rules of procedure for contested cases in OAR 345-001-0005(1) "Except as described in this rule, the Council adopts and incorporates by reference in this chapter the following rules from the AG's Uniform and Model Rules...OAR 137-003-0001 through -0092."

When conducting contested case hearings, ORS 183.635(1) requires that most state agencies use administrative law judges (ALJ's) from the Office of Administrative Hearings (OAH) to conduct the contested case hearings; ORS 183.635(2) specifically exempts certain agencies from being required to use OAH ALJs, including the Energy Facility Siting Council (ORS 183.635(2)(k)). EFSC has established by rule at OAR 345-015-0023(1) that "The Council shall appoint a hearing officer to conduct a contested case proceeding on behalf of the Council...The

Council may appoint a Council member, an employee of the Department of Energy, or some other person or persons as it sees fit.” In the past, EFSC typically appointed private-practice attorneys to serve as its hearings officers to conduct contested cases. In more recent years, Council has appointed OAH ALJs to serve as hearing officers. This is allowed per ORS 183.640(1), which states that “Upon request of an agency, the chief administrative law judge for the Office of Administrative Hearings may assign administrative law judges from the office to conduct contested case proceedings on behalf of agencies that are exempted from mandatory use of administrative law judges assigned from the office under ORS 183.635.” Council first appointed an OAH ALJ to serve as hearing officer in the Boardman Solar Project application for site certificate in 2017. The Department, on behalf of EFSC, has established a cost-recovery contract with OAH for their services.

OAR 137-003-0000(2) (and similarly at OAR 137-003-00501) requires that: “When an administrative law judge assigned from the Office of Administrative Hearings conducts a contested case hearing for the agency, the proceedings shall be conducted pursuant to OAR 137-003-0501 to 137-003-0700, unless...(b) The Attorney General, by order, has exempted the agency or a category of the agency's cases from the application of such rules in whole or in part.” OAH has adopted its own specific contested case procedural rules at OAR 137-003-0501 to -0701. The OAH rules are similar though not identical to the model rules. As noted above, Council has adopted the model rules and established its own procedural rules.

In order for OAH ALJs to conduct a contested case for Council, OAH must receive the AG’s exemption from using the OAH procedural rules, which, as noted, are not the same rules as adopted by Council. Because EFSC has appointed OAH ALJs as its hearing officers for multiple energy facility applications, the Department recommends Council request the Attorney General provide a general exemption from the application of OAR 137-003-0501 through 137-003-0700 for OAH ALJs when conducting contested cases on behalf of Council. The Department recommends that this request include an exemption for all contested cases that could be conducted by OAH ALJs on behalf of EFSC, including applications for site certificate, amendments of site certificates, or other types of contested cases.

DOJ counsel, on behalf of EFSC, began the process of requesting the exemption from the AG in 2017 at the time of the Boardman Solar Project application for site certificate; however, because there were no requests for party status to the contested case, the contested case was perfunctory and the AG’s exemption was not needed.

The Department recommends not seeking an exemption from the application of OAR 137-003-0580 (Motion for Summary Determination). Neither the Model Rules adopted by the Council nor the Council's contested case rules contain a rule specifically pertaining to motions for

summary determination. Application of OAR 137-003-0580 would improve Council's contested case proceedings.

Recommendation: Because Council has appointed Oregon Office of Administrative Hearings Law Judges as its hearing officers for multiple energy facility applications, the Council request the Attorney General of Oregon provide a general exemption from the application of the Office of Administrative Hearings Contested Case rules in OAR 137-003-0501 through 137-003-0700 for all contested cases conducted by OAH ALJs on behalf of Council; with one exception, OAR 137-003-0580 which relates to motions for summary determination.