

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF ENERGY**

IN THE MATTER OF:) **CERTIFIED QUESTIONS TO**
) **COUNCIL REGARDING**
THE APPLICATION FOR SITE) **INTERPRETION OF OAR 345-015-**
CERTIFICATE FOR THE) **0085(1) AND (2)**
BOARDMAN TO HEMINGWAY)
TRANSMISSION LINE) OAH Case No. 2019-ABC-02833

Pursuant to OAR 345-015-0023(5)(k),¹ the ALJ certifies the following questions to the Council for its consideration and disposition:

1. Should OAR 345-015-0085(1) be read to restrict a limited party’s authorization to propose site certificate conditions to those that relate to and are within the scope of the issue(s) on which the limited party was granted standing in the contested case?

2. Should OAR 345-015-0085(2) be read to restrict a limited party to presenting evidence and argument relating to the appropriateness, scope or wording of another party’s proposed site certificate condition to those proposed conditions that relate to and are within the scope of the issue(s) on which the limited party was granted standing in the contested case?

BACKGROUND AND CONTEXT

In the *Energy Facility Siting Council Order on Appeals of Hearing Officer Order on Party Status, Authorized Representatives and Issues*, issued November 25, 2020, the Council affirmed the ALJ’s designation of limited party status for petitioners granted standing in contested case proceeding. Accordingly, in the *Amended Order on Party Status, Authorized Representatives and Issues for the Contested Case (Amended Order on Party Status)*, issued December 4, 2020, the ALJ stated as follows:

I find it appropriate under OAR 137-003-0005(8) and (9), OAR 137-003-0040, and OAR 345-015-0083, to limit successful petitioners’ participation in this

¹ OAR 345-015-0023(5)(k) states:

(5) The hearing officer is authorized to carry out the responsibilities assigned in this rule, including but not limited to the authority to:

* * * * *

(k) Within the hearing officer's discretion, or at the request of the Council, certify any question to the Council for its consideration and disposition;

contested case to the issues properly raised in their respective petitions for party status.

** * * The limited party's participation in the contested case will be limited to the specific issue or issues the limited party properly raised in their petition for party status. A limited party will have standing to respond on procedural matters, to participate in discovery related to the identified issue(s) properly raised in their petition, and to present evidence, cross-examine witnesses, and submit written briefing on the identified issue(s) properly raised in their petition. Limited parties will not have standing to respond and/or be heard on all issues properly before the ALJ.*

Amended Order on Party Status at 10, emphasis added.

OAR 345-015-0085 sets out requirements for the Hearing Officer's Proposed Contested Case Order. This rule also addresses a party or limited party's permission to propose site certificate conditions and to present evidence and argument related to any other party's proposed site certificate conditions:

(1) The hearing officer shall allow any party, including any limited party, to propose site certificate conditions that the party believes are necessary or appropriate to implement the policy of ORS 469.310 or to meet the requirements of any other applicable statute, administrative rule or local government ordinance. Parties shall submit proposed site certificate conditions to the hearing officer in writing according to a schedule set by the hearing officer.

(2) In a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, any party or limited party may present evidence relating to the appropriateness, scope or wording of any other party's proposed site certificate conditions and may present written proposed findings of fact, briefs and other argument concerning proposed conditions.

Read together, OAR 345-015-0016 and OAR 345-015-0085 appear to be in conflict. OAR 345-015-0016 prohibits the ALJ from considering issues not raised with sufficient specificity and the *Amended Order on Party Status* limits the limited parties' participation in the contested case to the specific issue(s) on which the limited party has standing. On the other hand, OAR 345-015-0085(1) authorizes any party/limited party to propose site certificate conditions the party/limited party believes necessary to implement the policy of ORS 469.310, and OAR 345-015-0085(2) allows any party/limited to present evidence and argument related to another party's proposed site certificate conditions.

In this contested case proceeding, a number of limited parties timely submitted proposed site certificate conditions pursuant to OAR 345-015-0085(1). Many of these proposed site certificate conditions relate to, and are within the scope of, the identified issue(s) on which the limited party has standing. However, some limited parties submitted proposed conditions that are unrelated to, and outside the scope of, the issues on which the limited party has standing.

The Applicant has objected to these latter proposed conditions, and asked that they be excluded from the contested case because they are outside the scope of any identified issue in the contested case and/or outside the issue(s) on which the limited party has standing.

OAR 345-015-0016 and OAR 345-015-0085 are rules promulgated by Council to govern the contested case process. The ALJ is required to give deference to Council's plausible interpretation of its own rules. *See Don't Waste Oregon Committee v. Energy Facility Siting Council*, 320 Or 132 (1994). As this appears to present a question of first impression, the ALJ seeks the Council's guidance in harmonizing apparently conflicting provisions and interpreting OAR 345-015-0085(1) and (2).

As set out above, the ALJ questions whether, under OAR 345-015-0085(1), the Council intended to allow any limited party to propose any site certificate conditions the limited party believes are necessary or appropriate regardless of the limitations on the limited party's participation in the contested case *or*, alternatively, whether this provision should be read to limit a limited party's ability to propose site certificate conditions to conditions that relate to and are within the scope of issue(s) on which the limited party has standing.

Additionally, the ALJ seeks guidance as to whether, under OAR 345-015-0085(2), the Council intended to allow any limited party to present evidence and argument on any other party's proposed site certificate conditions regardless of the limitations on the limited party's participation in the contested case, *or* alternatively, whether a limited party's ability to be heard on another party's proposed site certificate conditions should be limited to those proposed conditions that relate to and are within the scope of issue(s) on which the limited party has standing.

The cross-examination hearing in this contested case is set to begin on January 10, 2022. Following completion of the cross-examination hearing, the parties and limited parties will submit closing arguments. As time is of the essence, the ALJ requests the Council's prompt attention and response to these certified questions.

Alison Greene Webster

Senior Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF MAILING

On December 14, 2021, I mailed the foregoing CERTIFIED QUESTIONS TO COUNCIL REGARDING INTERPRETION OF OAR 345-015-0085(1) AND (2) issued on this date in OAH Case No. 2019-ABC-02833.

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