

Energy Facility Siting Council November 19-20, 2020

Agenda Item G: Boardman to Hemingway Transmission Line Project

Council Review of Appeals on Hearing Officer Order on Party Status, Authorized
Representatives and Issues for Contested Case for the November 19-20, 2020 EFSC Meeting

Attachment D: Appellant/Party Responses to Appeals

(Filed by Applicant and Oregon Department of Energy)

Applicant Response to Appeals



JOCELYN PEASE
Direct (503) 290-3620
jocelyn@mrg-law.com

November 13, 2020

VIA EMAIL OR U.S. MAIL

Alison Greene-Webster, Senior Administrative Law Judge
Office of Administrative Hearings
550 Capitol Street NE, Salem, OR 97301
Fax: 503-373-7806
Email: OED_OAH_Referral@oregon.gov

**Re: OAH Case No. 2019-ABC-02833 - Boardman to Hemingway Transmission Line –
Idaho Power Company’s Reply to Appeals**

Dear ALJ Greene-Webster:

Attached for filing in the Boardman to Hemingway Transmission Line matter is the Applicant Idaho Power Company’s Reply to Appeals.

Thank you,

Jocelyn Pease

Attachment
cc: B2H Service List

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

In the Matter of the Application for Site
Certificate for the

BOARDMAN TO HEMINGWAY
TRANSMISSION LINE

APPLICANT IDAHO POWER
COMPANY'S REPLY TO APPEALS

OAH Case No: 2019-ABC-02833

1 **I. INTRODUCTION**

2 Pursuant to the Letter regarding Procedural Information Concerning Hearing Officer's
3 Order on Party Status from Jesse Ratcliffe, dated October 30, 2020, and in response to the appeals
4 filed by petitioners, Applicant Idaho Power Company ("Idaho Power" or the "Applicant") files
5 this Reply to Appeals ("Reply"). To maintain an orderly and efficient contested case process,
6 Idaho Power recommends that the Energy Facility Siting Council ("EFSC" or "Council") reject
7 the appeals and instead uphold Administrative Law Judge ("ALJ" or "Hearing Officer") Webster's
8 rulings on limited party status and on the issues properly raised for the contested case in the Interim
9 Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case
10 issued on October 29, 2020 ("Party Status Order"), as amended by the Corrected Issues List issued
11 on November 9, 2020. The ALJ's rulings on party status and issues are well-reasoned, consistent
12 with the EFSC statutes and rules as well as the Administrative Procedures Act ("APA") and the
13 Attorney General's Model Rules of Procedure for Contested Case ("Model Rules"), and fall
14 squarely within the scope of her discretion.

15 **A. Party Status**

16 Throughout this proceeding, Idaho Power has recommended that all petitioners should be
17 afforded limited party status, and that their participation be limited to the issues that the Hearing
18 Officer concluded were properly raised in their petitions. This approach is consistent with the

1 APA, which allows agencies to impose restrictions on the participation of limited parties; it is fair,
2 in that it allows the parties to address their issues of chief concern; and it will reasonably further
3 the administrative goal of an orderly and efficient process.

4 Contrary to the assertions raised in the appeals, Idaho Power’s recommendation that party
5 status be limited is not motivated by a desire to prevent members of the public from fully
6 participating on their issues of concern. Instead, Idaho Power’s chief concern in arguing for
7 limited party status is in maintaining an orderly process and reasonable schedule that will allow
8 Idaho Power to meet its in-service date for the Boardman to Hemingway Transmission Line
9 Project (“B2H” or “Project”) by 2026, which is critical to Idaho Power’s resource needs as the
10 company exits coal plant operations over the coming years.

11 In the event that the Council reverses the ALJ’s Ruling and grants all petitioners full party
12 status, Idaho Power urges that the Council also provide specific direction to the Hearing Officer
13 to adopt procedural guidelines for the contested case that will reduce the inefficiency and delay
14 that will likely result, and to allow Idaho Power to meet its in-service date for B2H.

15 **B. Issues**

16 Idaho Power recommends that the Council uphold the ALJ’s rulings on the issues properly
17 raised in this case and reject the requests in the appeals to allow parties to address additional issues.
18 In analyzing the petitions for party status and proposed contested case issues, the Hearing Officer
19 closely followed the requirements of the EFSC statutes and rules related to the identification of
20 contested case issues,¹ and Idaho Power agrees with and supports the analysis presented in the
21 Party Status Order. Idaho Power does not further address the appeals regarding specific contested
22 case issues in this Reply, and instead focuses on the party status issue and related concerns
23 regarding schedule and process.

¹ ORS 469.370(3); OAR 345-0015-0016(3).

1 **II. BACKGROUND**

2 The Oregon Department of Energy (“ODOE”) issued its Proposed Order on B2H on July
3 2, 2020, and required interested petitioners to file their petitions for party status by August 27,
4 2020. ODOE received 52 petitions, and subsequently, Idaho Power and ODOE filed Responses
5 to Petitions on September 22, 2020. The Hearing Officer held Prehearing Conferences on
6 September 25, 2020 and October 1, 2020, which provided petitioners an opportunity to present
7 arguments about party status and proposed issues. During that same period in late September and
8 early October, the Hearing Officer allowed for additional briefing on party status and issues.

9 The Hearing Officer issued her Party Status Order on October 29, 2020, identifying which
10 petitioners had properly raised at least one issue to establish standing to participate in the contested
11 case, identifying which issues had been properly raised, and granting limited party status to all
12 petitioners who had established standing. Specifically, the Party Status Order clarifies that for
13 limited parties, the scope of participation is limited to issues properly raised in their petitions for
14 party status:

15 The limited party’s participation in the contested case will be limited to the specific
16 issue or issues the limited party properly raised in their petition for party status. A
17 limited party will have standing to respond on procedural matters, to participate in
18 discovery related to the identified issue(s) properly raised in their petition, and to
19 present evidence, cross-examine witnesses, and submit written briefing on the
20 identified issue(s) properly raised in their petition.²

21 Additionally, the Party Status Order provides that where more than one limited party has
22 established standing on a particular issue of public concern, the limited parties will be required to
23 consolidate their representation and presentation on the issue, which will avoid redundancy,
24 maintain order, and facilitate efficiency while allowing the asserted issue/public interest to be
25 represented in the contested case.³

² *In the Matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line*, Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case at 10-11 (Oct. 29, 2020) [hereinafter “Party Status Order”].

³ Party Status Order at 11 (citing *Marbet v. Portland General Electric*, 277 Or 447, 455 (1977)).

1 Jesse Ratcliffe, as Counsel to EFSC, served a letter in this proceeding clarifying that
2 petitioners could file an appeal on party status and issues by November 6, 2020, that ODOE and
3 the Applicant would have an opportunity to respond on November 13, 2020, and that the appeals
4 will be considered at the November 20, 2020 Council Meeting. Twenty-six petitioners timely filed
5 appeals on party status and issues.

6 **III. APPLICABLE LAW REGARDING PARTY STATUS**

7 The EFSC statutes and rules grant party status to the applicant and ODOE in all contested
8 cases relating to site certificates.⁴ Other interested individuals and organizations may petition for
9 party or limited party status in the contested case.⁵ If the Hearing Officer grants a petition, she
10 “shall specify areas of participation and procedural limitations” as she “deems appropriate.”⁶
11 Additionally, any “petition to participate as a party may be treated as a petition to participate as a
12 limited party.”⁷

13 The Council conducts its contested cases pursuant to the APA and the Council’s contested
14 case procedures.⁸ Under the APA, parties may “present evidence and argument on all issues
15 properly before the presiding officer in the proceeding.”⁹ However, the APA allows each agency
16 to “adopt rules of procedure governing participation in contested case proceedings by persons
17 appearing as limited parties.”¹⁰ The Council has promulgated its own rules governing participation

⁴ ORS 469.370(5) (“Following receipt of the proposed order from the department, the council shall conduct a contested case hearing on the application for a site certificate in accordance with the applicable provisions of ORS chapter 183 and any procedures adopted by the council. The applicant shall be a party to the contested case. . . .”); OAR 345-015-0080(2) (“The Department must participate in all contested case proceedings conducted by the Council with all the rights of a party.”).

⁵ OAR 345-015-0016(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.”).

⁶ OAR 137-003-0005(9).

⁷ OAR 137-003-0005(8).

⁸ ORS 469.370(5) (“Following receipt of the proposed order from the department, the council shall conduct a contested case hearing on the application for a site certificate in accordance with the applicable provisions of ORS chapter 183 and any procedures adopted by the council.”).

⁹ ORS 183.417(1).

¹⁰ ORS 183.417(2); *see also* ORS 183.450(3) (“Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence. Persons appearing in a limited party status shall participate in the manner and to the extent prescribed by rule of the agency.”).

1 in contested cases, but also applies the Model Rules to the extent that they do not conflict with the
2 Council’s rules.¹¹ The Model Rules identify two important procedural limitations on limited
3 parties’ participation in contested cases:

4 (3) The hearing shall be conducted, subject to the discretion of the presiding officer,
5 so as to include the following:

6 * * * * *

7 (b) The statement and evidence of opponents, interested agencies, and other
8 parties; *except that limited parties may address only subjects within the area*
9 *to which they have been limited;*

10 * * * * *

11 (4) Presiding officers or decision makers, agency representatives, interested
12 agencies, and parties shall have the right to question witnesses. However, *limited*
13 *parties may question only those witnesses whose testimony may relate to the area*
14 *or areas of participation granted by the agency.*¹²

15 As mentioned above, the Hearing Officer may specify additional limitations as she “deems
16 appropriate.”¹³ For example, in a 2015 EFSC contested case, the Hearing Officer limited
17 participation to the issues that the petitioners properly raised in their petitions for party status.¹⁴

18 Regardless of whether a party is accorded full or limited status, the Council’s rules
19 authorize all parties “to propose site certificate conditions that the party believes are necessary or
20 appropriate to implement the policy of ORS 469.310 or to meet the requirements of any other
21 applicable statute, administrative rule or local government ordinance.”¹⁵ Parties and limited
22 parties may also “present evidence relating to the appropriateness, scope or wording of any other

¹¹ OAR 345-001-0005(1), (3) (“(1) Except as described in this rule, the Council adopts and incorporates by reference in this chapter the following rules from the Attorney General’s Uniform and Model Rules (July 2014): . . . 137-003-0001 through 137-003-0092[.] . . . (3) In any conflict between the model rules and Council rules, the Council shall apply its own rules.”).

¹² OAR 137-003-0040(3)(b) and (4) (emphasis added).

¹³ OAR 137-003-0005(9).

¹⁴ *In the Matter of the Application for Site Certificate for the South Dunes Power Plant*, Order on Petitions for Party Status; Order Granting Application for Admission *Pro Hac Vice* at 7–21 (Dec. 28, 2015).

¹⁵ OAR 345-015-0085(1).

1 party's proposed site certificate conditions and may present written proposed findings of fact, briefs
2 and other argument concerning proposed conditions.”¹⁶

3 **IV. ARGUMENT**

4 The limitations on party status in the Party Status Order appropriately balance the
5 importance of public participation with need for a fair and orderly process.

6 **First**, limiting petitioners’ participation to the issues properly raised in their petitions will
7 result in the most efficient and effective presentation of the issues for the Council’s consideration
8 and will ensure that “unduly repetitious evidence” is properly excluded from the record.¹⁷
9 Similarly, Idaho Power’s proposed limitation will help the Hearing Officer “[m]aintain order” and
10 “[f]acilitate presentation of evidence” in the contested case.¹⁸ In the Party Status Order, the
11 Hearing Officer granted limited party status to 35 petitioners and identified 71 properly raised
12 contested case issues. Given the breadth of issues and number of petitioners, if each petitioner
13 were allowed to address every contested case issue, it would be very difficult to maintain an orderly
14 evidentiary process. Limiting petitioners to the issues properly raised in their petition and
15 consolidating participation on issues as recommended by the Hearing Officer will reduce
16 duplicative testimony and argument, and provide for an efficient and orderly process.

17 **Second**, the recommended approach is consistent with the Council’s regulatory framework
18 and Oregon administrative law, which require parties to raise issues at an early stage in the process
19 to (1) provide fair notice to the applicant and reviewing agency such that they have an opportunity

¹⁶ OAR 345-015-0085(2).

¹⁷ ORS 183.450(1) (“Irrelevant, immaterial or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude agency action on the record unless shown to have substantially prejudiced the rights of a party.”). The Model Rules authorize the Hearing Officer to enforce this requirement. OAR 137-003-0040(6) (“The presiding officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, or immaterial matter.”).

¹⁸ OAR 345-015-0023(2)(b),(d) (A hearing officer shall take all necessary action to: . . . Facilitate presentation of evidence; [and] . . . Maintain order[.]”).

1 to respond to the issue; and (2) avoid unfair surprise in the contested case.¹⁹ Limiting petitioners
2 to the issues that they properly raised in their DPO comments and petition for party status will
3 ensure that Idaho Power and ODOE receive fair notice of all contested case issues, as is required
4 by relevant EFSC statutes and rules governing the identification of contested case issues.²⁰

5 **Finally**, Idaho Power’s recommended approach is practical and fair, given that the issues
6 properly raised by a petitioner are likely to be those most meaningful to that petitioner, and which
7 that petitioner is best suited to present. Petitioners may represent either a personal or public interest
8 in the outcome of the contested case,²¹ and in either case the petitioners that identified the interest
9 in their petition will be best prepared to assert that interest in the contested case. Additionally, to
10 the extent that a petitioner raised a personal interest, it is not clear that it would be appropriate for
11 any other petitioner to address that personal interest. To the extent that petitioners purport to
12 address a public interest, it is not clear that all petitioners would be qualified to address that public
13 interest.²² The practical effect of granting all petitioners full party status would be to allow them
14 to provide evidence in this case on issues that they have not addressed in their DPO comments or
15 petitions, and about which they have not expressed any particular interest or claimed

¹⁹ *Boldt v. Clackamas County*, 107 Or App 619, 622–23 (1991). *Boldt* applied the “sufficient specificity” statute from LUBA proceedings, but that statute has similar requirements to the analogue in EFSC contested cases. Compare ORS 197.763(1) with ORS 469.370(3).

²⁰ In accordance with ORS 469.370(5), “[i]ssues that may be the basis for a contested case shall be limited to those raised on the record of the public hearing” unless “[t]he action recommended in the proposed order, including any recommended conditions of the approval, differs materially from that described in the draft proposed order, in which case only new issues related to such differences may be raised.” Thus, in order to be included in the contested case, an issue must have been raised on the record of the DPO or relate to a new issue or new condition language in the Proposed Order. In addition, for contested case issues raised on the record of the DPO, EFSC rules further provide that the issue must (1) be within the jurisdiction of the Council, and (2) have been presented “with sufficient specificity to afford the decision maker an opportunity to respond to the issue[.]” OAR 345-015-0016(3). “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.” *Id.* (Emphasis added).

²¹ The determination of whether a petitioner’s interest will be impacted is left to the agency but is subject to judicial review. ORS 183.310(7)(c). The Council has the authority to determine whether a petitioner is qualified to represent a public interest. *Marbet*, 277 Or at 455.

²² With respect to at least several issues, petitioners filed their petitions to address a specific area on which they claim to have expertise – for example, Dr. Fouty for soils, Kevin and Anne March for fisheries issues, and Gail Carbiener for Oregon Trails issues. Accordingly, it makes sense for parties’ participation to be limited to their claimed areas of expertise. Dr. Fouty did not raise fisheries issues or Oregon trail issues in her DPO comments or petition, and it is not clear that she would have any particular expertise to address these issues. Similarly, Kevin and Anne March did not raise soils or trails issues and it is not clear that either would have relevant expertise on these topics.

1 expertise. This approach simply does not make sense and would substantially burden the record
2 in this case without providing any discernible benefit to the record. Accordingly, the argument that
3 all parties should be permitted to address all issues should be rejected.

4 V. RESPONSES TO APPEALS

5 STOP B2H, Irene Gilbert, and numerous other petitioners filed appeals requesting that they
6 be granted full party status to address any and all issues in the contested case. Their primary
7 contention is that all petitioners must be allowed to address every contested case issue because the
8 APA guarantees that right to all parties.²³ Additionally, the parties contend that: the Model Rules
9 allow the Hearing Officer to grant limited party status only if limited party status is requested by
10 the petitioner,²⁴ the ALJ's granting limited party status is an abuse of discretion,²⁵ and granting
11 the petitioners limited party status will prevent them from responding to Idaho Power's proposed
12 contested case issues.²⁶ None of these arguments is sound. As discussed below, the APA allows
13 agencies to adopt their own rules for how limited parties participate in contested case proceedings,
14 the Model Rules plainly allow the ALJ discretion to grant petitioners limited party status, and
15 limited parties may respond to Idaho Power's proposed contested case issues because those issues
16 are all related to proposed site certificate conditions.

17 A. The Hearing Officer's Rulings are Consistent with the APA.

18 In its appeal, STOP B2H²⁷ relies on the APA sections ORS 183.417(1) and ORS
19 183.413(2)(e) to assert that the petitioners are entitled to address every issue in the contested

²³ *In the Matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line*, STOP B2H Coalition's Appeal From ALJ Order on Party Status and Issues for Contested Case at 3 (Nov. 6, 2020) [hereinafter "STOP B2H Appeal"]; *In the Matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line*, Irene Gilbert's Party Status Appeal (Nov. 5, 2020) [hereinafter "Gilbert Appeal"].

²⁴ STOP B2H Appeal at 3.

²⁵ Gilbert Appeal at 3.

²⁶ STOP B2H Appeal at 5-6.

²⁷ Ms. Gilbert also raises a similar argument. Gilbert Appeal at 3.

1 case.²⁸ However, their reliance on those provisions is misplaced, ignoring critical context in the
2 applicable statutory framework, and failing to give meaning to all provisions of the APA and EFSC
3 statutes.

4 STOP B2H’s position is rooted primarily in ORS 183.417(1) of the APA, governing
5 procedures in contested case hearings.²⁹ That subsection states that parties may “present evidence
6 and argument on all issues properly before the presiding officer” in the contested case.³⁰ STOP
7 B2H implies that this provision guarantees that limited parties have an absolute right to respond to
8 every issue in a case, regardless of agency rules. However, this argument entirely ignores the very
9 next sentence in that statute found in ORS 183.417(2) which grants agencies, including the
10 Council, the authority to “*adopt rules of procedure governing participation in contested case*
11 *proceedings by persons appearing as limited parties.*”³¹ Similarly, ORS 183.450(3) governing
12 evidence in contested cases explicitly provides that, while every party shall have the right of cross-
13 examination and to submit rebuttal evidence, “[p]ersons appearing in a limited party status shall

²⁸ STOP B2H Appeal at 3 (“The Oregon Administrative Procedure Act (APA) provides that a ‘party has the right to respond to **all issues** properly before the presiding officer and present evidence and witnesses on those issues.’”) (emphasis in original); Gilbert Appeal at 3 (“ORS 183.413(2)(e) States the party has the right to respond to all issues properly before the presiding officer and present evidence and witnesses on those issues.”).

²⁹ STOP B2H also argues that ORS 183.413(2)(e)—stating that “a party has the right to respond to all issues properly before the presiding officer”—creates “a due process right on the part of STOP (and others) to participate on ‘all issue[s]’ – not just on certain issues.” STOP B2H Appeal at 3. This reading of the statute is wrong, as it fails to consider the text and context of the statute. *See State v. Gaines*, 346 Or 160, 171 (2009) (reiterating that the first step in statutory analysis “remains an examination of text and context.”). Indeed, as explained by the Oregon Supreme Court, the statutory purpose of ORS 183.413 is to enumerate the contents of a *notice* of a hearing—not to confer any substantive procedural rights. *Smith v. Bd. Of Parole & Post-Prison Supervision*, 268 Or App 457, 467 (2015) (noting that the statutory text “pertains solely to the contents of a *notice* of hearing . . . it does not purport to confer any substantive procedural rights) (emphasis in original); *see also Smith v. Mills*, 268 Or App 454, 456 (2015) (following *Smith*). In this context, ORS 183.413(2) compiles procedural rights addressed elsewhere in the APA, but does create any additional procedural rights for contested case hearings. *See, e.g., Villanueva v. Bd. of Psychologist Exam’rs*, 175 Or App 345, 356–57 (2001) “ORS 183.413 requires that parties to a contested case be informed generally of their rights and remedies in the process. Subsection (2) of that statute sets out the information that must be provided.”); *Schuch v. Bd. Of Parole & Post-Prison Supervision*, 139 Or App 327, 331 (1996) (“ORS 183.413 . . . establishes the general notice requirements for contested case hearings.”); *Liu v. Portland State Univ.*, 281 Or App 294, 301 (2015) (noting in a parenthetical that ORS 183.413 gives a party to a contested case a right to prehearing notice of rights and procedures).

³⁰ ORS 183.417(1); STOP B2H Appeal at 3; Gilbert Appeal at 4.

³¹ ORS 183.417(2) (“Agencies may adopt rules of procedure governing participation in contested case proceedings by persons appearing as limited parties.”).

1 participate in the manner and to the extent prescribed by rule of the agency.”³² These provisions
2 of the APA evince a clear legislative intent to allow agencies to promulgate rules to restrict the
3 scope of participation by limited parties.

4 The Oregon Supreme Court has recognized that “when one statute deals with a subject in
5 general terms and another deals with the same subject in a more minute and definite way, the two
6 should be read together and harmonized, if possible, while giving effect to a consistent legislative
7 policy.”³³ Here, ORS 183.417(1) is a more general statement of procedural rights for parties, while
8 ORS 183.417(2) is a more specific provision addressing the participation of limited parties in
9 contested case proceedings. Thus, to give effect to both provisions of ORS 183.417, subsection 2,
10 must be understood to explain and modify subsection 1.³⁴ In other words, parties may respond to
11 all issues in a case—unless an agency imposes restrictions on the participation by limited parties,
12 in which case those limitations must be given effect. Indeed, this reading is required in order to
13 avoid an absurd result, whereby, on one hand, agencies are allowed to impose limitations on
14 participation by limited parties, but on the other hand are deprived of the ability to impose the most
15 meaningful limitation on these parties’ participation—limitations on the scope of participation.³⁵

16 Additionally, the APA framework must also be considered in context and harmonized with
17 the EFSC statutory scheme, which imposes limitations on how parties may raise issues in an EFSC
18 contested case proceeding. Specifically, the EFSC statutes require that persons that intend to
19 request party or limited party status in a contested case before the Council must first raise their

³² ORS 183.450(3).

³³ *State v. Edmonds*, 364 Or 410, 421 (2019); see also Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012) (explaining that “the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence”).

³⁴ Notably, construing ORS 183.417(2) to modify ORS 183.417(1), would be similar to the approach to interpreting ORS 183.450(3), which describes both parties and limited parties in the same statutory provision, and in which the second sentence addressing limited parties modifies the first sentence addressing parties.

³⁵ Consistent with principle of statutory construction, the Council must interpret ORS 183.417(1) and (2) so that each provision to give meaning to both without achieving an absurd result. See ORS § 174.010; *Vasquez v. Double Press Mfg., Inc.*, 364 Or 609, 630 (2019) (“We have recognized that when a statute has two or more plausible interpretations, we would not favor the one that ‘would lead to an absurd result that is inconsistent with the apparent policy of the legislation as a whole.’”) (quoting *State v. Vasquez-Rubio*, 323 Or 275, 282–83 (1996)).

1 issues in comments before the record of the public hearing closes, and the issues must be raised
2 with sufficient specificity to allow the council, the Department of Energy, and the applicant an
3 adequate opportunity to respond.³⁶ Persons that did not participate in the public hearing and
4 comment phase of the proceeding may not participate in the contested case.³⁷ This framework
5 indicates a legislative intent that petitioners in EFSC proceedings be allowed to address only those
6 issues that they properly raised in the comment phase, and included in their petitions. The only
7 way to harmonize EFSC’s framework is to give effect to ORS 183.417(2) by allowing EFSC to
8 adopt rules restricting limited parties to the issues they properly raised in comments on the record
9 during the public hearing stage and properly present in their petitions for party status.

10 Accordingly, STOP B2H’s reading of ORS 183.417(1) to allow all parties to present
11 evidence on all issues—without any limitation as contemplated in ORS 183.417(2)—would
12 frustrate the legislature’s intent to allow agencies to prescribe rules restricting limited parties’
13 evidentiary powers and would achieve an absurd result. The more general statement of rights in
14 ORS 183.417(1) must be read in context with ORS 183.417(2) and 183.450(3) and the EFSC
15 statutory scheme, and the more specific statements regarding limited parties’ control over any
16 conflict with the more general statements relevant to all parties. The most plausible way to
17 harmonize these two provisions is to read the specific provisions of ORS 183.417(2), regarding
18 limited parties, as being a modification to the general statement enumerated in ORS 183.417(1).
19 Thus, when all relevant provisions of the APA are read together, it is clear that parties’ rights to
20 respond to all issues in a case are subject to the specific limitations imposed by agencies on those
21 persons who are accorded limited party status.

22 **B. STOP B2H’s Assertion that the Hearing Officer Cannot Treat Petitions Filed in this**
23 **Case as Petitions for Limited Party Status is Inconsistent with the Model Rules.**

24 STOP B2H challenges the Hearing Officer’s authority to treat petitions for party status as

³⁶ ORS 469.370(2)(e) and (3).

³⁷ ORS 469.370(5).

1 petitions for limited party status.³⁸ According to STOP B2H, OAR 137-003-0005(8) allows the
2 Hearing Officer to exercise that discretion only when a petitioner chooses to request limited party
3 status, and there is nothing “in the Rule or the APA that provides authority for an ALJ or Hearings
4 Officer to forcibly limit a party’s participation when they meet the criteria for full party status.”³⁹
5 STOP B2H has not provided any support for this assertion and its statements contradict the plain
6 language of OAR 137-003-0005(8), which states: “A petition to participate as a party may be
7 treated as a petition to participate as a limited party.” Additionally, the APA contemplates that
8 agencies have the authority to limit parties’ participation, but is completely silent as to how
9 agencies may do so—leaving the matter entirely to the discretion of the agency. Here, EFSC has
10 adopted rules, including the Model Rules, which provide the agency with broad authority to limit
11 parties’ participation.

12 Moreover, while not explicit in STOP B2H’s appeal, they are essentially arguing that the
13 Model Rules violate the APA—and thus if the Council were to adopt STOP B2H’s reasoning, the
14 Council would also be repudiating the Model Rules, which it has incorporated by reference into
15 its own rules.⁴⁰ A much more reasonable result would be to give effect to the statutory provisions
16 in the APA and rule provisions in the Model Rules regarding limited party status.⁴¹

17 **C. The ALJ Acted Within Her Discretion to Limit Party Status Under the Model Rules.**

18 Consistent with ORS 183.417(2), the Council has in fact adopted and incorporated
19 provisions of the Model Rules governing participation for limited parties.⁴² Those rules

³⁸ STOP B2H Appeal at 3-4 (“The Model Rules of Procedure for Contested Cases make reference to the concept of ‘limited’ party status. However, the reference in the rules is to the ability of a party **to limit their own status** should they choose to do so. . . . The ALJ’s conclusion that these requirements somehow authorize forcibly limiting a parties [*sic*] participation to only certain issues contravenes both the express language of the APA and also the spirit or intent of the APA.”).

³⁹ STOP B2H Appeal at 6.

⁴⁰ OAR 345-015-0001.

⁴¹ ORS 183.417(2); ORS 183.450(3); OAR 137-003-0005(8) and (9).

⁴² 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 Attorney General’s Uniform and Model Rules (July 2014): . . . 137-003-0001 through 137-003-0092[.]”).

1 specifically provide the hearing officer with discretion to determine whether a petition for party
2 status should be treated as a petition for limited party status, and provide that limited parties may
3 testify and cross-examine witnesses only within “the area or areas of participation granted by the
4 agency.”⁴³ Similarly, EFSC’s own rule, OAR 345-015-0083(2) contemplates that petitioners will
5 be granted limited party status.⁴⁴

6 Despite those permissible limitations, Ms. Gilbert argues that the ALJ has abused her
7 discretion in imposing limitations on party status, that the Oregon Court of Appeals precedent in
8 *Berwick v. Adult & Family Servs. Div.* implies an obligation on the ALJ to grant full party status
9 to assist petitioners in presenting evidence in the contested case.⁴⁵ However, nothing in *Berwick*
10 suggests that a petitioner seeking to intervene in a contested case is entitled to present evidence on
11 all issues arising in that contested case, and there are significant differences between *Berwick* and
12 the instant case. First, the contested case in *Berwick* was a non-adversarial fact-gathering
13 proceeding meant to assist the agency in deciding whether the claimant satisfied the criteria to
14 prove unemployability.⁴⁶ The court expressly relied on the nature of the proceedings in its
15 determination that the ALJ had a heightened responsibility to assist the claimant. Conversely, the
16 contested case process before EFSC is much more adversarial, and the ALJ plays a role more akin
17 to the “disinterested adjudicator.” For that reason, it is not clear that *Berwick* affects the ALJ’s

⁴³ OAR-137-003-0005(8); OAR 137-003-0040(4) (“Presiding officers or decision makers, agency representatives, interested agencies, and parties shall have the right to question witnesses. However, limited parties may question only those witnesses whose testimony may relate to the area or areas of participation granted by the agency.”); OAR 137-003-0040(3)(b) (“The hearing shall be conducted, subject to the discretion of the presiding officer, so as to include the following: . . . The statement and evidence of opponents, interested agencies, and other parties; except that limited parties may address only subjects within the area to which they have been limited[.]”).

⁴⁴ “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.” OAR 345-015-0083(2).

⁴⁵ Gilbert Appeal at 3.

⁴⁶ *Berwick*, 74 Or App 460, 465-466 (1985) (On appeal, the court discussed the non-adversarial nature of public benefit hearings. In cases before the AFSD, claimant is the only party to the proceeding, for AFSD is the decider, not the opponent, and the court explained: “The hearings officer’s responsibilities are shaped by the character of the hearing. The hearings officer is not a disinterested adjudicator observing two parties fighting. Rather, he or she aims both at helping AFSD make the best possible decision and at assuring the claimant a fair and full hearing.”).

1 duties in this contested case in any manner.⁴⁷

2 Furthermore, *Berwick* does not bear on the question of whether a petitioner is entitled to
3 party or limited party status. In *Berwick* the claimant’s rights were the subject of the contested
4 case. Accordingly, the claimant was a party under ORS 183.310(7)(a) and did not need to petition
5 for party or limited party status under ORS 183.310(7)(c). Although individuals who are
6 statutorily granted full party status have the right to present evidence on all issues, nothing in
7 *Berwick* suggests that petitioners seeking to participate in a contested case have that same right.
8 Rather, in *Berwick* the court held merely that the hearings officer in a non-adversarial proceeding
9 has a duty to ensure a full and fair hearing to the claimant and that part of that duty requires the
10 ALJ to assist an unrepresented claimant in presenting favorable evidence.

11 **D. If Granted Limited Party Status, Petitioners May Nevertheless Respond to Idaho**
12 **Power’s Proposed Conditions.**

13 STOP B2H argues that if it is limited to party status, it would be precluded from responding
14 to the issues that Idaho Power identified in its Petition Identifying Contested Case Issues.⁴⁸
15 However, all of the issues that Idaho Power identified as contested case issues relate to proposed
16 site certificate conditions, as described in the Hearing Officer’s Corrected Table of Identified
17 Issues. Under the Council’s contested case rules, “any party or limited party may present evidence
18 relating to the appropriateness, scope or wording of any other party’s proposed site certificate
19 conditions and may present written proposed findings of fact, briefs and other argument
20 concerning proposed conditions.”⁴⁹ Because those issues relate to Idaho Power’s proposed

⁴⁷ See *Wahlgren v. ODOT*, 196 Or App 452, 459 (2004) (stating that “it is not clear . . . that *Berwick* even applies” to adversarial implied consent cases before the DMV).

⁴⁸ STOP B2H Appeal at 5 (“For example, being a limited party would potentially mean that STOP could not challenge or oppose on the issues that the applicant IPC has appealed on. One of those IPC appeal points seeks to remove a critical condition that the agency placed in the draft Proposed Order, that would require the applicant to survey and deal with bats. . . . Yet as a limited party, STOP would potentially not be able to present evidence, or cross examine, or submit briefs on this issue.”).

⁴⁹ OAR 345-015-0085(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

1 modifications to site certificate conditions, all limited parties, including STOP B2H, may address
2 those proposed conditions.

3 VI. RELIEF IN THE ALTERNATIVE

4 In the event the Council rejects the Hearing Officer’s decision on party status, and grants
5 full party status to the petitioners, Idaho Power urges the Council to consider the potential
6 implications to the ability of the Hearing Officer to maintain an efficient and orderly process, as
7 well as the potential impacts to the overall schedule, and provide direction to help keep the
8 contested case on track so that Idaho Power may receive a site certificate in time to meet its 2026
9 in-service date.

10 In particular, Idaho Power is concerned that if all parties have full party status to address
11 all issues identified in the Party Status Order, conceivably all 35 parties could issue discovery and
12 provide evidence and argument on all 71 issues. Even if each party were allowed to ask only **one**
13 question or data request per issue in discovery, this would result in 2,485 discrete questions or data
14 requests—many of which may be cumulative or duplicative—creating inefficiency in the
15 discovery process. The same considerations apply to testimony and briefing, where, in the absence
16 of consolidation, there is a high likelihood of cumulative and duplicative testimony and
17 argument.⁵⁰ These process considerations will necessarily result in significant delays to the overall
18 schedule.

19 Idaho Power proposed a schedule in this case, which assumed the Hearing Officer’s limits
20 on party participation, and certain parties have already indicated they will need substantially more
21 time to prepare their case. For example, STOP B2H claims that they will need 90 to 120 days
22 from the date of completing discovery to file their testimony.⁵¹ Under Stop B2H’s timeline, 8 to

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.”).

⁵⁰ OAR 137-003-0005(3)(f).

⁵¹ *In the Matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line*, STOP B2H Coalition’s Memorandum in Opposition to Idaho Power’s Motion to Adopt Proposed Schedule at 9 (Oct. 29, 2020).

1 9 months will have passed between issuance of the Proposed Order and the start of direct
2 testimony—and that’s assuming there is **no** discovery and the parties continued to be limited to
3 the issues they properly raised in their petition.⁵² If the Council grants the parties full party status
4 and/or discovery occurs, it is not unreasonable to anticipate the parties will request to push the start
5 of testimony out even longer. Furthermore, if the scope of issues that each party may address
6 expands by affording all parties full party status, Idaho Power and ODOE may require more time
7 to review and respond to cumulative and duplicative discovery requests, testimony, and argument,
8 and the Hearing Officer may require additional time to review and consider the entire record in
9 issuing a contested case order.

10 Indeed, there is significant risk that a process with no limitations imposed could result in
11 extending the schedule out far enough to potentially jeopardize Idaho Power’s 2026 in-service
12 date. Importantly, the 2026 in-service date is not merely aspirational—it is needed to fill a resource
13 gap resulting from the Company’s coal plant exits in the coming years.⁵³ Receiving a timely
14 decision from the Council on the site certificate will be essential to meeting the 2026 on-line date
15 for B2H. And while 2026 may seem distant, many intermediate tasks are required between
16 obtaining the site certificate and completing construction. There is very little, if any, room in the
17 schedule for delay. Therefore, Idaho Power seeks to have a final decision and site certificate by
18 the end of 2021.

19 Without any sideboards on the contested case process, Idaho Power is concerned that the

⁵² Note that the timing contemplated in the EFSC statute for issuance of a site certificate is 12 months from submission of the application for site certificate. ORS 469.370(9)(d).

⁵³ B2H is needed in 2026 to make up the capacity deficit created by customer growth and Idaho Power’s planned exit from coal operations at the Valmy, Boardman and certain units of the Jim Bridger coal plants. Idaho Power exited Valmy Unit 1 (127 MW) in 2019, and the Boardman plant ceased operations just last month. In addition, the Second Amended 2019 Integrated Resource Plan filed in early October 2020 with the Public Utility Commission of Oregon (“OPUC”) (see *In the Matter of Idaho Power Company*, 2019 Integrated Resource Plan, Docket LC 74, Idaho Power Company’s Amended 2019 Integrated Resource Plan, (Oct. 2, 2020)), contemplates that Idaho Power will exit one Bridger Coal unit (177 MW) and Valmy Unit 2 (133 MW) in 2022, a second Bridger unit (180 MW) in 2026, a third Bridger unit (174 MW) in 2028, and the fourth and last Bridger unit (177 MW) in 2030. As a result of these coal plant exits, combined with expected load growth, Idaho Power will be facing resource deficits by 2026—unless B2H is completed and on-line as planned.

1 process considerations described above will quickly overwhelm the Hearing Officer’s ability to
2 maintain an efficient and orderly process. In light of these concerns, if the Council elects to grant
3 full party status to all petitioners, Idaho Power urges the Council to also provide the following
4 direction in its order on the appeals:

5 (1) The Hearing Officer should take any and all appropriate measures to consolidate
6 participation to ensure an orderly and efficient process and to avoid unnecessary
7 cumulative and duplicative discovery requests, evidence, and argument. ⁵⁴

8 (2) The Hearing Officer and parties in the case will endeavor to maintain a reasonable
9 schedule in this case without undue delay, which would allow for a Council decision
10 on the site certificate by the end of 2021.

11 **VII. CONCLUSION**

12 Idaho Power requests that the Council reject the appeals on party status and issues and
13 uphold the Hearing Officer’s rulings in the Party Status Order. To the extent that the Council is
14 inclined to grant the appeals and overrule the Hearing Officer, Idaho Power urges the Council to
15 also provide specific direction regarding the consolidation of participation and schedule in this
16 case to avoid overwhelming and unduly delaying the contested case process.

17 ////

18 ////

19 ////

20 ////

21 ////

⁵⁴ For example, some reasonable process recommendations that could help streamline the process include requiring that parties identify which of the 71 issues they propose to address in the case before the December 4, 2020 Case Management conference, that all discovery requests on a particular issue must be coordinated among the parties seeking to address that issue to avoid duplicative requests, that parties must coordinate and work together to provide testimony, that requests for cross-examination must be consolidated such that a single representative from all intervening parties would be responsible for cross-examination on a particular issue, and that parties must work together to consolidate briefing to avoid duplicative argument.

DATED: November 13, 2020

MCDOWELL RACKNER GIBSON PC



Lisa F. Rackner, OSB No. 837844

lisa@mrg-law.com

Jocelyn Pease, OSB No. 102065

jocelyn@mrg-law.com

419 SW 11th Avenue, Suite 400

Portland, Oregon 97205

Telephone: (503) 595-3925

Facsimile: (503) 595-3928

David Stanish

dstanish@idahopower.com

Idaho Power Company

Attorneys for Idaho Power Company

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 13, 2020, the foregoing **APPLICANT IDAHO POWER COMPANY'S REPLY TO APPEALS** was emailed to:

Alison Greene-Webster, Senior Administrative Law Judge
Hearings Officer
Office of Administrative Hearings
OED_OAH_Referral@oregon.gov

I further certify that on November 13, 2020, the foregoing **APPLICANT IDAHO POWER COMPANY'S REPLY TO APPEALS** was served by First Class Mail or electronic mail as indicated below:

By: First Class Mail:

John C. Williams
PO Box 1384
La Grande, OR 97850

By: Electronic Mail:

David Stanish
Attorney at Law
Idaho Power Company
dstanish@idahopower.com

Lisa Rackner
Attorney at Law
Idaho Power Company
lisa@mrg-law.com

Jocelyn Pease
Idaho Power Company
Attorney at Law
jocelyn@mrg-law.com

Joseph Stippel
Agency Representative
Idaho Power Company
jstippel@idahopower.com

Christopher Burford
Attorney at Law

Office of the President
Eastern Oregon University
cburford@eou.edu

Kellen Tardaewether
Agency Representative
Kellen.tardaewether@oregon.gov

Patrick Rowe
Assistant Attorney General
Patrick.g.rowe@doj.state.or.us

Sam Myers
sam.myers84@gmail.com

Susan Geer
susanmgeer@gmail.com

Whit Deschner
deschnerwhit@yahoo.com

Gail Carbiener
mcccarb@bendbroadband.com

Charles H. Gillis
charlie@gillis-law.com

David Moyal
moyald@gmail.com

Corrine Dutto
dutto@eoni.com

John B. Milbert
jmfisherman9@gmail.com

Kathryn Andrew
lkathrynandrew@gmail.com

Jerry Hampton
jerryhampton61@gmail.com

Ken and Marsha Hildebrandt
ken_marsha@comcast.net

Greg Larkin
larkingreg34@gmail.com

Kathryn Morello
cndyrela@eoni.com

Stacia Jo Webster
staciajwebster@gmail.com

Daniel L. White
danno@bighdesign.biz

Joann Marlette
garymarlette@yahoo.com

John H. Luciani
dirtfarmerjohn@gmail.com

Dr. Karen Antell
Professor of Biology Eastern Oregon
University, Science Office
kantell@eou.edu

Norm Cimon
ncimon@oregontrail.net

Joe Horst and Ann Cavinato
joehorst@eoni.com

Matt Cooper
mcooperpiano@gmail.com

Virginia and Dale Mammen
dmammen@eoni.com

Jim and Kaye Foss
onthehoof1@gmail.com

Miranda Aston
tranquilhorizonscooperative@gmail.com

Charles A. Lyons
marvinroadman@gmail.com

Dianne B. Gray
diannebgray@gmail.com

Timothy C. Proesch
tranquilhorizonscooperative@gmail.com

Janet Aston
owyheeoasis@gmail.com

Suzanne Fouty
suzannefouty2004@gmail.com

Susan Badger-Jones
sbadgerjones@eoni.com

Michael McAllister
wildlandmm@netscape.net

Lois Barry
loisbarry31@gmail.com

Anne March
amarch@eoni.com

Colin Andrew
candrew@eou.edu

Peter Barry
petebarry99@yahoo.com

Kevin March
amarch@eoni.com

Louise Squire
squirrel@eoni.com

Jennifer Miller
rutnut@eoni.com

Ralph Morter
amorter79@gmail.com

Stop B2H Coalition
fuji@stopb2h.org

Irene Gilbert
ott.irene@frontier.com

Kelly Skovlin
kskovlin@gmail.com

Greg Larkin
larkingreg34@gmail.com

Ryan W. Browne
browner@eou.edu

Jonathan White
jondwhite418@gmail.com

Jim and Jane Howell
d.janehowell@gmail.com

John Winters
wintersnd@gmail.com

Jeri Watson
lotusbsilly@eoni.com

Sam Hartley
samhartley57@gmail.com

Brian Doherty
bpdoherty@hughes.net

Sue McCarthy
suemc@eoni.com

Jim Kreider
jkreider@campblackdog.org

Jeffery Seeley
jeff.seeley@doj.state.or.us

Nicole Milbrath
nichole.milbrath@centurylink.com

Carl and Julie Morton
cjmorton@centurylink.net

Mike J. Sargetakis
mike@oxbowlaw.com

Karl G. Anuta
kga@integra.net

Sarah Esterson
Sarah.Esterson@oregon.gov

Jesse Ratcliffe
jesse.d.ratcliffe@doj.state.or.us

/s/ Alisha Till

Alisha Till
Paralegal

Oregon Department of Energy Response to Appeals

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

**IN THE MATTER OF THE
APPLICATION FOR A SITE
CERTIFICATE FOR THE BOARDMAN
TO HEMINGWAY TRANSMISSION
LINE**

**OREGON DEPARTMENT OF
ENERGY'S RESPONSE TO APPEALS
OF THE HEARING OFFICER'S
OCTOBER 29, 2020 ORDER ON PARTY
STATUS, AUTHORIZED
REPRESENTATIVES AND ISSUES**

OAH Case No. 2019-ABC-02833

On July 2, 2020, the Oregon Department of Energy ("Department") issued *Public Notice of the Proposed Order on the Application for Site Certificate* ("ASC") for the Boardman to Hemingway Transmission Line ("proposed facility"). The proposed facility is a 300-mile 500 kilovolt transmission line, extending across five Oregon counties (Morrow, Umatilla, Union, Malheur and Baker), proposed by Idaho Power Company ("Applicant"). In the Public Notice, the Department established an August 6, 2020 deadline for eligible participants to submit petitions for party or limited party status in the contested case proceeding on the Proposed Order on the ASC for the proposed facility. The August 6, 2020 deadline was extended by the Department based upon requests from eligible participants to August 27, 2020.

In response to the Public Notice, 53 petitions were filed with the Hearing Officer. Pursuant to OAR 137-003-0005(4), Hearing Officer notified petitioners, Applicant and Department of their opportunity to file responses to petitions. The Department and Applicant filed responses on September 22, 2020, the Hearing Officer's established filing date.¹ Following Pre-Hearing Conferences conducted on September 25 and October 1, 2020 by the Hearing Officer, petitioners were provided an opportunity to file additional written argument on limited party status and the Department's September 22, 2020 *Response to Petitions*. Additional written responses were filed by petitioners McAllister, Morton, Moyal,

¹ B2HAPPDoc3-2 Contested Case 2019-ABC-02833 Amended Notice of Pre-Hearing Conference and Pre-Hearing Conference Agenda. 2020-09-08.

Gilbert, White, Luciani, Larkin, STOP B2H Coalition, Geer, Deschner, Fouty, Cooper, L. Barry, Carbiener, Squire, Cimon, K. Andrew, P. Barry, C. Andrew, Foss, Proesch, Aston and Winters. Based upon additional filed written responses and oral arguments provided at the September 25 and October 1, 2020 Pre-Hearing Conferences, the Department filed an *Amended Response to Petitions* and *Second Amended Response to Petitions* on September 28 and October 6, 2020, respectively, based upon leave granted by Hearing Officer. The *Second Amended Response to Petitions* recommended two additional petitioners be granted limited party status, added issues and added or modified 23 issue statements based on clarification provided in petitioner responses.

The Hearing Officer issued her *Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case* (“Order on Party Status”) on October 29, 2020, granting limited party status to 35 petitioners and denying limited or full party status to the other 18 petitioners; the order identifies 70 properly raised contested case issues, and denies 47 issues. The *Order on Party Status* notified petitioners of their right to appeal the Hearing Officer’s determination, pursuant to OAR 345-015-0016(6) and OAR 345-015-0057(1), within seven days, or by November 6, 2020. On November 9, 2020, Hearing Officer issued a *Notice to Council of Appeals Pursuant to OAR 345-015-0016(6) and Corrected Table of Identified Issues* (“Notice to Council”) identifying and including appeals filed by 27 petitioners.

The Department submits the following response, including the Department’s interpretation of the requirements for requesting party status in the contested case, the legal requirements for issues considered in a contested case and an evaluation of whether appeals filed meet the established legal requirements.

I. LEGAL REQUIREMENTS OF A CONTESTED CASE

A. Requesting Party Status

Pursuant to ORS 469.370(5) and OAR 345-015-0016, in order to become a party or limited party, a person must submit a petition which satisfies several requirements:

- (1) The person must have commented either in writing or in person on the record of the draft

proposed order public hearing, from May 22 through August 22, 2019.

- (2) The person must demonstrate a personal interest in the outcome of the proceeding or demonstrate that they represent a public interest in the outcome of the proceeding and are qualified to represent the public interest.
- (3) The person must have properly raised at least one contested case issue in the request for party or limited status.

B. Properly Raised Contested Case Issues

Pursuant to ORS 469.370(5) and OAR 345-015-0016(3), in order to properly raise a contested case issue, the issue must:

- (1) Be within the Energy Facility Siting Council's ("EFSC") jurisdiction;
- (2) Have been raised in person or in writing on the record of the draft proposed order hearings;
- (3) Have been raised with sufficient specificity to afford EFSC, the Department, and the Applicant an adequate opportunity to respond to the issue; and,
- (4) Have been included in the petition for party or limited party status, with a short and plain statement of the issue or issues that a petitioner wishes to raise, including a reference to the petitioner's comments on the record of the public hearing showing that the person raised the issue on the record of the public hearing.

C. Appeal Rights

Hearing Officer's *Order on Party Status* notified petitioners of their right to appeal the Hearing Officer's determination, pursuant to OAR 345-015-0016(6) and OAR 345-015-0057(1), which state:

- OAR 345-0016(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."
- OAR 345-015-0057(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."

II. RESPONSE TO APPEALS

A. Stop B2H Coalition

Appeal Summary

Petitioner Stop B2H Coalition filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.
2. Petitioner disputes denial of the following issues:
 - a. Whether Applicant's visual impact assessments are invalid because Applicant used an outdated methodology (based on a 1974 USFS Handbook) to assess visual impacts on Morgan Lake Park and other areas instead of Landscape Aesthetic, Scenic Management System (SMS), published in 1995.
 - b. Whether the Soil Protection Standard and General Standard of Review require an evaluation of carbon sequestration, carbon storage and carbon loss.
 - c. Whether the methods used to determine the extent of an adverse impact of the proposed facility on scenic resources, protected area and recreation along the Oregon Trail were flawed and developed without peer review on public input. Specifically, whether Applicant erred in applying numeric values to the adverse impact and whether Applicant used unsatisfactory measurement locations/observation points in its visual impact assessment.
3. Petitioner seeks clarification on properly raised contested case issue statements.
 - a. Whether the Department improperly modified/reduced the noise analysis area in Exhibit X from one mile of the proposed site boundary to ½ mile of the proposed site boundary

and whether OAR 345-021-0010(1)(x)(E) requires notification to all owners of noise sensitive property within one mile of the site boundary.

- b. Whether the Department erred in approving the methodology used to evaluate compliance with OAR 340-035-0035.
4. Petitioner disputes Council's legal authority to evaluate appeal on issues.

Evaluation

1. Council may hear Stop B2H Coalition's appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*.

Stop B2H argues that the Oregon Administrative Procedures Act (APA) gives all parties to a contested case regarding a site certificate the right to participate with regard to every issue being considered in the contested case even if the party never raised the issue on the record of the Draft Proposed Order nor requested a contested case on the issue. As support for this assertion, Stop cites to ORS 183.413(2)(e), which states that the notice an agency must give prior to commencement of a contested case must include "a statement that the party has a right to respond to all issues properly before the presiding officer and present evidence and witnesses on those issues." ORS 183.413(2)(e). Stop also cites to ORS 183.417(1) for the same proposition.

There are two flaws in Stop's argument. First, ORS 183.413(2)(e) does not confer substantive rights on parties to a contested case, it only addresses what must be included in a notice.² Second, ORS 183.417(1) and 183.413(2)(e) must be interpreted in conjunction with other statutes and rules that establish EFSC has the right to treat persons seeking full party status as limited parties and that participation in EFSC contested cases by persons other than the

² Smith v. Bd. of Parole, Post-Prison Supervision, 268 Or. App. 457, 467, 343 P.3d 245, 251 (2015) ("the statutory text pertains solely to the contents of a *notice* of hearing . . . it does not purport to confer substantive procedural rights").

applicant and Department is limited to those issues the person raised with sufficient specificity on the record of the Draft Proposed Order.

By statute, persons that intend to request to participate in a contested case regarding an application for a site certificate must first raise their issues in comments before closing of the record of the final public hearing before the Department's issuance of the proposed order (*i.e.*, on the record of the Draft Proposed Order). ORS 469.370(2)(e) and (3). The issues must be raised with sufficient specificity to allow the Council, the Department of Energy, and the applicant an adequate opportunity to respond. ORS 469.370(3). Persons that did not participate in the public hearing and comment phase of the proceeding may not participate in the contested case. ORS 469.370(5).

Model Rule for Contested Cases OAR 137-003-0005(8)³ establishes that an agency (or in this matter the Hearing Officer) may treat a petition to participate as a party as a petition to participate as a limited party, stating: **“A petition to participate as a party may be treated as a petition to participate as a limited party.”** Further, subsection (9) of that rule states **“the agency shall specify areas of participation and procedural limitations as it deems appropriate”** (emphasis added).

Consistent with those statutes, and as expressly allowed by the Model Rule provisions discussed above, EFSC has limited persons allowed to participate in the contested case hearing to those issues that they previously raised on the record. OAR 345-015-0083(2) imposes that requirement for the contested case hearing on an initial application for a site certificate, stating: “the hearing officer shall 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**

³ In OAR 345-001-0005(1) EFSC adopted the Model Rules for Contested Cases in 137-003-0001 through 137-003-0092.

parties to those issues they raised on the record of the public hearing described in OAR 345-015-0220” (emphasis added).

Thus, contrary to Stop’s assertion, Stop is not entitled to participate in every issue in the contested case; rather, it may participate with regard to those issues that it raised on the record of the Draft Proposed Order and for which the Hearing Officer rules is appropriate for the contested case. This same approach holds true for all petitioners.

2. Council may hear Stop B2H Coalition’s appeal on denied issues (a), (b) and (c), as listed above, pursuant to OAR 345-015-0016(6). Denial of issues (a), (b) and (c) should be maintained as determined in the *Order on Party Status*.

a. Stop B2H Coalition disputes denial of the issue arguing “Whether Applicant’s visual impact assessments are invalid because Applicant used an outdated methodology (based on a 1974 USFS Handbook) to assess visual impacts on Morgan Lake Park and other areas instead of Landscape Aesthetic, Scenic Management System (SMS), published in 1995” and of Hearing Officer’s determination that STOP B2H Coalition “did not raise the outdated methodology issue with sufficient specificity on the record of the draft proposed order” public hearing. Stop B2H Coalition maintains that the issue of inappropriate methodology was properly raised in its draft proposed order comments. Stop B2H Coalition does not appear to refute Hearing Officer’s determination that STOP B2H Coalition did not specifically contend that the Applicant’s methodology was outdated or that Applicant should have used the 1995 SMS methodology instead. Instead, STOP B2H Coalition asserts that there is not a legal requirement to use certain “magic words” to raise an issue with sufficient specificity, and that they were not required to use specific terminology or reference specific documents to have properly raised the issue of whether Applicant used an inappropriate visual impact assessment methodology.

Pursuant to OAR 345-015-0016(3), to have raised an issue with sufficient specificity, the person raising an issue must have presented facts at the public hearing that support the person's position on the issue. As noted in the *Order on Party Status*, Stop B2H Coalition's draft proposed order comments identified concerns about the visual impact assessment at Morgan Lake Park and asserted that the Applicant had "conjured up many pages of methodology" and that the resulting conclusions were "unsupported with relevant credible data and fail to consider Oregonian's subjective 'opinion/evaluation' of their scenic and recreational resources." Stop B2H Coalition's concerns with the methodology used did not provide facts to illustrate how the methodology failed to produce deficient conclusions, except to point out that it did not consider the subjective opinions or evaluations of Oregonians.

In its petition; however, STOP B2H Coalition specifically requests a contested case proceeding on the issue of whether Applicant's use of an outdated 1974 USFS Handbook to evaluate visual impacts invalidates conclusions of visual impacts. In addition to substantially refining the issue raised in comments, the petition effectively adds new facts to support Stop B2H Coalition's position on the issue, which conflicts with the OAR 345-015-0016(3) requirement that the issue be raised with sufficient specificity on the record of the draft proposed order. For this reason, the Department recommends Council concur with Hearing Officer's determination that the issue did not satisfy OAR 345-015-0016(3); therefore, Hearing Officer's denial of the issue should be maintained.

- b. Stop B2H Coalition disputes denial of the issue, "Whether the Soil Protection Standard and General Standard of Review require an evaluation of carbon sequestration, carbon storage and carbon loss" and Hearing Officer's determination that "the Soil Protection Standard does not extend to impacts on the earth's atmosphere from soil. The General Standard of review does not require Council to evaluate any adverse impact on soils (a

resource) apart from or independent of the Soil Protection standard” and “the carbon sequestration issue is not within the jurisdiction of the Council.” Stop B2H Coalition contends that the Hearing Officer erred by focusing on one of the reasons **why** it had said that soil impacts were important to consider (because carbon released back into the atmosphere as a result of damaged or disturbed soils), but that Stop B2H Coalition (with Dr. Fouty’s DPO comments) raised issues of vegetative and ground disturbing activity, soil compaction, etc.

Pursuant to OAR 345-015-0016(5)(b), Stop B2H Coalition’s petition included the following short and plain statement of the issue it desired to raise in the contested case proceeding, “The particular issue we would like to raise in this contested case relates to Soil Protection. In particular our disagreement concerns Idaho Power’s repeated statements that there are no EFSC standards that require them to analyze or address carbon sequestration, carbon storage or carbon loss in the EFSC process...” The Department recommends Council rely on the petition in its evaluation of whether the issue was properly raised and not consider modification of the issue through appeal in order to reverse Hearing Officer’s determination.

OAR 345-015-0016(5)(b) requires a petitioner to provide a short and plain statement of the issue or issues on the issue that the person desires to raise in the contested case proceeding. While Stop B2H Coalition may have preserved its right to raise other issues related to soil impacts in the contested case proceeding through its comments on the draft proposed order, it failed to do so in its petition and instead, chose to on one particular issue. For this reason, the Department recommends Council concur with Hearing Officer’s determination that the issue raised in the petition does not meet the requirements under OAR 345-015-0016(3), and therefore Hearing Officer’s denial of the issue should be maintained.

c. Stop B2H Coalition disputes denial of the issue, “Whether the methods used to determine the extent of an adverse impact of the proposed facility on scenic resources, protected area and recreation along the Oregon Trail were flawed and developed without peer review on public input. Specifically, whether Applicant erred in applying numeric values to the adverse impact and whether Applicant used unsatisfactory measurement locations/observation points in its visual impact assessment” and the Hearing Officer’s determination that the issue was not raised on the record of the draft proposed order public hearing with sufficient specificity. Stop B2H Coalition notes Hearing Officer’s acknowledgement that it did raise concerns about how “the proposed transmission line would severely compromise the scenic, historical, and cultural values of the Oregon Trail,” and that “STOP B2H also challenged Applicant’s undergrounding analysis.” Stop B2H Coalition again argues that it did not need to use “magic words” such as we “challenge the methodology” for assessing Oregon Trail impacts because they challenged the conclusions of visual impact assessments which effectively includes the methods for the impact assessment. The Department agrees that STOP B2H Coalition did raise concerns and state their position on the issue of impacts to the Oregon trail, but notes that to raise an issue with sufficient specificity to afford the applicant an opportunity to respond to the issue, the person must have presented facts at the public hearing that support the person’s position. No such evidence or argument was provided to support the assertion that the methods used to determine the extent of an adverse impact of the proposed facility on scenic resources, protected area and recreation along the Oregon Trail were flawed. Department notes that STOP B2H Coalition’s DPO comments did provide specific examples of alleged deficiencies of Applicants undergrounding analysis provided as Exhibit BB to the Application for Site Certificate, however these examples are related to an alternative design that is not proposed by the applicant, and are therefore

not relevant to the issue of whether the methods used to determine the extent of an adverse impact of the proposed facility are flawed. The Department recommends Council concur with Hearing Officer's determination that the issue does not meet the requirements under OAR 345-015-0016(3) and therefore denial of the issue should be maintained.

3. Council may hear Stop B2H Coalition's appeal to clarify properly raised contested case issues identified under heading A. 3(a) and (b) listed above, pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Issue statement for issue A.3 (a) listed above should be maintained; issue statement for Issue A.3 (b) should be modified.

- a. Stop B2H Coalition contests the accuracy of the following issue statement, "Whether the Department improperly modified/reduced the noise analysis area in Exhibit X from one mile of the proposed site boundary to ½ mile of the proposed site boundary and whether OAR 345-021-0010(1)(x)(E) requires notification to all owners of noise sensitive property within one mile of the site boundary." Stop B2H Coalition maintains that the issue raised was not a challenge to the "noise analysis area" but that the Department improperly modified the OAR 345-021-0010(1)(x)(E) "noise notification area." The framing of the issue is consistent with the issue raised in the petition which stated, "ODOE in the DPO improperly modified/reduced the distance for *noise evaluation* of the noise sensitive properties, from 1 mile to ½ mile. This has not been corrected and has been carried into the Proposed Order. STOP wishes to contest this error" [Emphasis added]. Further, this properly raised contested case issue has two parts: the first part questions whether the Department improperly modified the noise analysis area for Exhibit X and the second part questions whether OAR 345-021-0010(1)(x)(E) requires notification to all owners of noise sensitive properties within one mile of the site boundary. The Department notes the second part of the issue – whether OAR 345-021-

0010(1)(x)(E) requires notification to noise sensitive receptors within one mile of the site boundary – is expected to address the sub-issue raised in the appeal. For this reason, the Department recommends Council maintain the issue statement, as presented in the *Order on Party Status*.

- b. Stop B2H Coalition requests clarification of the following issues statement, “Whether the Department erred in approving the methodology used to evaluate compliance with OAR 340-035-0035.” Stop B2H Coalition questions whether the issue statement broadly covers issues they raised on noise methodologies or whether it would be limited only to a review of the Department’s authority to approve noise methodologies.

In draft proposed order comments, Stop B2H Coalition raised concerns with the Department’s approval of noise analysis methodologies and methodologies themselves, including concerns with Applicant’s use of representative monitoring positions.

Therefore, the Department recommends Council amend the issue statement as follows:

“Whether the methodologies used for the noise analysis to evaluate compliance with OAR 340-035-0035 were appropriate and whether the Department erred in approving the methodology used to evaluate compliance with OAR 340-035-0035.”

4. Council may hear STOP B2H Coalition’s question on the legal basis for an interlocutory appeal to Council on anything other than the issue of party status (i.e. issues and issue clarifications). The Department notes that the appeals reviewed by Council are being done so under OAR 345-015-0016(6) and not under an interlocutory appeal under OAR 345-015-0057, where -0057 is specifically limited to an appeal of a party’s termination to participate in the contested case proceeding.

B. Colin Andrew

Appeal Summary

Petitioner Colin Andrew filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.
2. Petitioner disputes denial of the following issues:
 - a. Whether, as a reference for its assessing visual impacts of the proposed facility on Morgan Lake Part, Applicant was required to use updated assessment criteria, Landscape Aesthetic, Scenic Management System (SMS), published in 1995, instead of the 1974 USFS Handbook.

Evaluation

1. Council may hear Mr. Andrew's appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*.

Mr. Andrew disputes Hearing Officer's limited party designation arguing: his issues should not be limited to a narrowly defined subset because they are interconnected to other contested case issues; petitioners are qualified and educated to respond to other issues; and it is wrong to streamline the process. The Department recommends Council maintain Hearing Officer's limited party designation, limiting Mr. Andrew's participation in the contested case proceeding to his properly raised contested case issues as determined by the Hearing Officer, pursuant to OAR 137-003-0005(8) and – (9).⁴ Limited party status is also appropriate under OAR 137-003-0040, and OAR 345-015-0083.
2. Council may hear Mr. Andrew's appeal on denied issue (a) pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Denial of issue (a) should be maintained.

⁴ Under OAR 137-003-0005(8) an agency (or in this matter the Hearing Officer) may treat a petition to participate as a petition to participate as a limited party. Subsection (9) states, "the agency shall specify areas of participation and procedural limitations as it deems appropriate."

- a. Mr. Andrew disputes denial of the issue, “Whether, as a reference for its assessing visual impacts of the proposed facility on Morgan Lake Part, Applicant was required to use updated assessment criteria, Landscape Aesthetic, Scenic Management System (SMS), published in 1995, instead of the 1974 USFS Handbook,” and of Hearing Officer’s determination that “he did not raise a specific challenge to the methodology and assessment criteria Applicant used to evaluated visual impacts of the proposed facility at Morgan Lake Park, and did not reference the 1995 SMS in those comments” and therefore the issue was not raised on the record of the draft proposed order public hearing.

Mr. Andrew asserts that “it does not matter whether I specifically referred to the 1995 SMS or not,” which is inconsistent with OAR 345-015-0016(3), which states that to have raised an issue with sufficient specificity, the person raising an issue must have presented facts at the public hearing that support the person’s position on the issue. Based upon review, Mr. Collin’s draft proposed order comments states that “Morgan Lake Park...and Summary of Impacts...severely underestimates the permanent impact of development on this unique park,” but does not address or identify the issue raised in his petition. For these reasons, the Department recommends Council concur with Hearing Officer’s determination that because the issue was not raised on the record of the draft proposed order public hearing, the issue was not raised with sufficient specificity to afford the decisionmaker an opportunity to respond to the issue. Hearing Officer’s denial of the issue should be maintained.

C. Kathryn Andrew

Appeal Summary

Petitioner Kathryn Andrew filed an appeal on November 6, 2020, disputing the following findings of the

Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.
2. Petitioner disputes denial of the following issues:
 - a. Whether noise and visual impacts of the proposed facility on Morgan Lake Park and Wallowa-Whitman National Forest is inconsistent with Statewide Land Use Planning Goal 4 (forestlands to provide for recreational opportunities).

Evaluation

1. Council may hear Ms. Andrew’s appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Ms. Andrew disputes Hearing Officer’s limited party designation on the issues she properly raised because she believes full participation by concerned citizens “is key to an informed decision as to whether environmental and public safety issues have been or can be adequately addressed by the applicant.” Ms. Andrew does not offer legal argument to support her contention that full party status should be granted. The Department recommends Council maintain Hearing Officer’s limited party designation, limiting Ms. Andrew’s participation in the contested case proceeding to her properly raised contested case issues as determined by the Hearing Officer, pursuant to OAR 137-003-0005(8) and – (9).⁵ Limited party status is also appropriate under OAR 137-003-0040, and OAR 345-015-0083.
2. Council may hear Ms. Andrew’s appeal on denied issue (a) pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Denial of issue (a) should be maintained.
 - a. Ms. Andrew disputes denial of the issue “Whether noise and visual impacts of the proposed facility on Morgan Lake Park and Wallowa-Whitman National Forest is inconsistent with Statewide Land Use Planning Goal 4 (forestlands to provide for recreational opportunities).” Hearing Officer found that Ms. Andrew raised concerns

⁵ Under OAR 137-003-0005(8) an agency (or in this matter the Hearing Officer) may treat a petition to participate as a petition to participate as a limited party. Subsection (9) states, “the agency shall specify areas of participation and procedural limitations as it deems appropriate.”

regarding impacts to forestlands and consistency with Goal 4 in her comments on the DPO, but did not present facts or arguments to support her position with regard to Morgan Lake Park and therefore did not raise the issue with sufficient specificity to afford the Department, Applicant or Council an opportunity to respond.

Ms. Andrew concedes that it was her understanding “that the criteria at this point in the process is to raise the issue, and that arguments regarding my issue are to be made later in the proceeding” but cites her statement on the record of the DPO that “...The loss of forest land recreational opportunities at Morgan Lake to the buzzing high voltage towers planned to transverse the park would be in direct violation of the intention of Goal #4” and Hearing Officer and Department’s ability to respond to and rephrase that statement as evidence that “issue facts were clearly presented,” and therefore fulfilled the criteria for preserving standing for consideration in the contested case. The Department does not contest Ms. Andrew’s assertion that she clearly identified her position on the issue in her DPO comments; however, asserting a position on an issue does not satisfy the requirement to raise an issue with sufficient specificity found in OAR 345-015-0016(3). The rule requires a presentation of facts to support the petitioner’s position on the issue. Ms. Andrew did not, and does not appear to purport to have, identified facts about the nature of the loss, the nature of recreational opportunities alleged to be impacted, or the nature of the impacts themselves that would allow the Department, Council, or Applicant to respond. As such, the Department recommends Council maintain Hearing Officer’s denial of the issue.

D. Janet Aston

Petitioner Janet Aston filed an email complaint on November 2, 2020 regarding the effect of participation by the Department and Applicant on the fairness and equitability of the contested case proceeding. The email complaint did not include specific appeal of the Order on Party Status.

E. Miranda Aston

Petitioner Miranda Aston filed an email complaint on November 2, 2020 regarding the effect of participation by the Department and Applicant on the fairness and equitability of the contested case proceeding. The email complaint did not include specific appeal of the Order on Party Status.

F. Lois Barry

Appeal Summary

Petitioner Lois Barry filed appeals on November 5 and 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.
2. Petitioner disputes denial of the following issue:
 - a. Whether Applicant’s visual impact assessments are invalid because Applicant did not use updated USFS visual assessment criteria (1995 Landscape Aesthetic, Scenic Management System (SMS)) to evaluate visual impacts, thereby invalidating the visual impact analysis for Morgan Lake Park and other protected areas, scenic resources and important recreational opportunities.

Evaluation

1. Pursuant to OAR 345-015-0016(6), Council may hear Ms. Barry’s appeal on limited party status, as determined in the *Order on Party Status*. Ms. Barry disputes Hearing Officer’s designating her as a limited party, arguing she should be granted full party status because she has “fulfilled each of the stipulations listed in OAR 137-003-0005(7).⁶” This rule sets forth criteria a Hearing Officer

⁶ OAR 137-003-0005(7) states: “In ruling on petitions to participate as a party or a limited party, the agency shall consider: (a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding; (b) Whether any such affected interest is within the scope of the agency’s jurisdiction and within the scope of the notice of contested case hearing; (c) When a public interest is alleged, the qualifications of the petitioner to represent that interest; (d) The extent to which the petitioner’s interest will be represented by existing parties.”

should consider when determining whether a petitioner should be allowed to participate in a contested case. It does not establish that a person such as Ms. Barry, who the Hearing Officer determined only requested a contested case with regard to five issues, should be allowed to participate in the contested case on every issue in the contested case, including issues that she did not raise with sufficient specificity or issues for which she never requested a contested case. For these reasons, the Department recommends Council maintain Hearing Officer's limited party designation, limiting Ms. Barry's participation in the contested case proceeding to the contested case issues she properly raised, as determined by the Hearing Officer.

2. Pursuant to OAR 345-015-0016(6), Council may hear Ms. Barry's appeal on denied issue (a) as determined in the *Order on Party Status*. Denial of issue (a) should be maintained.
 - a. Ms. Barry disputes denial of her petition for a contested case on the issue of whether Idaho Power used "an outdated and superseded methodology" for analyzing visual impacts of the proposed facility to support their conclusions of 'no significant impact' under the Council's scenic, recreational and protected areas standards. She alleges "[i]t is essential to accept a contested case on this issue to determine if applicant's findings of 'no significant adverse impact' would be valid using the requisite 1995 SMS methodology."

In her comments on the record of the DPO, Ms. Barry raised concern regarding the visual impact assessment completed for Morgan Lake Park, but she did not express concern regarding the version of the USFS methodology employed. Ms. Barry does not dispute that she did not raise this issue on the record of the DPO. Rather, she contends she did not raise this issue on the record because she assumed applicant was using the 1995 methodology because Applicant said they were using that methodology. The Hearing Officer correctly ruled that because Ms. Barry did not raise the version of USFS

methodology issue with sufficient specificity on the record of the DPO, it is not a proper issue to be considered in the contested case.

G. Peter Barry

Appeal Summary

Petitioner Peter Barry filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.
2. Petitioner disputes denial of the following issues:
 - a. Whether Applicant has established a need for the proposed facility.
 - b. Whether Morgan Lake Park should be evaluated as a protected area.

Evaluation

1. Pursuant to OAR 345-015-0016(6), Council may hear Mr. Barry's appeal on limited party status, as determined in the *Order on Party Status*. Mr. Barry disputes Hearing Officer's designating him as a limited party and requests full party status "based on the laws, commons sense and the goal for which we all are involved here – a full hearing of facts and issues concerning the siting of an energy facility." For the reasons discussed in Section II. A. above (response to Stop B2H appeal), the Department recommends Council maintain Hearing Officer's ruling that Mr. Barry's (and all petitioners') participation in the contested case proceeding is limited to the contested case issues he properly raised, as determined by the Hearing Officer.
2. Pursuant to OAR 345-015-0016(6), Council may hear Mr. Barry's appeal on denied issues (a) and (b) as determined in the *Order on Party Status*. Denial of issue (a) and (b) issues should be maintained.
 - a. Mr. Barry disputes Hearing Officer's denial of the issue, "Whether Applicant has established a need for the proposed facility." In Mr. Barry's appeal he contends that he is requesting that all of the issues he raised be accepted based on full compliance with the

process and OAR's stated by other petitioners, however, he does not provide any supporting information for the appeal, petition, or DPO comments for Council to consider. The Department recommends Council concur with Hearing Officer's determination that because the issue was not raised on the record of the draft proposed order public hearing with sufficient specificity to afford the Decision Maker, Department, and Applicant to respond to, therefore the issue was not properly raised because the requirements under OAR 345-015-0016(3) were not met.

- b. Mr. Barry's disputes Hearing Officer's denial of the issue, "Whether Morgan Lake Park should be evaluated as a protected area." In Mr. Barry's appeal he contends that he is requesting that all of the issues he raised be accepted based on full compliance with the process and OAR's stated by other petitioners, however, he does not provide any supporting information for the appeal, petition, or DPO comments for Council to consider. The Department recommends Council concur with Hearing Officer's determination that because the issue was not raised on the record of the draft proposed order public hearing, the issue was not properly raised because the requirements under OAR 345-015-0016(3) were not met.

H. Gail Carbiener

Appeal Summary

Petitioner Gail Carbiener filed an appeal on November 5, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes denial of the following issues:
 - a. Whether the methods Applicant use to assess visual impacts for purposes of the Protected Areas, Scenic Resources, and Recreation Standards were independently obtained.

Whether the key observation points for visual simulations were adequate and whether Applicant adequately analyzed the visual impact from NHOTIC.

Evaluation

1. Council may hear Mr. Carbiener’s appeal on denied issue (a) pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Denial of issue (a) should be maintained.
 - a. Mr. Carbiener’s disputes denial of the issue, “Whether the methods Applicant use to assess visual impacts for purposes of the Protected Areas, Scenic Resources, and Recreation Standards were independently obtained. Whether the key observation points for visual simulations were adequate and whether Applicant adequately analyzed the visual impact from NHOTIC.” Mr. Carbiener offers additional details that were not included in his petition or DPO comments including dates and locations where Key Observation Point (KOP) photos were taken and references comments provided as part of the federal NEPA review. The Department notes that the record is closed, and Council cannot consider information added to the record at this point. Mr. Carbiener challenged Applicant’s conclusions of visual impact assessment and asserted that the DPO does not comply with the scenic values from the Blue Mountains Parkway and NHOTIC because the proposed transmission lines cause a significant decrease in scenic values but he did not specifically challenge applicant’s methodology for assessing visual impacts, including the locations of KOPs. For this reason, the Department recommends Council concur with Hearing Officer’s determination that because the issue was not raised on the record of the draft proposed order public hearing, the issue was not properly raised because the requirements under OAR 345-015-0016(3) were not met.

I. Matt Cooper

Appeal Summary

Petitioner Matt Cooper filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.

Evaluation

1. Council may hear Mr. Cooper’s appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Mr. Cooper disputes Hearing Officer’s limited party designation on the issue he properly raised because: his issues overlap with other issues granted; he should not be limited in his ability to introduce new evidence or share details with other petitioners; and, the designation stifles arguments brought forward by petitioners and is contradictory to the spirit of public participation and due process.

Council contested case rule OAR 345-015-0083(2) states “[a]t the conclusion of the [prehearing] conference(s), the hearing officer shall 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 on the DPO). Limited party status is also appropriate under OAR 137-003-0040, which states “limited parties may question only those witnesses whose testimony may relate to the area or areas of participation granted by the agency” and which the Council adopted in OAR 345-001-0005(1). For these reasons and those discussed in Section II. A. above (response to Stop B2H appeal), the Department recommends Council maintain Hearing Officer’s limited party designation, limiting Mr. Cooper’s participation in the contested case proceeding to his properly raised contested case issues as determined by the Hearing Officer.

J. Whit Deschner

Appeal Summary

Petitioner Whit Deschner filed an appeal on November 5, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.

Evaluation

1. Council may hear Mr. Deschner’s appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Mr. Deschner disputes Hearing Officer’s limited party designation on the issue he properly raised because he filled all the requirements to qualify for full party status. For the reasons discussed in Section II. A. above (response to Stop B2H appeal), the Department recommends Council maintain Hearing Officer’s limited party designation, limiting Mr. Deschner’s participation in the contested case proceeding to his properly raised contested case issue as determined by the Hearing Officer, pursuant to OAR 137-003-0040 and OAR 345-015-0083, which the Council adopted as authorized by OAR 137-003-0005(8) and (9).⁷

K. Jim and Kaye Foss

Appeal Summary

Petitioner Kaye Foss filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.

Evaluation

1. Council may hear the Foss’s appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. The Foss’s dispute Hearing Officer’s limited party designation on the issue they properly raised because they raised the general issue of agriculture lands assessment and they feel strongly that landowners should also have the right to review the assessments and provide input and feedback. For the reasons discussed in Section II. A. above (response to Stop B2H appeal), the Department recommends Council maintain Hearing Officer’s

⁷ Under OAR 137-003-0005(8) an agency (or in this matter the Hearing Officer) may treat a petition to participate as a petition to participate as a limited party. Subsection (9) states, “the agency shall specify areas of participation and procedural limitations as it deems appropriate.”

limited party designation, limiting the Foss’s participation in the contested case proceeding to their properly raised contested case issue as determined by the Hearing Officer, pursuant to OAR 137-003-0040 and OAR 345-015-0083, which the Council adopted as authorized by OAR 137-003-0005(8) and (9).⁸

L. Suzanne Fouty

Appeal Summary

Petitioner Suzanne Fouty filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.
2. Petitioner disputes the scope of the following issue:
 - a. Whether the Soil Protected Standard and General Standard of Review require an evaluation of carbon sequestration, carbon storage and carbon loss.
3. Petitioner disputes the denial of the following issue:
 - a. Whether the Soil Protection Standard and General Standard of Review require an assessment of loss of above ground organic material related to the construction and operation of transmission lines, including an assessment of the impact on soils of wildfires.

Evaluation

1. Council may hear Ms. Fouty’s appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Ms. Fouty disputes Hearing Officer’s limited party designation on the issues she properly raised because she can only represent the public interest on soil-related impacts if she is given full party status because then she can correctly discuss the

⁸ Under OAR 137-003-0005(8) an agency (or in this matter the Hearing Officer) may treat a petition to participate as a petition to participate as a limited party. Subsection (9) states, “the agency shall specify areas of participation and procedural limitations as it deems appropriate.”

issue of the project's impacts on soil productivity and the Soil Protection Standard. For the reasons discussed in Section II. A. above (response to Stop B2H appeal), the Department recommends Council maintain Hearing Officer's limited party designation, limiting Ms. Fouty's participation in the contested case proceeding, pursuant to OAR 137-003-0005(8) and – (9), to her properly raised contested case issues as determined by the Hearing Officer. Limited party status is also appropriate under OAR 137-003-0040, and OAR 345-015-0083.

2. Council may hear Ms. Fouty's appeal of the scope of issue (a) pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Maintain scope of issue (a).

a. Ms. Fouty disputes scope of the issue, "Whether the Soil Protected Standard and General Standard of Review require an evaluation of carbon sequestration, carbon storage and carbon loss," and Hearing Officer's determination that carbon sequestration, carbon storage, or carbon loss fall outside Council's jurisdiction. Ms. Fouty maintains that these are covered under the Soil Protection Standard and the General Standard of Review because impacts to vegetation will impact soil productivity and anything that degrades the soil and vegetation will impact the atmosphere because the carbon that has been extracted by plants and put into the soil or held in plant matter is released back into the atmosphere. The Department notes that in the Hearing Officer's Order on Party Status, Ms. Fouty properly raised the issues of erosion factors for potentially impacted soils, soil compaction and loss of soil structure, however, the portion of the issue related to carbon sequestration and carbon storage is not within Council jurisdiction. The Department recommends Council concur with Hearing Officer's determination that the issue does not meet the requirements under OAR 345-015-0016(3), because it is not within the Council's jurisdiction.

In Ms. Fouty's appeal, she also disputes the Hearing Officer findings under the evaluation for issues not properly raised by the Stop B2H Coalition under the same issue

(a). She disagrees with the assertion that Soil Protection Standard is limited to impacts *to soil* from energy facility projects, because she contends, it is not possible to disconnect the soil and the atmosphere. She disputes the Hearing Officer evaluation of that there is not a Council siting standard that requires an applicant to analyze, or Council to consider, carbon sequestration, carbon storage, carbon loss. She states that there isn't anything in OAR 345-022-0000 that excludes these factors from being evaluated and that the language in the General Standard of Review, "including, but not limited to" permits the evaluation of these factors. The Department recommends Council concur with Hearing Officer's determination and the associated findings that the issue does not meet the requirements under OAR 345-015-0016(3), because it is not within the Council's jurisdiction.

3. Council may hear Ms. Fouty's appeal of the denial of issue (a) pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Denial of issue (a) should be maintained.
 - a. Ms. Fouty disputes scope of the issue, "Whether the Soil Protection Standard and General Standard of Review require an assessment of loss of above ground organic material related to the construction and operation of transmission lines, including an assessment of the impact on soils of wildfires," and the Hearing Officer's determination that this issue was not raised with sufficient specificity. In her appeal, Ms. Fouty contends that she raised the issue of wildfire and soil productivity and erosion as it relates to this project by including statements about carbon sinks and harvest and wildfire as carbon sources from the Oregon Global Warming Commission's 2018 Forest Carbon Accounting Report. Ms. Fouty maintains that even if she did not state both construction and operation of the facility in portion of her comment letter, the connection (between the facility and fires) is clear. The Department recommends Council concur with Hearing Officer's determination that the issue does not meet the requirements under OAR 345-015-0016(3), because it

was not raised with sufficient specificity. DPO comments make reference to the issue of wildfires and carbon sequestration however, they do not raise the issue of fires related to the construction and operation of the proposed facility, nor do they present facts of analysis of such.

M. Susan Geer

Appeal Summary

Petitioner Susan Geer filed an appeal on November 5, 2020, disputing the following findings of the Order on Party Status :

1. Petitioner disputes designation as a limited rather than full party.
2. Petitioner disputes denial of the following issue:
 - a. Whether the Rice Glass Hill Natural Area should be evaluated as a Protected Area.
3. Petitioner objects to time limits imposed for submission of appeals.

Evaluation

1. Council may hear Ms. Geer’s appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Ms. Geer disputes Hearing Officer’s limited party designation on the issues she properly raised because: her issues are complex and cannot be properly described or defended if limited to the discrete issues as defined in the Hearing Officer’s Order on Party Status. For the reasons discussed in Section II. A. above (response to Stop B2H appeal), the Department recommends Council maintain Hearing Officer’s limited party designation, limiting Ms. Geer’s participation in the contested case proceeding to her properly raised contested case issues as determined by the Hearing Officer.
2. Council may hear Ms. Geer’s appeal on denied issue (a) pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Denial of issue (a) should be maintained.
 - a. Ms. Geer disputes denial of the issue, “Whether the Rice Glass Hill Natural Area should be evaluated as a Protected Area” and of Hearing Officer’s determination that the issue

was not properly raised under OAR 345-015-0016(3) (i.e., issue raised with sufficient specificity, on the record of the draft proposed order, and within Council jurisdiction). Ms. Geer believes that she identified the issue in comments on the record of the draft proposed order and that there are not requirements to provide rule or statutory references in support of issues. Ms. Geer's draft proposed order comments describe native plants and grasses identified in a Natural Area Plan for the Glass Hill area which could be impacted by the proposed facility, however the comments did not refer to any standard or requirement applicable to the issue – reference to the Council's Protected Areas standard was subsequently included in Ms. Geer's petition. For this reason, the Department recommends Council concur with Hearing Officer's determination that because the issue was not raised on the record of the draft proposed order public hearing and did not provide reference to an applicable Council standard or other applicable regulatory requirement, the issue was not properly raised because the requirements under OAR 345-015-0016(3) were not met.

3. Council may not hear Ms. Geer's objection to the 7-day appeal period; in the alternative, if heard, the objection should be denied. Ms. Geer objects to the appeal period and requests that an additional week be granted for submission of appeals. The scope of appeals is established under OAR 345-015-0016(6) and -0057, which includes an established appeal timeframe of 7-days from the date of Hearing Officer determination on requests to participate as a party or limited party and for any Hearing Officer ruling resulting in termination of a party's right to participate in the contested case proceeding, respectively. The objection is inconsistent with rule established timeframes and not within the scope of the rules.

N. Irene Gilbert

Appeal Summary

Petitioner Irene Gilbert filed two appeals on November 5, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.
2. Petitioner disputes denial of the following issues:
 - a. Whether the Department erred in recommending approval of Applicant’s noise consultant’s methodology for assessing noise impacts because the recommendation is based on incorrect information, such as Council’s authority to review and approve sound measurement procedures and the methods for establishing ambient noise levels specific to a linear facility.
 - b. Whether the impacts from the proposed facility on accepted farm practices and the cost of accepted farm practices have been adequately evaluated or mitigated.
3. Petitioner disputes the fairness of the opportunity to appeal the Order on Party Status.

Evaluation

1. Pursuant to OAR 345-015-0016(6), Council may hear Ms. Gilbert’s appeal on limited party status, as determined in the *Order on Party Status*. Ms. Gilbert disputes Hearing Officer’s limited party designation on the issues she properly raised because: it denies the ability of other parties to challenge other contested case issues; the determination was inappropriately based on recommendations from the Department and Applicant; and is inconsistent with ORS 183.413(2)(e), which states that a contested case notice shall include “A statement that the party has the right to respond to *all issues* properly before the presiding officer and present evidence and witnesses on those issues.” [Emphasis added]. For the reasons discussed in Section II. A. above (response to Stop B2H appeal), the Department recommends Council maintain the Hearing Officer’s limited party designation, limiting Ms. Gilbert’s participation in the contested case proceeding to her properly raised contested case issues as determined by the Hearing Officer.

2. Council may hear Ms. Gilbert’s appeal on denied issues (a) and (b) pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Denial of issue (a) should be maintained; issue (b) should be granted.

a. Ms. Gilbert disputes denial of the issue, “Whether the Department erred in recommending approval of Applicant’s noise consultant’s methodology for assessing noise impacts because the recommendation is based on incorrect information, such as Council’s authority to review and approve sound measurement procedures and the methods for establishing ambient noise levels specific to a linear facility” and of Hearing Officer’s determination that the issue was not related to a change in the proposed order which differed materially from the action recommended in the draft proposed order, as allowed under OAR 345-015-0016(3). Ms. Gilbert represents that the issue was raised resulting from “new information in the proposed order not previously disclosed in the draft proposed order.”

While the issue is related to revisions presented in the proposed order, the Hearing Officer determined that those revisions did not result in a change in the *action* as recommended in the draft proposed order [see OAR 345-015-0016(3)] [Emphasis added]. The referenced revisions provide a discussion of the methods and assumptions used for the corona noise analysis, as provided in ASC Exhibit X, and did not result in changes in recommended conditions or actions from those presented in the draft proposed order. Therefore, the Department recommends Council concur with Hearing Officer’s determination that the issue does not meet the requirements under OAR 345-015-0016(3) and therefore should be denied.

b. Ms. Gilbert disputes denial of the issue, “Whether the impacts from the proposed facility on accepted farm practices and the cost of accepted farm practices have been adequately evaluated or mitigated” and of Hearing Officer’s determination that the issue of

landowner compensation is not within Council jurisdiction. Hearing Officer's determination also identifies that Ms. Gilbert's petition did not identify the date, or provide reference to, where in her draft proposed order comments the issue was raised (required under OAR 345-015-0016(4)(c)), however, because it does not appear the issue was denied for this reason we do not address this determination further.

Ms. Gilbert argues that ORS 215.275(5) requires an evaluation of the impacts of a proposed transmission line to the cost of accepted farm practices. Hearing Officer denied the issue for consideration in the contested case because "concerns about economic losses to farmers along the transmission line fall outside the Council's jurisdiction." The Department agrees with Hearing Officer that matters of economic damages to individual farmers are outside of the Council's jurisdiction; however, consideration of general increases in the costs of farm practices on farmland surrounding the proposed site of a utility facility under ORS 215.275(5) is within scope of the Council's Land Use Standard and is applicable to the proposed facility. Because the issue relates to a matter within the Council's jurisdiction, the Department recommends Council find that the issue was properly raised and should be granted for review in the contested case proceeding.

3. Council may not hear Ms. Gilbert's objection regarding the fairness of the contested case process. The scope of appeals is established under OAR 345-015-0016(6) and -0057, which includes appeals of the Hearing Officer determination on requests to participate as a party or limited party and for any Hearing Officer ruling resulting in termination of a party's right to participate in the contested case proceeding, respectively.

O. Jane and Jim Howell

Petitioners Jane and Jim Howell filed an email inquiry on October 7, 2020 requesting clarification on the scope of prehearing conferences held on September 25 and October 8, 2020 related to review and

discussion of issues raised in petitions. An appeal of the Hearing Officer's Order on Party Status was not filed by petitioners during the established timeframe (October 29 through November 6, 2020).

P. Greg Larkin

Appeal Summary

Petitioner Greg Larkin filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes denial of petition for party status.
2. Petitioner objects to time limits imposed for submission of appeals.

Evaluation

1. Council may hear Mr. Larkin's appeal on denial of participation as a party or limited party in the contested case proceeding pursuant to OAR 345-015-0016, as determined in the *Order on Party Status*. Denial of party status should be maintained.

Mr. Larkin disputes the Hearing Officer's denial of party or limited party status in the contested case proceeding and Hearing Officer's findings that because his draft proposed order comments did not "tie his concerns to a particular siting standard, did not challenge a specific finding or determination in the DPO or Proposed Order, and did not present facts or argument on the record of the DPO to support his concern" the issue does not satisfy the requirements under OAR 345-015-0016(3). In his appeal, Mr. Larkin asserts he was not required to raise his issue on the record of the DPO because the petition sought party status in the contested case based on proposed order revisions which differ materially from the action recommended in the draft proposed order, as allowed under OAR 345-015-0016(3).

The Department agrees that the proposed order includes changes from the draft proposed order in the recommended action presented in Section IV.Q.1 *Noise Control Regulation* related to granting a variance from the ambient antidegradation standard for the entirety of the length of the transmission line rather than limited to specific noise sensitive receptor locations. This change

was identified in the Department's Notice of Proposed Order, Attachment 1; petitioners were afforded 56 days to review the notice, proposed order and submit a petition.

The Hearing Officer provided three opportunities for petitioners to identify their issues, as raised in their petition (Prehearing Conferences on September 25 and October 1, 2020; and an opportunity to respond to the Department's Amended Response to Petitions). Mr. Larkin participated in the prehearing conferences and did not identify that his petition sought to raise an issue related to compliance with the rules for allowing an exception or a variance to DEQ's Noise Rules. The Department does not consider it appropriate to appeal Hearing Officer's determination based on new information or arguments that substantively change the nature of the issue stated in the petition, regardless of whether the revised issue is related to a material change as allowed under OAR 345-015-0016(3). For this reason, the Department recommends Council maintain Hearing Officer's denial of Mr. Larkin's participation as a party or limited party in the contested case proceeding.

2. Council may not hear Ms. Larkin's objection to the 7-day appeal period; in the alternative, if heard, the objection should be denied. Mr. Larkin objects to the appeal period and requests that an additional week be granted for submission of appeals. The scope of appeals is established under OAR 345-015-0016(6), which establishes an appeal timeframe of 7-days from the date of Hearing Officer determination on requests to participate as a party or limited party and for any Hearing Officer ruling resulting in termination of a party's right to participate in the contested case proceeding, respectively. The objection is inconsistent with rule established timeframes and not within the scope of the rules.

Q. John Luciani

Appeal Summary

Petitioner John Luciani filed an appeal on November 6, 2020, disputing the following findings of the

Order on Party Status:

1. Petitioner disputes denial of petition for party status.

Evaluation

1. Council may hear Mr. Luciani's appeal on denial of participation as a party or limited party in the contested case proceeding pursuant to OAR 345-015-0016, as determined in the *Order on Party Status*. Denial of party status should be maintained.

Mr. Luciani disputes the Hearing Officer's denial of party or limited party status in the contested case proceeding and Hearing Officer's findings that because his draft proposed order comments did not "tie his concerns to a particular siting standard, did not challenge a specific finding or determination in the DPO or Proposed Order, and did not present facts or argument on the record of the DPO to support his concern" the petition did not satisfy the requirements under OAR 345-015-0016(3). Mr. Luciani asserts that Hearing Officer claimed "that there is no rule that requires the developer to address and mitigate for impacts to my farm property..", argues that listing exact standards in support of issues raised is not required, and identifies that his issue is related to ORS 215.275(5). The Hearing Officer's determination on Mr. Larkin's petition did not assert that there is not an applicable regulatory requirement to Mr. Larkin's petition, rather that the petition did not meet any of the criteria under OAR 345-015-0016(3).

The Hearing Officer provided three opportunities for petitioners to identify their issues, as raised in their petition (Prehearing Conferences on September 25 and October 1, 2020; and an opportunity to respond to the Department's Amended Response to Petitions). Mr. Luciani participated in the prehearing conferences and did not identify that his petition was seeking party status based on the evaluation under ORS 215.275(5). The Department does not consider it appropriate to appeal Hearing Officer's determination based on new information provided in the appeal. For the above described reasons, the Department recommends Council maintain Hearing Officer's denial of Mr. Luciani's participation as a party or limited party in the contested case proceeding.

R. Charles Lyons

Appeal Summary

Petitioner Charles Lyons filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes denial of petition for party status.

Evaluation

1. Council may hear Mr. Lyon's appeal on denial of participation as a party or limited party in the contested case proceeding pursuant to OAR 345-015-0016, as determined in the *Order on Party Status*. Denial of party status should be maintained.

Mr. Lyons disputes the Hearing Officer's denial of party or limited party status in the contested case proceeding and Hearing Officer's findings that "he did not raise the issues raised in his petition with sufficient specificity on the record of the draft proposed order" and therefore did not satisfy the requirements under OAR 345-015-0016(3). Mr. Lyons' petition identifies an issue of whether the Draft Fire Prevention and Suppression Plan is sufficient due to its reliance on negotiated agreements and limited local resources for fire response. His appeal identifies that he did not reference the Draft Fire Prevention and Suppression Plan in his draft proposed order comments but that he raised the issue of wildfire risk on August 21, 2019. Mr. Lyons's draft proposed order comments expressed concerns of potential wildfire risk but did not raise the issue as identified in his petition, did not identify an applicable rule or requirement for which to evaluate the issue, and did not provide any facts on the issue. Therefore, the Department recommends Council concur with Hearing Officer's findings and maintain denial of Mr. Lyon's participation as a party or limited party in the contested case proceeding.

S. Virginia and Dale Mammen

Appeal Summary

Petitioners Virginia and Dale Mammen filed an appeal on November 5, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.

Evaluation

1. Council may hear Mr. and Ms. Mammen’s appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Mr. and Ms. Mammen dispute Hearing Officer’s limited party designation on the issues they properly raised arguing it is unreasonable to have been required to identify all issues of concern due to procedural time limits. For the reasons discussed in Section II. A. above (response to Stop B2H appeal), the Department recommends Council maintain Hearing Officer’s limited party designation, limiting Mr. and Ms. Mammen’s participation in the contested case proceeding to their properly raised contested case issues as determined by the Hearing Officer, pursuant to OAR 137-003-0005(8) and – (9).⁹ Limited party status is also appropriate under OAR 137-003-0040, and OAR 345-015-0083.

T. Anne March

Appeal Summary

Petitioner Anne March filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes denial of the following issues:
 - a. Whether Applicant should include in its Fish Passage Plan and be required to replace a culvert on an unnamed stream (referenced as Crossing ID R-37969 in Exhibit BB-2, Table 1) to an appropriate size for fish passage.

Evaluation

⁹ Under OAR 137-003-0005(8) an agency (or in this matter the Hearing Officer) may treat a petition to participate as a petition to participate as a limited party. Subsection (9) states, “the agency shall specify areas of participation and procedural limitations as it deems appropriate.”

1. Council may hear Ms. March’s appeal on denied issues (a) pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Issue (a) should be granted.

a. Ms. March disputes Hearing Officer’s denial of the issue, “Whether Applicant should include in its Fish Passage Plan and be required to replace a culvert on an unnamed stream (referenced as Crossing ID R-37969 in Exhibit BB-2, Table 1) to an appropriate size for fish passage” and of Hearing Officer’s determination that the issue be denied because Ms. March “did not raise concerns about this specific stream crossing in her comments on the DPO and therefore it is not a proper issue for consideration in the contested case.” Ms. March identifies that she raised the issue in draft proposed order comments provided on August 18, 2019. Based on review of the record, the Department confirms that Ms. March’s comments were received on August 22, 2019 and clearly identify an issue related to potential impacts to anadromous fish in Ladd Creek, as evaluated in ASC Exhibit BB, and necessity of a 3a/3b design for the Ladd Creek bridge crossings. Therefore, the Department recommends Council find that the issue was properly raised and grant the issue for review in the contested case proceeding.

U. JoAnne Marlette

Appeal Summary

Petitioner JoAnne Marlette filed an appeal on November 6, 2020, disputing the following findings of the *Order on Party Status*:

1. Petitioner disputes designation as a limited rather than full party.

Evaluation

1. Council may hear Ms. Marlette’s appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Ms. Marlette disputes Hearing Officer’s limited party designation on the issues she properly raised because: she meets all four requirements to be granted full party status; the determination was inappropriately based on

recommendations from the Department and Applicant; and is not supported by rule. For the reasons discussed in Section II. A. above (response to Stop B2H appeal), the Department recommends Council maintain Hearing Officer’s limited party designation, limiting Ms. Marlette’s participation in the contested case proceeding, pursuant to OAR 137-003-0005(8) and – (9),¹⁰ to her properly raised contested case issues as determined by the Hearing Officer. Limited party status is also appropriate under OAR 137-003-0040, and OAR 345-015-0083.

V. Michael McAllister

Appeal Summary

Petitioner Michael McAllister filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes designation as a limited rather than full party.
2. Petitioner disputes denial of the following issues:
 - a. Failure to Comply with ORS 469.370(13)
 - b. Remaining EFSC Standards Raised in Public Comment

Evaluation

1. Council may hear Mr. McAllister’s appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Mr. McAllister disputes Hearing Officer’s limited party designation on the issue he properly raised because: there was no justification provided; his issues have broad reach and overlap with other contested case issues; he met the eligibility requirements under ORS 469.370(5) and OAR 345-015-0016 for full party status; and is inconsistent with ORS 183.413(2)(e), which states that a contested case notice shall include “A

¹⁰ Under OAR 137-003-0005(8) an agency (or in this matter the Hearing Officer) may treat a petition to participate as a petition to participate as a limited party. Subsection (9) states, “the agency shall specify areas of participation and procedural limitations as it deems appropriate.”

statement that the party has the right to respond to *all issues* properly before the presiding officer and present evidence and witnesses on those issues.” [Emphasis added]

For the reasons discussed in Section II. A. above (response to Stop B2H appeal), the Department recommends Council maintain Hearing Officer’s limited party designation, limiting Mr. McAllister’s participation in the contested case proceeding to his properly raised contested case issues as determined by the Hearing Officer.

2. Council may hear Mr. McAllister’s appeal on denied issues (a) and (b) pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Issue (a) should be granted.

a. Mr. McAllister disputes Hearing Officer’s framing of his issues and argues that Hearing Officer “misstated the issue, ignores its primary intent and framed the issue” in a way in order to determine that it is not within Council jurisdiction. The *Order on Party Status* identifies his issues as, “Whether Applicant was required to include the least impactful route, the Agency Selected NEPA route, in its application to Council” and “Whether Council’s failure to consider the Agency Selected NEPA Route constitutes a violation of ORS 469.370(13).” Hearing Officer’s determination denying the issue states that these issues fall outside of Council jurisdiction because there is no standard that requires Applicant’s to propose the least impactful route or the route recommended by a federal agency.

Mr. McAllister appears to be arguing that his issue be defined more broadly and generally as “Whether Applicant failed to comply with ORS 469.370(13)” but then suggests that the Hearing Officer’s interpretation of ORS 469.370(13) would exclude routes reviewed by the federal agency to ensure NEPA compliance – which aligns with the second issue reviewed by the Hearing Officer. OAR 345-015-0016(5)(b) requires that a petition include a short and plain statement of the issue or issues that the person desired to raise in the contested case proceeding. Neither the petition nor appeal include a short

and plain statement of the issue being raised. It is not clear to the Department how the issues as framed and evaluated in the *Order on Party Status* differ substantively from the issue and arguments provided in the appeal. For these reasons, the Department recommends Council maintain Hearing Officer's denial of the issue.

- b. Mr. McAllister disputes Hearing Officer's denial of issues raised related to other EFSC standards and refers to detailed analysis provided in his draft proposed order comments on environmental impacts of the Morgan Lake Alternative. Hearing Officer's determination denying Mr. McAllister's other issues was based on the issues not satisfying the requirements under OAR 345-015-0016(3). Based on thorough review of Mr. McAllister's draft proposed order comments, petition and *Order on Party Status*, the Department recommends Council maintain Hearing Officer's denial of Mr. McAllister's other issues.

W. Sam Myers

Appeal Summary

Petitioner Sam Myers filed an email inquiry on November 5, 2020 seeking clarification on the Hearing Officer's determination of his party status. The email inquiry requests that he be granted full party status, rather than limited. The Department construes the email inquiry as a potential appeal disputing the following findings of the Order on Party Status:

1. Petitioner requests full party status on his issues granted.

Evaluation

1. Council may hear Mr. Myers's appeal on limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Mr. Myers requests that he be granted full party status on his issues. Hearing Officer identified that Mr. Myers's petition included two issues and determined that both issues were properly raised contested case issues. Therefore, it is clarified that Mr. Myers has been granted limited party status on the issues he raised. The designation of

limited party status does not limit the extent of the individual's participation on their granted issues. For the reasons discussed in Section II. A. above (response to Stop B2H appeal), the Department recommends Council maintain Hearing Officer's limited party designation, limiting Mr. Myers' participation in the contested case proceeding to his properly raised contested case issues as determined by the Hearing Officer.

X. Tim Proesch

Petitioner Tim Proesch filed an email complaint on November 2, 2020 regarding the effect of participation by the Department and applicant on the fairness and equitability of the contested case proceeding. The email complaint did not include specific appeal of the Order on Party Status.

Y. Stacia Jo Webster

Appeal Summary

Petitioner Stacia Jo Webster filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner requests full party status on the denied issue.
2. Petitioner disputes denial of the following issues:
 - a. Whether the Fire Prevention and Suppression Plan (Attachment U-3) is adequate and whether local service providers would be able to respond to a facility-related fire.
3. Petitioner requests clarification on the rules and next steps in the process; and requests that Hearing Officer be allowed to work independently of the Department and Applicant.

Evaluation

1. The Department recommends that Council not hear Ms. Webster's appeal of full party status because it is related to the denied issue evaluated below. If Council grants issue (a) for consideration in the contested case proceeding, Ms. Webster would have limited party status on that issue. If Council maintains denial of the issue, the full party vs. limited party aspect of her appeal is moot.

2. Council may hear Ms. Webster’s appeal on denied issues (a) pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Issue (a) should be denied.

a. Ms. Webster disputes Hearing Officer’s denial of the issue, “Whether the Fire Prevention and Suppression Plan (Attachment U-3) is adequate and whether local service providers would be able to respond to a facility-related fire” and Hearing Officer’s determination that because Ms. Webster’s draft proposed order comments “did not reference the Fire Prevention and Suppression Plan and did not offer facts or argument to support her position that existing local resources would be unable to adequately provide fire response services,” the issue was not properly raised per the requirements under OAR 345-015-0016(3). Ms. Webster asserts that she referred to the Fire Prevention and Suppression Plan in her petition and during the October 1, 2020 prehearing conference, and that her draft proposed order comments were related to fire protection from wildfire during construction, operation, and maintenance of the proposed facility. Based on additional review of Ms. Webster’s draft proposed order comments and petition, the Department recommends Council concur with Hearing Officer’s determination and maintain denial of the issue because the issue was not properly raised per the requirements under OAR 345-015-0016(3).

3. Council may not hear Ms. Webster’s request for clarification on the rules and next steps in the process; or request that Hearing Officer be allowed to work independently of the Department and Applicant. The scope of appeals is established under OAR 345-015-0016(6) and -0057, which includes appeals of the Hearing Officer determination on requests to participate as a party or limited party and for any Hearing Officer ruling resulting in termination of a party’s right to participate in the contested case proceeding, respectively. The objection is not within the scope of the rules. Council may provide, or direct the Department or Hearing Officer to provide, the requested clarification outside of the appeal hearing.

Z. John Williams

Appeal Summary

Petitioner John Williams filed an appeal on November 6, 2020, disputing the following findings of the Order on Party Status:

1. Petitioner disputes limited party designation to represent a personal interest in potential impacts from proposed facility to cultural resources located on his private property.
2. Petitioner disputes the timeframe to appeal the Order on Party Status.

Evaluation

1. Council may hear Mr. Williams's appeal of the personal interest designation of his limited party status pursuant to OAR 345-015-0016(6), as determined in the *Order on Party Status*. Mr. Williams's asserts that his issue is "important to current and future generations" and therefore should not be "just about me or any landowner." The Order on Party Status's *Table of Identified Issues and Parties with Standing on Issue* identifies that Mr. Williams has been granted standing to represent a personal interest in the issue granted, "Whether Applicant adequately evaluated archeological resource "Site 6B2H-MC-10" on Mr. Williams' property, Parcel 03S37E01300." Mr. Williams petition stated, "I need to represent my concerns personally..." and identifies an issue specific to Site 6B2H-MC-10 on Parcel 03S37E1300. Mr. Williams's petition did not include information required under OAR 137-003-0005(3)(e) and (f) to represent a public interest (i.e., petition did not identify an interest in representing a public interest, nor include the following required information: a detailed statement of such public interest, the manner in which such public interest would be affected by the results of the processing, petitioner's qualifications to represent such public interest, and a statement of the reasons why existing parties to the proceeding cannot adequately represent the interest). For these reasons, the Department recommends Council deny the appeal of the personal interest designation of Mr. Williams's limited party status.

2. Council may not hear Mr. Williams' objection to the 7-day appeal period; in the alternative, if heard, the objection should be denied. Mr. Williams objects to the appeal period. The scope of appeals is established under OAR 345-015-0016(6) and -0057, which includes an established appeal timeframe of 7-days from the date of Hearing Officer determination on requests to participate as a party or limited party and for any Hearing Officer ruling resulting in termination of a party's right to participate in the contested case proceeding, respectively. The objection is inconsistent with rule established timeframes and not within the scope of the rules.

III. CONCLUSION

In conclusion, the Department recommends Council maintain Hearing Officer's determinations as presented in the *Order on Party Status*, with the exception of the following modifications:

1. The statement for issue NC-3, as defined in Hearing Officer's Corrected Table of Identified Issues and Parties with Standard on Issue, should be modified as follows: "Whether the methodologies used for the noise analysis to evaluate compliance with OAR 340-035-0035 were appropriate and whether the Department erred in approving the methodology used to evaluate compliance with OAR 340-035-0035" because STOP B2H Coalition raised the issue of noise analysis methodologies in its petition and in its draft proposed order comments, and is within Council's jurisdiction, consistent with the requirements under OAR 345-015-0016(3).
2. Ms. Gilbert should be granted limited party status on the following issue, "Whether the impacts from the proposed facility on accepted farm practices and the cost of accepted farm practices have been adequately evaluated or mitigated" because the issue is within Council jurisdiction under ORS 215.275(5), was raised on the record of the draft proposed order with sufficient specificity and therefore satisfies all requirements under OAR 345-015-0016(3).
3. Ms. Gilbert should be granted limited party status on the following issue, "Whether Applicant should include in its Fish Passage Plan and be required to replace a culvert on an unnamed stream (referenced as Crossing ID R-37969 in Exhibit BB-2, Table 1) to an appropriate size for fish

passage” because the issue was raised on the record of the draft proposed order public hearing with sufficient specificity, and is within Council’s jurisdiction. The issue should be granted as a properly raised contested case issue because the requirements under OAR 345-015-0016(3) were satisfied.

CERTIFICATE OF FILING

I certify that on November 13, 2020, the foregoing THE OREGON DEPARTMENT OF ENERGY'S RESPONSE TO APPEALS OF THE HEARING OFFICER'S OCTOBER 29, 2020 ORDER ON PARTY STATUS, AUTHORIZED REPRESENTATIVES AND ISSUES was emailed to:

Alison Greene Webster, Senior Administrative Law Judge
Hearings Officer
Office of Administrative Hearings
OED_OAH_Referral@oregon.gov

DATED this 13th day of November 2020.

/s/ Patrick G. Rowe

Patrick G. Rowe, OSB #072122
Senior Assistant Attorney General
Attorney for the Oregon Department of
Energy

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2020, the foregoing THE OREGON DEPARTMENT OF ENERGY'S RESPONSE TO APPEALS OF THE HEARING OFFICER'S OCTOBER 29, 2020 ORDER ON PARTY STATUS, AUTHORIZED REPRESENTATIVES AND ISSUES was served by mailing or emailing a true copy of the above-listed document as set forth below:

By: First Class Mail:

John C. Williams
PO Box 1384
La Grande, OR 97850

By: Electronic Mail:

David Stanish
Attorney at Law
Idaho Power Company
dstanish@idahopower.com

Lisa Rackner
Attorney at Law
Idaho Power Company
lisa@mrg-law.com

Jocelyn Pease
Idaho Power Company
Attorney at Law
jocelyn@mrg-law.com

Joseph Stippel
Agency Representative
Idaho Power Company
jstippel@idahopower.com

Christopher Burford
Attorney at Law
Office of the President
Eastern Oregon University
cburford@eou.edu

Kellen Tardaewether
Agency Representative
Oregon Department of Energy
Kellen.tardaewether@oregon.gov

Karl G. Anuta
STOP B2H Coalition
kga@integra.net

Mike J. Sargetakis
STOP B2H Coalition
mike@oxbowlaw.com

Sam Myers
sam.myers84@gmail.com

Susan Geer
susanmgeer@gmail.com

Whit Deschner
deschnerwhit@yahoo.com

Charles H. Gillis
charlie@gillis-law.com

Corrine Dutto
dutto@eoni.com

Kathryn Andrew
lkathrynandrew@gmail.com

Ken and Marsha Hildebrandt
ken_marsha@comcast.net

Kathryn Morello
cndyrela@eoni.com

Daniel L. White
danno@bighdesign.biz

John H. Luciani
dirtfarmerjohn@gmail.com

Norm Cimon
ncimon@oregontrail.net

Matt Cooper
mcooperpiano@gmail.com

Jim and Kaye Foss
onthehoof1@gmail.com

Charles A. Lyons
marvinroadman@gmail.com

Timothy C. Proesch
tranquilhorizonscooperative@gmail.com

Suzanne Fouty
suzannefouty2004@gmail.com

Gail Carbiener
mcgccarb@bendbroadband.com

David Moyal
moyald@gmail.com

John B. Milbert
jmfisherman9@gmail.com

Jerry Hampton
jerryhampton61@gmail.com

Greg Larkin
larkingreg34@gmail.com

Stacia Jo Webster
staciajwebster@gmail.com

Joann Marlette
garymarlette@yahoo.com

Dr. Karen Antell
Professor of Biology Eastern Oregon
University, Science Office
kantell@eou.edu

Joe Horst and Ann Cavinato
joehorst@eoni.com

Virginia and Dale Mammen
dmammen@eoni.com

Miranda Aston
tranquilhorizonscooperative@gmail.com

Dianne B. Gray
diannebgray@gmail.com

Janet Aston
owyheeoasis@gmail.com

Susan Badger-Jones
sbadgerjones@eoni.com

Michael McAllister
wildlandmm@netscape.net

Anne March
amarch@eoni.com

Peter Barry
petebarry99@yahoo.com

Louise Squire
squirel@eoni.com

Ralph Morter
amorter79@gmail.com

Irene Gilbert
ott.irene@frontier.com

Greg Larkin
larkingreg34@gmail.com

Jonathan White
jondwhite418@gmail.com

John Winters
wintersnd@gmail.com

Sam Hartley
samhartley57@gmail.com

Sue McCarthy
suemc@eoni.com

Jim Kreider
jkreider@campblackdog.org

Jeffery R. Seeley
Jeff.seeley@doj.state.or.us

Sue McCarthy
suemc@eoni.com

Lois Barry
loisbarry31@gmail.com

Colin Andrew
candrew@eou.edu

Kevin March
amarch@eoni.com

Jennifer Miller
rutnut@eoni.com

Stop B2H Coalition
fuji@stopb2h.org

Kelly Skovlin
kskovlin@gmail.com

Ryan W. Browne
browner@eou.edu

Jim and Jane Howell
d.janehowell@gmail.com

Jeri Watson
lotusbsilly@eoni.com

Brian Doherty
bpdoherly@hughes.net

Alisha Till
alisha@mrg-law.com

Nichole Milbrath
nichole.milbrath@centurylink.com

Carl Morton
carlmorton2000@gmail.com

DATED this 13TH day of November 2020.

/s/ Patrick G. Rowe

Patrick G. Rowe, OSB #072122
Senior Assistant Attorney General
Attorney for the Oregon Department
of Energy