

ATTACHMENT 1



Oregon

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To: Oregon Energy Facility Siting Council

From: Thomas L. Jackman, Rules Coordinator

Date: February 9, 2023

Subject: Agenda Item B (Action Item) Contested Case Rules - Consideration of Draft Notice of Proposed Rulemaking for the February 23, 2024 EFSC Meeting

Attachments: Attachment 1: Redline of proposed contested case rules
Attachment 2: Overview of the Office of Administrative Hearing's Contested Case Model Rules
Attachment 3: Draft Notice of Proposed Rulemaking (to be provided in supplemental packet)
Attachment 4: RAC Written Feedback on Proposed Rules

STAFF RECOMMENDATION

Staff requests Council's authorization to issue a Notice of Proposed Rulemaking and initiate formal proceedings to adopt the proposed amendments to the contested case rules as shown in Attachment 1.

BACKGROUND AND SUMMARY

Council authorized staff to begin work on revising and updating its rules for contested case proceedings as part of its 2023-2025 Rulemaking Schedule.

Staff presented preliminary recommendations for the scope and direction of this rulemaking at its July 2023 meeting. At this meeting, the Council approved staff's recommended scope and directed staff to form a Rules Advisory Committee (RAC) to assist in the preparation of draft proposed rules.

The following month, staff invited a diversity of stakeholders to join a RAC and convened a meeting on September 7, 2023. After a discussion of the contested case process, RAC members were invited to provide feedback and comments on the current rules.

The RAC met again on October 27, 2023 to discuss the preliminary feedback from members as well as staff's proposal to swap the incorporation of the Attorney General's contested case model rules for the Attorney General's Office of Administrative Hearings contested case model rules (see discussion on this, below). After this meeting, staff developed a draft set of amended rules and distributed them to the RAC for their review on January 2, 2024.

On February 1, 2024, the RAC met a third time and at this meeting discussed feedback regarding staff's initial draft of the rules. The majority of the RAC was generally satisfied with the proposed rules and provided some modest feedback during the RAC meeting, which staff incorporated into the draft rules attached herein as Attachment 1. Two RAC members, Irene Gilbert and Jim Kreider, both representing

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the public, had extensive written feedback on the proposed changes and the contested case process in general. See Attachment 4. This feedback was given to staff hours before the third RAC meeting. Given the extensive nature of the feedback and the limited time frame for review prior to and during the RAC meeting, staff arranged to meet separately with Ms. Gilbert and Mr. Kreider to go through their feedback and to see if any concerns or proposed rule language was appropriate for RAC review. Staff met with Ms. Gilbert and Mr. Kreider on February 7, 2024 for approximately three hours to discuss their concerns in detail. Staff also circulated their written feedback on February 1, 2024, to the entire RAC for comment. To date, no other RAC members have provided comment on this feedback.

This report contains:

- A summary of staff’s draft of proposed changes (see Attachment 1) to the Council’s contested case rules as currently laid out in Division 15 of OAR 345.
- A review of the main outstanding RAC issues not addressed in the draft rules as submitted.
- A copy of written feedback received from RAC members (see Attachment 4).

SUMMARY OF PROPOSED AMENDED CONTESTED CASE RULES

The proposed changes to the Council’s contested case rules—found in Division 15 of OAR 345, from Rule 12 through Rule 85—can be divided into roughly five categories:

- 1) Reorder and reorganize the rules to better match the flow of the contested case process.
- 2) Update the rules to reflect a proposed adoption of the Office of Administrative Hearing’s model rules for contested cases.
- 3) Improve the consistency of the rules, both internally and to ensure they properly match Oregon laws and other administrative rules.
- 4) Improve the clarity of the rules by providing or enhancing definitions where appropriate. This category also includes changes designed to enhance the readability of the rules.
- 5) Improve the efficiency of the contested case process by providing additional guidance to all parties and prospective parties who are affected by these rules.

It is important to note that the intent for the changes proposed in categories 1) through 4) is not to alter the substance of the rules as they are today. The intent is to assist participants—including the hearing officer—in understanding the Council’s existing contested case process.

On the other hand, the changes in category five *do* constitute new requirements for participants, but these are relatively few in number and intended to be minor changes, whose goal is to ensure a more efficient resolution of the existing contested case process.

What follows is a more detailed review and explanation of each category of proposed changes, including illustrative examples.

1) Reorganize

The existing contested case rules live in Division 15 of OAR 345, from Rule 12 through Rule 85. Division 15 contains not just the contested case rules, but, more generally, all the “Procedures Governing Council and Department of Energy Proceedings, Including Site Certificate Hearings.” It is odd to place the contested case rules at the beginning of this division, given that the contested process occurs towards the end of the siting process.

Staff proposes completely shifting the rules governing the contested case process to the 0400s in Division 15 (i.e., OAR 345-015-0400+), which are currently empty. This places the contested case rules at the logical end of the siting procedure rules found in Division 15.

In addition to moving the entire block of contested case rules, staff further suggests reordering the rules to better match the flow of the contested case process. For example, moving the rule on the prehearing conference (“Prehearing Conference and Prehearing Order”) from the end of the contested case rules towards the beginning, or from 345-15-0083 to 345-015-0430 (emphasis added).

On top of reordering the rules to match their logical flow, in the proposed rules some subsections have been moved as well. For example, subsection (1) and (2) of existing 345-015-0085 (Hearing Officer’s Proposed Contested Case Order) is now found in the proposed rules at 345-0445-0445 (Submission of Evidence and Proposed Site Conditions), as the material moved relates to submission of proposed site conditions to the hearing officer and as such it makes more sense to include it in a section on the submission of material to the hearing officer.

Finally, as expected, numerous changes have been made throughout the proposed rules to update rule references to match the various new locations of the rules.

2) Adopt Oregon Office of Administrative Hearings Model Rules

Council’s existing contested case rules incorporate the Attorney General’s (AG) Uniform and Model Rules.¹ The AG has a second set of contested case rules that are written for the Office of Administrative Hearings (OAH). This second set of model rules is found at OAR 137-003-0501 through 137-003-0700.

After an extensive review of both sets of model rules for contested cases, staff is proposing that Council adopt the OAH version. This proposed switch to a new set of model rules is driven by a few different factors, but the main one is that the OAH model rules generally contain more detail and clarity than the model rules that are currently incorporated. For example, additional guidance is found in the OAH model rules regarding summary determination, subpoenas, dating of documents received, and discovery procedures in general.²

Another significant consideration is the Council’s recent trend of using OAH administrative law judges (ALJs) to act as hearing officers for its contested case proceedings, but it is important to note that adoption of OAH’s model rules does not bind Council to the use of OAH’s ALJs. This is because EFSC is explicitly exempted by statute from having to use an OAH ALJ as a hearing officer.³ However, it is not an insignificant benefit that the ALJ hearing officers the Council is likely to continue to rely on for the foreseeable future will be more familiar with the OAH model rules than they are with the existing ruleset used by the Council.

The Council is not bound by OAH model rules through this adoption. As laid out in OAR 345-015-0400(3)⁴, “In any conflict between the Office of Administrative Hearing rules and Council rules, the Council shall apply its own rules.”⁵

¹ See OAR 345-001-0005(1).

² For a detailed chart comparing the OAH model rules with the current model rules, please see Attachment 2.

³ See ORS 183.625(2)(k).

⁴ All references to rules OAR-345-015-04XX are to the renumbered rules in the proposed draft included as Attachment 1.

⁵ See ORS 183.630(1), which allows agencies to seek an exemption from the Attorney General from the OAH model rules even after adopting them, which EFSC has done and intends to continue to do.

Due to the proposed adoption of the model rules, Staff is also recommending the removal of now duplicative rules. These include, for example:

1. Deleting OAR 345-015-0038. This rule deals with the ability of the hearing officer to hold separate hearings to cover multiple issues, but this is duplicative of the model rule found at OAR 137-003-0525(1)(c), which states that the hearing officer has the ability to "[d]etermine whether cases shall be consolidated or bifurcated..."
2. Deleting OAR 345-015-0051. This rule deals with evidence offered by governing bodies, but this is covered at OAH model rule OAR 137-003-0610, which allows the submission of any evidence that is not irrelevant, immaterial, or unduly repetitious and would allow the evidence at issue in OAR 345-015-0051.

As discussed above, the Council's existing rules include the adoption of the AG's contested case model rules, supplemented by additional rules found in OAR 345, Division 15. The proposed rules will not be any different—if the Council approves the rules as proposed, its contested case process will continue to have two sets of rules: a set of model rules drafted by the AG, supplemented by citing specific rules found in OAR, Division 15. Staff realizes that this framework has and will continue to result in potential confusion, as parties must juggle going to two different places to identify how to properly navigate the Council's contested case process. To that end, staff proposes to Council that it direct staff to create a guide that combines the two rulesets into one place, which will then be made available to the public via Council's website.

3) Consistency

The third change that staff proposes to make involves edits to ensure the Council's contested case rules are consistent with existing Oregon laws and regulations and to ensure internal consistency. This includes, for example:

1. Modifying language found at OAR 345-015-0415(2). Specifically, changing "decision maker" to "Council, the Department and the applicant." This matches the language used at ORS 469.370(3), which states that ". . . issues shall be raised with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond to each issue."
2. Ensuring consistent use of "contested case hearing" as opposed to "contested case proceeding." Existing rules are not totally consistent with the use of these two phrases. Staff proposes that any use of the word "hearing" in the rules should either be a reference to the hearing officer or be used in the context of the formal event (e.g., the "contested case hearing") where evidence is presented by the two parties, cross examination takes place, etc. Staff further proposes that all other references to the contested case process more generally be changed to "contested case proceeding."

4) Clarity

Improving clarity is the fourth major focus for these proposed rule revisions. This category of changes reflects the bulk of the feedback from RAC members, some of whom expressed frustration in navigating and applying some of the concepts found in the contested case rules. As stated in the introduction, these changes are **not intended to alter in any way the existing intent or scope of the contested case rules**. The additional language is intended solely to more clearly convey Council's existing understanding regarding these various concepts.

Examples of these proposed rule changes to improve clarity include:

1. Including additional language on what it means to have raised an issue during the draft proposed order (DPO) phase with “sufficient specificity.” See OAR 345-015-0415(3). Note that staff is also asking for Council approval to modify OAR 345-015-0220, which is the governing language on what sufficient specificity means. OAR 345-015-0220 covers the DPO hearing phase, and so it is not part of the contested case rules. However, this is just a clarification, not a substantive change, and staff recommends changing this language as well to ensure consistency with the proposed changes.
2. Including additional language on what it means to qualify as indigent. See OAR 345-015-0420(2).
3. Adding language to make it clear that a hearing officer has the power to stay a contested case proceeding, and under what circumstances this should occur. See OAR 345-015-0465(1).
4. Adding language to make it clear that proposals for new site certificate conditions must be related to issues on which a party has been granted standing. See OAR 345-015-0445(3).
5. Adding language on what it means to be a limited party in a contested case proceeding. See OAR 345-015-0415(6).

5) Efficiency

Finally, the last category of changes staff is proposing relates to additional minor requirements for contested case participants. These are not intended to burden anyone but are intended to ensure that parties provide the information needed to have their issues understood by all and to allow for a more efficient resolution of the contested case.

Examples of proposed changes that fall under this category include:

1. Requiring that a separate statement be submitted for each issue that a participant wishes to raise. See OAR 345-015-0415(4)(b). The idea here is that by requiring each issue be submitted via its own individual statement, the hearing officer and the applicant or site certificate holder will better understand what a person is objecting to.
2. Requiring that dates of prior comments during the DPO phase be included in a party status request. See OAR 345-015-0415(4)(c). The goal with this addition is to help persons wishing to apply for party status to produce the evidence from the record that will establish their claims.

RAC FEEDBACK

Throughout the preliminary phase of the contested case rulemaking, RAC members provided a variety of feedback on the contested case rules. Essentially, all the feedback from RAC members other than Ms. Gilbert and Mr. Kreider centered on category 4 of rule changes, the clarity of the rules. Again, with the exception of Ms. Gilbert and Mr. Krieder, who represent the public, this feedback was relatively modest and has been incorporated into the version of the draft rules attached to this memo. The feedback provided by Ms. Gilbert and Mr. Krieder was more extensive, and while staff did its best to accommodate their concerns, a consensus was not reached in all areas. The main remaining areas of concern are as follows:

- 1) The exact nature of what it means to raise an issue at the draft proposed order hearing with sufficient specificity

While staff did its best to describe in detail exactly what parties need to have presented during the public comment period of the draft proposed order, Ms. Gilbert expressed concerns that it is still unclear exactly what parties must submit to ensure participation in a contested case. Fundamentally, what parties need to raise during the DPO public comment period or at the public hearing is threefold:

(1) the issue they are concerned about, (2) the Council standard or conclusion of law that the issue is related to, and (3) any facts supporting this concern. See OAR 345-015-0415(3). Staff suggests that the revised language is clear, and that there may be educational opportunities outside of the rulemaking process where additional guidance to members of the public can be provided in this area.

2) What it means to be a limited party compared to a full party

Ms. Gilbert is concerned that parties to a contested case cannot participate on issues for which they have not been granted standing. See OAR 345-015-0415(7). Standing is a fundamental concept of American legal jurisprudence and the existing framework for establishing standing, which we are seeking only to clarify and not change, is derived from two places. The very nature of the siting process as established by Oregon law is to ensure a thorough, inclusive, transparent yet streamlined review of large-scale energy projects through the Council's consolidated review process. The second is consistency with the County land use review process which includes similar language in ORS 197.797(1)⁶. That statutory provision requires that issues that may be the basis for an appeal must be raised prior to the conclusion of the final evidentiary hearing with statements or evidence to allow all participants and decision makers an opportunity to respond. Staff suggests that the proposed rule strikes the proper balance of inclusiveness, transparency, efficiency, and procedural consistency.

3) The timeline for the denial of issues

Ms. Gilbert is concerned that parties to a contested case are improperly denied the opportunity to contest denial of party status. The rules as written allow for parties who have been completely denied an opportunity to participate in a contested case the ability to appeal to Council. See OAR 345-015-0460(1). Staff does not recommend expanding the right to appeal beyond this case.

4) The timeline for notice of contested case information

Ms. Gilbert is concerned that participants to a draft proposed order hearing are not given notice on how the siting process works sufficient to allow them to raise issues at the public hearing in a manner that would preserve their right to participate in a contested case proceeding. See OAR 345-015-220(4). Staff notes that modifying these rules substantively as Ms. Gilbert proposes to do is outside the scope of this rulemaking. Regardless, the guidance provided at the public hearing for the draft proposed order described in OAR 345-015-220(4) is not the first opportunity the public has to learn about how to participate in Council's siting process. Staff presents the location of documents such as "A Public Guide To Energy Facility Siting In Oregon" at the public informational meeting during the notice of intent stage which describes these requirements. Staff also goes over these requirements in significant detail during the Complete Application public informational meeting, both of which are in advance of the public comment period for the draft proposed order. Additionally, the notice of the draft proposed order is required to include this information.

5) The restriction for the proposal of additional conditions not related to issues on which a person was granted standing by the hearing officer

Ms. Gilbert is concerned that parties are denied the opportunity to propose conditions not related to issues on which a person was granted standing by the hearing officer. See OAR 345-015-0445(2). This is related to a concern discussed above, but staff recommends once again that the proposed language is appropriate. While limited parties cannot propose site conditions for issues on which they have not been granted standing, there is nothing precluding them from reaching out to the limited parties who do have standing on that issue and requesting that they propose those site conditions. Moreover, OAR

⁶ "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

345-015-0445(3) allows all limited parties to address any site conditions proposed by other parties during a contested case if those new conditions constitute “material changes to the site certificate conditions.” This proposed rule language mirrors what is found in statute. See ORS 469.370(7), which grants this right, but no more.

6) The financial cost of participating in a contested case

Mr. Kreider is concerned that participation in a contested case requires expensive legal counsel and expressed his desire that the rules allow for an intervenor fund that would assist those who are granted standing in a contested case. There is no statutory support to allow for this in rulemaking and any such funding would require legislative support. Indeed, intervenor funding for participation in the state siting process was proposed during the 2023 legislative session (see HB 3181-1 Section 12), but it failed to pass. That bill would have provided both statutory authority and statutory appropriations from the state’s general fund.

Some additional suggestions by Ms. Gilbert and Mr. Kreider were not taken up by staff. See Attachment 4. However, it was agreed upon by all that further RAC meetings or even separate meetings with staff were not likely to produce further compromise. Staff has asked all the contested case RAC members who still have concerns about what is being proposed to bring those concerns to Council during the public comment period, in writing and/or in person during the public hearing.

Fiscal Impacts

The rules as presented, with some minor exceptions, do not substantively change the Council’s contested case process. Thus, the fiscal impacts of the proposed rules will be minimal. It is staff’s goal to make these rules easier to understand and thus require fewer resources by the participants to navigate them. Clearer contested case rules should also result in fewer procedural battles, which often involve time-consuming motions. All of this should serve to reduce the financial burden on participation in a contested case, along with a reduction in staff and Council time. Staff suggested this probable outcome to RAC members, who did not disagree.

NEXT STEPS AND PROJECTED RULEMAKING TIMELINE

If Council is satisfied with the draft proposed rules, staff requests authorization to issue a Notice of Proposed Rulemaking and initiate formal proceedings to adopt the proposed amendments. Staff also recommends that Council hold a public hearing on this rulemaking as part of the formal public comment period at its next meeting, currently scheduled for March 21-22, 2024.

ATTACHMENT 1

**OAD CHAPTER 345 – OREGON ENERGY FACILITY SITING COUNCIL
RULES EFFECTIVE AUG. 29, 2023**

DIVISION 1 - GENERAL PROVISIONS

345-001-0005 - Uniform and Model Rules1

**DIVISION 15 - PROCEDURES GOVERNING COUNCIL AND DEPARTMENT OF ENERGY PROCEEDINGS, INCLUDING
SITE CERTIFICATE HEARINGS**

345-015-0001 - Purpose and Authority2
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345-015-0400 – Governing Provisions – NEW RULE~~2~~²
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345-015-0445 – Submission of Evidence and Proposed Site Certificate Conditions~~10~~¹⁰
345-015-0450 – Official Notice of Evidence.....~~11~~¹¹
345-015-0455 - Motions~~11~~¹¹
345-015-0460 – Interlocutory Appeals to Council~~12~~¹²
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345-015-0475- Hearing Officer's Proposed Contested Case Order~~13~~¹³
END OF CONTESTED CASE RULES – The changes made as indicated in redline below are additional edits made
to ensure conformity with the proposed revised contested case rules. 345-015-0200 - Notice to Agencies that
the Application is Complete.....~~14~~¹⁴
345-015-0220 - Public Hearing and Notice on the Draft Proposed Order~~16~~¹⁵
345-015-0230 - Council Review and the Department of Energy's Proposed Order~~17~~¹⁷

**OAR CHAPTER 345 – OREGON ENERGY FACILITY SITING COUNCIL
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DIVISION 1 - GENERAL PROVISIONS

345-001-0005 - Uniform and Model Rules

(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 (~~January-December 2012~~²⁰²³): OAR 137-001-0005 through 137-001-0100, 137-002-0010 through 137-002-0060, ~~137-003-0001 through 137-003-0092~~^{137-003-0501 through 137-003-0700}, and 137-005-0010 through 137-005-0070.

(2) Notwithstanding the provisions of OAR 137-003-~~0055~~⁰⁶⁶⁰(1), following the issuance of notice of a contested case, the Department of Energy shall enter into the record the substance of any significant contact between a Council member and any Department staff from that point forward, concerning facts in the record.

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

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.490

Commented [TJ1]: NOTE – The comments throughout this proposed redline indicate the reason for the proposed change, but they also have a number that corresponds with the five categories of changes discussed in the accompanying February staff report to Council.

Commented [TJ2]: Setting date to version of OAH Model Rules Council would adopt if accepted as proposed.

Commented [TJ3R2]: #2 OAH Rule

Commented [TJ4]: Updated reference due to move to OAH model rules.

Commented [TJ5R4]: #2 OAH Rule

Commented [TJ6]: Updated reference due to move to OAH model rules.

Commented [TJ7R6]: #2 OAH Rule

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ORAR CHAPTER 345 – OREGON ENERGY FACILITY SITING COUNCIL
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DIVISION 15 - PROCEDURES GOVERNING COUNCIL AND DEPARTMENT OF
ENERGY PROCEEDINGS, INCLUDING SITE CERTIFICATE HEARINGS

345-015-0001 - Purpose and Authority

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

Stat. Authority: ORS 469.470
Stat. Implemented: ORS 183.310 to 183.550, ORS 469.040, ORS 469.370, ORS 469.405, ORS 469.440

~~345-015-0014 - Contested Case Notices~~

- ~~(1) The Department must issue contested case notices for Council contested case proceedings as provided in OAR 137-003-0001. The notices, at a minimum, must include:~~
- ~~(a) A caption with the name of the person or agency to whom the notice is issued;~~
 - ~~(b) A short and plain statement of the issues to be considered under OAR 345-015-0016, and a reference to the particular sections of the statute and rules involved;~~
 - ~~(c) A statement of the party's right to be represented by counsel and that legal aid organizations may be able to assist a party with limited financial resources;~~
 - ~~(d) A statement of the party's rights to participate in the hearing as a party or limited party;~~
 - ~~(e) A statement of the agency's authority and jurisdiction to hold a hearing on the issues; and~~
 - ~~(f) A statement of the time and place of the hearing; and~~
 - ~~(g) A statement that active duty servicemembers have a right to stay proceedings under the federal Servicemembers Civil Relief Act as described in ORS 183.415(3)(g); and~~
- ~~(2) The Department must send a contested case notice by registered or certified mail to the applicant or certificate holder, and to each party or limited party to the contested case.~~

STATUTORY/OTHER AUTHORITY: ORS 469.470
STATUTES/OTHER IMPLEMENTED: ORS 183.415

Procedures for the Conduct of Contested Cases

345-015-0400 – Governing Provisions – NEW RULE

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

Commented [TJ8]: Changing "hearings" to "proceedings" whenever the entire contested case process is being referred to as opposed to the more narrow "hearing" where evidence is presented to the hearing officer.

Commented [TJ9R8]: #3 Consistency

Commented [TJ10]: Removed as 345-015-401 now contains the language about the adopted rules governing the contested case proceeding.

Commented [TJ11R10]: #1 Reorganize

Commented [TJ12]: New rule to clarify governing provisions for the contested case process.

Commented [TJ13R12]: #4 Clarity

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

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

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440

345-015-0403 - Contested Case Notices

The Department must issue contested case notices for Council contested case proceedings as provided in OAR 137-003-0505. The notices must also include:

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415

Commented [TJ14]: Removed existing list as unnecessary given the proposed adoption of OAR 137-003-0505, which serves the same function.

Commented [TJ15R14]: #2 OAH Rules

345-015-~~0023~~ 0405 -- Appointment and Duties of Hearing Officer

(1) The Council shall appoint a hearing officer to conduct a contested case proceeding on behalf of the Council or to compile the record and recommend resolution of objections to the record of a local land use proceeding held pursuant to ORS 469.503(2)(a). The Council may refer a contested case to the Office of Administrative Hearings for appointment of a hearing officer, or Council may appoint a Council member, an employee of the Department of Energy, or some other person or persons as it sees fit.

(2) A hearing officer shall take all necessary action to:

- (a) Ensure a full, fair, ~~and impartial, and efficient~~ hearing proceeding;
- (b) Facilitate presentation of evidence;
- (c) Comply with statutory time limits on Council decisions;
- (d) Maintain order; and
- (e) Assist the Council in making its decision.

Commented [JT*O16]: #4 Clarity

(3) At the commencement of a contested case hearing, the hearing officer shall explain the issues involved in the hearing and the matters that the parties must either prove or disprove.

(4) The hearing officer shall keep the Council informed regularly on the status of the contested case and maintain a complete and current record of all motions, rulings, testimony and exhibits during the

Commented [TJ17]: Removed as duplicative of OAR 137-003-0600(3).

Commented [TJ18R17]: #2 OAH Rules

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course of the hearing. The hearing officer shall keep the Council informed regularly on the status of the contested case;

- (a) All pleadings, motions, and intermediate rulings;
- (b) Evidence received or considered;
- (c) Stipulations;
- (d) A statement of matters officially noticed;
- (e) Questions and offers of proof, objections, and rulings thereon;
- (f) Information about any ex parte communication with the hearing officer that must be made part of the record under OAR 137-003-0625(2);
- (g) Proposed findings and exceptions; and
- (h) The proposed contested case order.

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

- (a) Administer oaths and affirmations;
- (b) Rule on offers of proof and receive evidence pursuant to the hearing officer's established schedule;
- (c) Consider petitions for, authorize, and limit depositions, as provided in OAR 137-003-0572 Order depositions and other discovery to be taken and to issue subpoenas;
- (d) Order and control discovery, as provided in OAR 137-003-00250568, and all other aspects of the contested case hearing proceeding, the order of proof, and the conduct of the participants;
- (e) Dispose of procedural matters and rule on motions;
- (f) Call and examine witnesses;
- (g) Hold conferences, including one or more prehearing conferences as provided in OAR 137-003-00350575, before or during the hearing for settlement, simplification of issues, or any other purpose the hearing officer finds necessary. The hearing officer may limit the issues of the contested case and including, for a contested case proceeding on an application for a site certificate or for an amendment to a site certificate, determinings shall limit these issues that have been raised with sufficient specificity in the public hearing;
- (h) Continue the hearing contested case proceeding from time to time;
- (i) Issue protective orders in accordance with the standards of Rule 36(C) of the Oregon Rules of Civil Procedure.
- (j) At the request of the Council, or upon motion of a party or limited party for good cause shown as provided in OAR 345-015-00620470, and with reasonable notice to all parties, reopen the contested

Commented [JT19]: Matching language found in statute (ORS 183.417(9))

Commented [JT20R19]: #3 Consistency

Commented [JT*O21]: This is presumed by (m), below.

Commented [JT*O22R21]: #4 Clarity

Commented [TJ23]: Making it clear that evidence submitted by parties must be part of the scheduled established by the HO

Commented [TJ24R23]: #4 Clarity

Commented [TJ25]: OAR 137-003-0568 explains how the issuance of subpoenas will work.

Commented [TJ26R25]: #2 OAH Rules

Commented [TJ27]: Reflecting adoption of OAH rules as proposed.

Commented [TJ28R27]: #2 OAH Rules

Commented [JT*O29]: #3 Consistency

Commented [TJ30]: Reflecting adoption of OAH rules as proposed.

Commented [TJ31R30]: #2 OAH Rules

Commented [TJ32]: #4 Clarity

Commented [TJ33]: #3 Consistency

Commented [TJ34]: #1 Reorganize

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~~case hearing proceeding~~ for reception of further evidence on issues identified in the notice at any time prior to final decision by the Council;

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

(l) Prepare and serve upon the parties a proposed order addressing those issues enumerated in the request for contested case hearing and any additional issues approved by the hearing officer, including findings of fact, findings of ultimate fact and conclusions of law; and

(m) Take any other action consistent with the Council's governing statutes and the Council's rules.

~~(6) Notwithstanding the provisions of OAR 137-003-0055(1), following the issuance of a notice of contested case, the hearing officer shall enter into the record the substance of any significant contact with Department staff or the parties from that point forward concerning facts in the record.~~

~~(75)~~ The Council may, on its own motion or upon the motion of a party or limited party, remove a hearing officer if it determines that the hearing officer is not competent to conduct the proceeding, is demonstrably biased for or against any party, or is otherwise unable to conduct the proceeding.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0012-0410~~ - Filing and Service of Documents in a Contested Case

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

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

~~(23) Upon motion by any party or limited party, the hearing officer may waive requirements for serving parties who are no longer actively participating in the proceeding and may modify the requirements for serving a limited party consistent with such party's limited interest upon consent by the party or limited party.~~

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

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440

Commented [TJ35]: Removing this language, given that OAR 137-003-0625 ("Ex Parte Communications with Administrative Law Judge") covers this topic thoroughly.

Commented [TJ36R35]: #2 OAH Rules

Commented [TJ37]: #4 Clarity

Commented [TJ38]: Removing (2) to remove wasted time and effort by participants. The only docs that should be filed with Council are those it must take action on.

Commented [TJ39R38]: #5 Efficiency

Commented [TJ40]: #5 Efficiency

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345-015-0016-0415 - Requests for Party or Limited Party Status in Contested Cases on Applications for a Site Certificate

(1) Notwithstanding OAR 137-003-0005(2) 0535(2) and (3), a person requesting to participate as a party or limited party in a contested case proceeding must submit a petition to the hearing officer and provide copies to the agency and the site certificate applicant by the date specified in the Department's notice issued under OAR 345-015-0230 and OAR 345-015-0014. Petitions received after the deadline will not be considered unless the hearing officer determines that good cause has been shown for failure to submit the petition by the required date.

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

~~(3) Except as described in section (4) of this rule, only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0220 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department did not follow the requirements of ORS 469.370(2) or (3) or unless the action recommended in the proposed order described in OAR 345-015-230, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences.~~

~~(3) If a person has not raised an issue at the public hearing with sufficient specificity to afford the Council, the Department and the applicant decision maker an adequate opportunity to respond to the issue, the hearing officer may not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have identified the recommended findings of fact, conclusions of law, or conditions of approval to which they object, specified the Council standard or other applicable state and local requirements on which their objection is based, and presented facts or statements supporting that objection on the record of the draft proposed order at the public hearing that support the person's position on the issue.~~

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

Commented [TJ41]: Updating to reflect adoption of OAH rules. Note that this is in here because unlike what is specified in the model rules / OAH model rules, in EFSC contested cases all petitions go to the hearing officer (not the agency) and by the deadline established in the notice (not 21 days before the hearing).

Commented [TJ42R41]: See OAR 137-003-0535(2), which states that petitions to participate in a contested case should be submitted to the agency and 137-003-0535(3), which states that petitions are to be filed 21 days before the hearing unless the agency by rule has set a different deadline.

Commented [TJ43R41]: #2 OAH rules

Commented [TJ44]: Removing as duplicative of proposed adoption of OAR 137-003-0535(2).

Commented [TJ45R44]: "Persons who have an interest in the outcome of the agency's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties. Unless otherwise provided by law, a person requesting to participate as a party or limited party shall file a petition with the agency and shall include a sufficient number of copies of the petition for service on all parties."

Commented [TJ46R44]: #2 OAH Rules

Commented [TJ47]: Revised to be consistent with ORS 469.370(3), which states that "... Issues shall be raised with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond to each issue."

Commented [TJ48R47]: #3 Consistency

Commented [TJ49]: Clarifying what it means to present an issue at the DPO hearing with sufficient specificity.

Commented [TJ50R49]: #4 Clarity

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

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

(a) The information required under OAR 137-003-00050535(34);

(b) A short and plain statement of the for each issue or issues that the person desires to raise in the contested case proceeding; the statement itself must identify the issue the person wishes to raise, it is not permissible to identify an issue a person wishes to raise only by referencing comments the person made on the record of the draft proposed order; and

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

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

(7) A limited party is a person to whom the hearing officer grants standing to participate in one or more, but not all the issues to be addressed in the contested case, as established in a prehearing order on party status and issues described in OAR 345-015-0430. Except as detailed in OAR 345-015-0445(3), a limited party may participate in the contested case on the issues, including proposed site certificate conditions, for which the hearing officer has granted them standing to participate but may not participate on issues, including proposed site certificate conditions, for which the hearing officer has not granted them standing to participate.

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

Statutory/Other Authority: ORS 469.373 & 469.470

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

345-015-0018 – Authorized Representative

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

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

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Commented [TJ51]: Cleaning up what was (4) and is now (3) to reduce complexity. The standard is the same even during a expedited review of special criteria facilities so no need to spell it out twice.

Commented [TJ52R51]: #1 Reorganize

Commented [TJ53]: Updated to reflect adoption of OAH model rules

Commented [TJ54R53]: #2 OAH rules

Commented [TJ55]: To simplify and speed up resolution of issues. Separate statements for each issue makes it easier for a hearing officer and the parties to address each issue.

Commented [TJ56R55]: #5 Efficiency

Commented [TJ57]: Added to ensure a swifter and easier resolution by the hearing officer. The drafter of the statement is the expert on their own claims, it should not be up to the hearing officer and/or applicant to decipher what is being claimed.

Commented [TJ58R57]: #5 Efficiency

Commented [TJ59]: The comments don't have to occur at the actual hearing, but can be any time during the public comment period.

Commented [TJ60R59]: #3 Consistency

Commented [TJ61]: Adding clarity as to how responses to petitioner requests by department and applicant should take place.

Commented [TJ62R61]: #4 Clarity

Commented [TJ63]: Defining what it means to be a limited party in order to remove as much confusion as possible regarding this issue.

Commented [TJ64R63]: #4 Clarity

Commented [TJ65]: See proposed 345-015-0430(4).

Commented [TJ66R65]: #1 Reorganize / #3 Consistency

Commented [JT*067]: Removing this language as unnecessary given OAR 137-003-0555, which states that a party or limited party may be represented by an authorized representative, defines "authorized representative" and establishes the scope of their participation in the case. See also ORS 183.452(2), which states that an agency may be represented at contested case hearings by an officer or employee of the agency.

Commented [TJ68R67]: #2 OAH Rules

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345-015-~~0022-0420~~ - Petition for Indigent Status

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

(2) "Indigent" means the person has an income level at or below 100 percent of the United States poverty level as defined by the most recently revised poverty income guidelines published by the U.S. Department of Health and Human Services for the person's household/family size, unless the hearing officer makes a determination as to the person's ability to pay for the cost to participate in the pending case based on other factors. In making the determination as to a person's ability to pay costs to participate in the case, the hearing officer shall consider not only the person's income, but also the availability of any assets, including, but not limited to, cash, stocks, bonds, and any other property that may be applied to the satisfaction of judgments, other financial obligations the person bears, and the nature and complexity of the case.

Commented [TJ69]: Defining what indigent means.

Commented [TJ70R69]: #4 Clarity

~~(23)~~ The hearing officer shall issue a determination on a petition for indigent status in writing and shall state the grounds for the determination. The hearing officer's determination is final unless the petitioner submits an appeal to the Council within seven days after the date of service of the determination.

~~(34)~~ The hearing officer may excuse a person granted indigent status from such requirements of the rules of this division as the hearing officer determines appropriate. As determined by the hearing officer, the Council may provide for the cost of service of pleadings and other documents, reasonable travel expenses of witnesses and copies of the record necessary to enable a person granted indigent status to participate fully in the contested case.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0080425~~ - Participation by Government Agencies

(1) Any state or local government agency other than the Department may request participation in a contested case as a party, limited party or interested agency, subject to the limitations described in OAR 345-015-~~00160415~~. For a contested case on a site certificate application, the agency must submit the request to the hearing officer in writing by the date specified in the Department's public notice issued under OAR 345-015-0230(3). For a contested case on a site certificate amendment, the agency must submit the request to the Department by the date specified in the notice of the opportunity to request a contested case issued under OAR 345-027-0371(4).

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

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 469.370, 469.405, 469.440, 469.605, 469.615 & 469.992

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345-015-0083430 - Prehearing Conference and Prehearing Order

(1) The hearing officer may hold one or more prehearing conferences to address petitions for party or limited party status and issues. The hearing officer shall consider which issues, if any, the person has standing to participate in by considering the applicable provisions in OAR 345-015-0415 and OAR 137-003-0535(8).

Commented [TJ71]: Rewritten solely to make this more readable.

(2) The hearing officer may also conduct one or more prehearing conferences for the purposes and in the manner described in OAR 137-003-0575.

(3) At the conclusion of the prehearing conference(s) described in (1) and (2), the hearing officer must issue a prehearing order or orders stating the issues to be addressed in the contested case hearing, the persons with standing on each issue, the contested case procedures, and the schedule.

Commented [TJ72]: Clarifying that that party status is set after the prehearing conference(s).

(4) The hearing officer's order on a request to participate as a party or limited party is final and may not be appealed to Council unless the ruling would terminate the petitioner's ability to participate in the contested case proceeding.

Commented [TJ73R72]: #4 Clarity

(4.5) The hearing officer may cancel or reschedule any previously noticed prehearing conference.

Commented [TJ74]: Adding language to better describe how the prehearing conference works. Note that 137-003-0575 cited in (2) outlines all the acceptable reasons for holding a prehearing conference, but it does not specifically mention party status, which is why we have supplemented our rules with subsection (1) here.

(6) If an appeal to Council of a hearing officer's ruling on party status described in subsection (1) results in the granting of party status, the hearing officer shall issue an amended order.

Commented [TJ75R74]: #1 OAH Rules / #4 Clarity

(7) Failure to raise an objection regarding suggested procedures to be followed in the contested case or a proposed description of an issue during the prehearing conference when such procedures and issues are being discussed and established by the hearing officer constitutes waiver of that issue.

Commented [TJ76]: Making it clear that an amended order is required if party status is granted as the result of an appeal of party status.

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

Commented [JT*077R76]: #4 Clarity

Commented [TJ78]: Making it clear how waiver of an issue occurs. Previous language implies parties have to reraise every issue to maintain standing.

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

Commented [JT*079R78]: #4 Clarity

Commented [TJ80]: This is language is removed as duplicative. The threshold for participation is established in 345-015-0415(2) and the hearing officer's allowing only issues that were raised on the record of the DPO hearing is covered in 315-015-0405(4)(g).

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

Commented [TJ81R80]: #1 Reorganize / #2 OAH Rules

345-015-0435024 - Suspension of Hearing and Exclusion of a Party

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

Commented [JT*082]: Removing "but not limited to" as this is implied.

Commented [TJ83R82]: #4 Clarity

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

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-0038 – Separate Hearings

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

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-0440 - Burden of Presenting Evidence - NEW RULE

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

Stat. Authority: ORS 183.341, ORS 183.417, ORS 469.470

Stat. Implemented: ORS 183.450

345-015-0043-0445 -- Submission of Evidence and Proposed Site Certificate Conditions: Testimony Submitted in Writing

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

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

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

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

Commented [JT*084]: Removing as duplicative of OAR 137-003-0525(c), which gives the hearing officer the authority to bifurcate hearings.

Commented [TJ85R84]: #2 OAH Rules

Commented [TJ86]: Adding to reflect ORS 183.450(2), which states: "The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position."

Commented [TJ87R86]: Note -- adopting this change should include the removal of OAR 345-021-0100, which has the added benefit of removing a contested case rule from Division 21 and putting it in Division 15 with the rest of the Contested Case rules, in line with the goal of simplification.

Commented [TJ88R86]: #3 Consistency

Commented [TJ89]: Making it clear that, as it is throughout this process, parties can only participate to the extent they have standing.

Commented [TJ90R89]: #4 Clarity

Commented [TJ91]: Including language consistent with ORS 469.370(7), which indicates any party can comment on conditions proposed by any other party, if the changes proposed are material.

Commented [TJ92R91]: #3 Consistency

Commented [TJ93]: Moving this language to better suit subject of rule language (submission of evidence).

Commented [TJ94R93]: This was part of what was 345-015-0083(2), which is now gone.

Commented [TJ95R93]: #1 Reorganize

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Stat. Authority: ORS 469.470
Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0046~~ 0450 -- Official Notice of Evidence- Official Notice

- (1) In a contested case proceeding, the hearing officer may take official notice of the following:
- (a) All facts of which the courts of the State of Oregon may take judicial notice;
 - (b) Administrative rulings and reports of the Council and other governmental agencies;
 - (c) Facts contained in permits and licenses issued by the Council or any other government agency;
 - (d) The factual results of the hearing officer's or the Council's personal inspection of physical conditions involved in the contested case; and
 - (e) General, technical, or scientific facts within the specialized knowledge of the Council or the Department of Energy.
- (2) The hearing officer shall notify parties of facts officially noticed and shall allow parties an opportunity to contest the facts so noticed.

Stat. Authority: ORS 469.470
Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

~~345-015-0051 – Evidence: Resolutions of Cities, Counties and Tribes~~

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

~~Stat. Authority: ORS 469.470
Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992~~

345-015-~~0054~~ 0455 - Motions

- ~~(1)~~ All parties, including limited parties, shall submit any motions in a contested case to the hearing officer. All motions are subject to OAR 137-003-0630 and the following requirements:
- ~~(a)~~ Unless a motion is made orally on the record during a contested case ~~hearing~~hearing, or unless the hearing officer directs otherwise, the moving party shall submit the motion in writing and shall state with particularity the grounds and relief sought. The moving party shall submit with the motion any brief, affidavit or other document relied on, and, as appropriate, a proposed form of order. The moving party shall serve the motion on all parties and limited parties to the contested case.
- ~~(2b)~~ Within seven calendar days after the date of service of a written motion, or such other period as the hearing officer may prescribe, a party or limited party may file an answer in support of or in DIVISION 15 - PROCEDURES GOVERNING COUNCIL AND DEPARTMENT OF ENERGY PROCEEDINGS, INCLUDING SITE CERTIFICATE HEARINGS

Commented [JT*096]: Removing as under 137-003-0610 as any evidence -- including the evidence discussed here -- would be admissible as long as it is not irrelevant, immaterial, or unduly repetitious. So this does not really add anything.

Commented [TJ97R96]: #2 OAH Rules

Commented [TJ98]: Making clear that newly adopted OAH model rules apply here.

Commented [TJ99R98]: #2 OAH Rules / #4 Clarity

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opposition to the motion, accompanied by affidavits or other evidence. The moving party shall have no right to reply, except as permitted by the hearing officer.

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

Commented [JT*O100]: #3 Consistency

Stat. Authority: ORS 469.470
Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0057-0460~~ – Prohibitions on Interlocutory Appeals to Council

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

Commented [TJ101]: Removing as it is not otherwise permitted by the rules.

Commented [TJ102R101]: #3 Consistency

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

Stat. Authority: ORS 469.470
Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0059-0465~~ - Prohibitions on Stays

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

Commented [TJ103]: Making it clear that a hearing officer has the power to stay proceedings for good cause.

Commented [TJ104R103]: #4 Clarity

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

Stat. Authority: ORS 469.470
Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0062-0470~~ - Reopening Record Prior to Decision

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

Commented [JT*O105]: #3 Consistency

- (1) The evidence is material to the proceeding; or
- (2) The evidence would substantially affect the outcome of the proceeding.

Stat. Authority: ORS 469.470
Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

**OAR CHAPTER 345 – OREGON ENERGY FACILITY SITING COUNCIL
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345-015-0085-0475- Hearing Officer's Proposed Contested Case Order

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

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

~~(13) After the completion of a hearing in a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, the hearing officer shall issue a proposed contested case order stating the hearing officer's findings of fact, conclusions of law, and recommended site certificate conditions on the issues in the contested case. The hearing officer shall serve the proposed contested case order on all parties and limited parties. In the proposed contested case order, the hearing officer shall include recommended resolutions of objections to the local land use record, if any. The hearing officer's recommendations are part of the decision-making record for the application but are not part of the Council's order unless adopted by Council.~~

~~(42) After the hearing in a contested case proceeding on any matter other than an application for a site certificate or proposed site certificate amendment, the hearing officer shall issue a proposed contested case order stating the hearing officer's findings of fact and conclusions of law. The hearing officer shall serve the proposed contested case order on all parties and limited parties.~~

~~(35) Parties and limited parties may file exceptions to the proposed contested case order within the time set by the hearing officer, not to exceed 30 days after the hearing officer issues the proposed order. A party filing exceptions shall serve a copy of the exceptions on all other parties and limited parties. In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.~~

~~(64) Parties and limited parties may file responses to exceptions within the time set by the hearing officer, not to exceed 15 days after the time set for filing exceptions. A party filing responses to exceptions shall serve a copy of the responses to exceptions on all other parties and limited parties.~~

~~(5) The filings described in (3) and (4) are only allowed to the extent they relate to issues on which parties have been granted standing by the hearing officer.~~

~~(67) After the period for filing responses to exceptions to the proposed order, the Council shall:~~

~~(a) Evaluate the exceptions and responses to the proposed order described in (3) and (4);~~

Commented [TJ106]: Moved (1) and (2) to 345-015-0445 to better fit subject matter of heading (submission of materials to HO).

Commented [TJ107R106]: #1 Reorganize

Commented [TJ108]: #3 Consistency

Commented [TJ109]: #3 Consistency

Commented [TJ110]: #3 Consistency

Commented [TJ111]: Updating to match how term is used in OAR 345-015-0240.

Commented [TJ112R111]: #3 Consistency

Commented [TJ113]: Clarifying that the Council is the final say as to the content of the Council's order on an application for a site certificate.

Commented [TJ114R113]: #4 Clarity

Commented [TJ115]: #3 Consistency

Commented [TJ116]: #3 Consistency

Commented [TJ117]: #3 Consistency

Commented [TJ118]: Adding language to describe who is allowed to file responses to exceptions.

Commented [TJ119R118]: #4 Clarity

ORAR CHAPTER 345 – OREGON ENERGY FACILITY SITING COUNCIL
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~~(57) After the period for filing responses to exceptions, the Council shall issue a final order. (b) shall review the hearing officer's proposed contested case order and;~~ and

~~(c) The Council shall review the Department's proposed order;~~ and

~~(d) After the period for filing responses to exceptions, the Council shall issue a final order. The Council may adopt, modify or reject the hearing officer's proposed order. The final order may adopt, modify or reject the hearing officer's proposed order and also the Department's proposed order.~~

~~(78) Following a contested case proceeding on an application for a site certificate, the Council, in its final order, the Council shall either grant approve or deny issuance of a site certificate the application. If the Council grants issuance of a site certificate approves the application, the Council shall issue a site certificate. The site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.~~

~~(89) Following a contested case proceeding on a proposed site certificate amendment, the Council, in its final order, shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate. The amended site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.~~

~~(109) The Council shall issue a site certificate or amended site certificate in duplicate counterpart originals and each counterpart, upon signing, will have the same effect.~~

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

END OF CONTESTED CASE RULES

The changes made as indicated in redline below are additional edits made to ensure conformity with the proposed revised contested case rules.

345-015-0200 - Notice to Agencies that the Application is Complete

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

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

DIVISION 15 - PROCEDURES GOVERNING COUNCIL AND DEPARTMENT OF ENERGY PROCEEDINGS,
INCLUDING SITE CERTIFICATE HEARINGS

Commented [TJ120]: Adding language to clarify how the Council uses the exceptions and the hearing officer's proposed contested case order when issuing its own final order.

Commented [TJ121R120]: #4 Clarity

Commented [JT*O122]: Modified phrasing to be more consistent with statute.

Commented [JT*O123R122]: #3 Consistency

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

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

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

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

(a) State the date of filing;

(b) Explain that if a person intends to raise an issue in the contested case, the person must raise the issue in the manner described in ~~OAR 345-015-00160415~~;

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

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

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

(B) Issues significant to the agency;

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

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

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

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

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

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

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.350

DIVISION 15 - PROCEDURES GOVERNING COUNCIL AND DEPARTMENT OF ENERGY PROCEEDINGS,
INCLUDING SITE CERTIFICATE HEARINGS

Commented [TJ124]: #1 Reorganize

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345-015-0220 - Public Hearing and Notice on the Draft Proposed Order

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and

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

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

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

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

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

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

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

345-015-0230 - Council Review and the Department of Energy's Proposed Order

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

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

DIVISION 15 - PROCEDURES GOVERNING COUNCIL AND DEPARTMENT OF ENERGY PROCEEDINGS,
INCLUDING SITE CERTIFICATE HEARINGS

Commented [TJ125]: #3 Consistency with the changes made above.

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

- (a) The public notice of the proposed order must include:
 - (A) A description of the facility and the facility's general location;
 - (B) A summary of the recommendations included in the Proposed Order;
 - (C) A description of the process and deadline for requests to participate as a party or limited party in the contested case under ~~OAR 345-015-0016~~OAR 345-015-0415;
 - (D) The date of the prehearing conference, if any; ~~and~~
 - (E) The date of the hearing; and
 - (F) The deadline for the Department and the applicant or certificate holder to respond to petitions for party status; and

Commented [TJ126]: Matching rule number change.

Commented [TJ127R126]: #3 Consistency

Commented [TJ128]: #4 Clarity

- (b) The Department must send the notice by mail or email to:
 - (A) All persons on the Council's general mailing list;
 - (B) All persons on any special mailing list set up for the proposed project;
 - (C) All persons who commented in person or in writing on the record of the public hearing conducted under OAR 345-015-0220; and
 - (D) The property owners listed in Exhibit F of the site certificate application, as updated by the applicant upon the request of the Department.
 - (E) The land management agency or organizations with jurisdiction over the protected areas identified in the proposed order.

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

Stat. Authority: ORS 469.470
Stat. Implemented: ORS 469.370

DIVISION 21 - APPLICATION FOR SITE CERTIFICATE

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~~**345-021-0100 - Contested Case Proceeding on the Application -- Burden of Proof**~~

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

Commented [TJ129]: Removed, see proposed OAR 345-015-0440, which deals with the burden of proof.

Commented [TJ130R129]: #1 Reorganize

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

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

DRAFT

**OAR CHAPTER 345 – OREGON ENERGY FACILITY SITING COUNCIL
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DRAFT

Comparing Contested Case Model Rules with OAH Rules

Topic	Council Rules	Model Rules	OAH Rules	Summary of differences between model and OAH Rules
Contested Case Notices	345-015-0014	137-003-0001	137-003-0505	No significant differences between Model and OAH Rule. The Council rule does not conflict with OAH Rule, but directly references Model Rule.
Referral to OAH/ Appointment of Hearing Officer	345-015-0220	No Comparable Rules	137-003-0515	<p>The OAH Rules contemplate that a contested case will be referred to OAH at the commencement of the contested case proceeding.</p> <p>Under the Council rules, a Hearing Officer is appointed before this point to conduct the Public Hearings on the DPO, and delegates certain agency actions, such as making rulings on petitions for party status and hearing requests to the Hearing Officer.</p> <p>OAH Rules allow the agency to delegate authority to the hearing officer, so this is not a conflict, but some clarification may be needed if the OAH Rules were adopted for use by the Council.</p>
Rights of Parties		137-003-0002	137-003-0510; 137-003-0505(1)(h); 137-003-0550;	<p>The rights of parties in contested cases are substantively the same under both the Model Rules and the OAH Rules.</p> <p>While the statement that a party that is not a natural person is required to be represented by an attorney is not required under the Model Rules, the requirement is provided in OAH Rules OAR 137-003-0505(1)(h) and 137-003-0550.</p>
Filing and	345-015-0012	No	137-003-0520	The OAH Rule describes filing and service requirements

Topic	Council Rules	Model Rules	OAH Rules	Summary of differences between model and OAH Rules
Service of Documents		Comparable Rules		<p>for documents that are not included in the Council rule, but since the Council rule delegates authority to specify the means and requirements for filing to the Hearing Officer there does not appear to be a conflict.</p> <p>The Council rule includes a specific provision for motions to amend the service list to remove limited parties who are no longer participating in the contested case. While this is not included in the OAH Rule, this procedure could potentially be contemplated under OAH Rule OAR 137-003-0630.</p>
Date of Receipt		No Comparable Rules	137-003-0520(9)	<p>For documents that are mailed, the OAH Rules rely on the postmark date to establish the date of filing. While the Council rules delegate the establishment of filing requirements for the contested case proceeding to the Hearing Officer, the Council often rely on the date of receipt to allow the Council to make timely decisions during Council meetings.</p> <p>For hearing requests, the OAH Rules allow agencies to adopt rules exempting themselves from the postmark rule based on operational conflicts. If the OAH Rules were adopted, the Council could adopt such a rule, or could consider requesting an exemption from the requirement from the Attorney General.</p>
Late Filings / Late Hearing Request	No Applicable Rules	137-003-0003	137-003-0528 137-003-0530 See also 137-003-0501(7)	Under OAH Rules, the decision to allow a late request is based on whether the requestor showed “good cause” – defined in OAR 137-003-0501(7) as existing when the late filing arose from “an excusable mistake, surprise, excusable neglect, reasonable reliance on the statement of a party or agency relating to procedural

Topic	Council Rules	Model Rules	OAH Rules	Summary of differences between model and OAH Rules
				<p>requirements, or from fraud, misrepresentation, or other misconduct of a party or agency participating in the proceeding.”</p> <p>This standard is broader than the standards used in the Model Rules which generally only allow a late filing to be considered if the delay was outside of the reasonable control of the filing party. See 137-003-0003(2)(a).</p> <p>Provisions for service of late hearing requests and the option to require an affidavit or other written explanation are the same in the Model and OAH Rules.</p> <p>The Model Rules allow the agency to choose whether other parties will have the opportunity to respond to a late hearing request. OAH Rules require that other parties be given a chance to respond.</p> <p>The OAH Rules contain additional procedures for resolving disputes related to decision to allow or deny a late hearing request.</p>
Limited Parties	345-015-0016	137-003-0005	137-003-0535	<p>The OAH Rule specifically includes language allowing an agency to differentiate between parties and limited parties by rule.</p> <p>Both the Model Rules and OAH Rules set 21 days before the hearing date as the default deadline for a petition for party status. The OAH Rules specifically authorize an agency to adopt rules setting a different deadline, which the Council has done under OAR 345-015-0016(1).</p>
Authorized	345-015-0018	137-003-0008	137-003-0555	Both the Model Rules and the OAH Rules allow agencies

Topic	Council Rules	Model Rules	OAH Rules	Summary of differences between model and OAH Rules
Representatives				to allow use of authorized representatives by rule. The Council has adopted such a rule under OAR 345-015-0018.
Indigent Status	345-015-0022	No Comparable Rules	No Comparable Rules	The Council's rules allow a party or limited party to submit a petition for indigent status. There is no similar provision in either the Model Rules or the OAH Rules, and it is not clear if this procedure would be allowed if the Council chose to have its contested cases conducted under the OAH Rules.
Collaborative Dispute Resolution	345-001-0005	137-003-0015	137-003-0565	<p>The procedures for use of collaborative dispute resolution in the Model Rules and the OAH Rules are generally the same.</p> <p>While the Council rules do not specifically mention collaborative dispute resolution processes, the Council has adopted the Attorney General's Model Rules for Collaborative Dispute Resolution under OAR 345-001-0005.</p>
Discovery	345-015-0023(5)	137-003-0025	137-003-0566 137-003-0567 137-003-0568 137-003-0569 137-003-0572 137-003-0567	<p>The Council's Rules delegate control over discovery to the Hearing Officer under OAR 345-015-0023(5), which specifically references the Model Rule.</p> <p>While the procedures for discovery provided in the OAH Rules are more robust than in the Model Rules, the standards and methods allowed and requirements for discovery requests are generally the same.</p> <p>The OAH Rules provide a maximum number of requests for admission and interrogatories that can be submitted without authorization from the ALJ. The Model Rules</p>

Topic	Council Rules	Model Rules	OAH Rules	Summary of differences between model and OAH Rules
				<p>don't establish any such caps.</p> <p>The methods listed in the OAH Rule are currently allowed in Council proceedings, but if the Council found that one or more methods was inappropriate, the OAH Rules allow an agency to adopt rules limiting discovery methods.</p> <p>The OAH Rules provide an opportunity for a party to request the Chief ALJ to review a discovery order. This is unique to OAH proceedings.</p> <p>The Model Rules and OAH Rules for enforcement of a discovery order contain similar provisions, although the OAH Rules provide additional detail on what occurs if a party fails to respond to a request for admission.</p>
Pre-hearing Conference	345-015-0083	137-003-0035	137-003-0575	<p>Prehearing Conferences are optional under all three sets of rules, although ORS 469.370(4) does imply that the prehearing conference is a mandatory step in a contested case proceeding on an Application for Site Certificate. The procedures are generally the same, although OAH Rules expand on the procedures for the conduct of prehearing conferences to include a prehearing conference notice and requirements for participation.</p> <p>The Council rule states that failure to raise an issue in the prehearing conference in a contested case on an application is a waiver of that issue. It is not clear whether the rule is meant to require persons to reiterate the issues raised in their petition for party status, or if the rule is meant to apply only to procedural</p>

Topic	Council Rules	Model Rules	OAH Rules	Summary of differences between model and OAH Rules
				<p>issues related to the conduct of the contested case. The OAH Rule provides a different standard, stating that failure to appear at the prehearing conference does not preclude judgement on issues already identified by the hearing officer.</p>
Motion for Summary Determination		No Comparable Rules	137-003-0580	<p>A motion for summary determination is a motion requesting a ruling in favor of the agency or moving party on any or all legal issues in the contested case.</p> <p>Neither the Council nor Model Rules contain a specific provision for Summary Judgement, although Hearing Officers have allowed use of the procedure in Council contested case proceedings, relying on Council's rule addressing motions (OAR 345-015-0054).</p>
Subpoenas		137-003-0025	137-003-0585	<p>Subpoenas are allowed under the Model Rules and OAH Rules, but specific procedures are not provided in the former.</p> <p>The Model Rule states that the agency may apply to circuit court to compel obedience to a subpoena, while the OAH Rule states the agency or the party requesting the discovery may apply to the circuit court to compel obedience to a subpoena.</p> <p>The OAH Rules allow a party to file a motion to quash a subpoena. There is no specific provision for such a procedure under the Model Rules.</p>
Conduct of Hearing	345-015-0023	137-003-0040	137-003-0600	<p>The procedures for the conduct of the hearing, the maintenance of the record, and the questioning of witnesses are largely the same in the Model Rules and the OAH Rules. The Council's rules require the Hearing</p>

Topic	Council Rules	Model Rules	OAH Rules	Summary of differences between model and OAH Rules
				<p>Officer to provide updates to the Council on the status of the case, and while there does not appear to be a similar provision in the OAH Rules, this is not a direct conflict.</p> <p>The Council has delegated several responsibilities to the Hearing Officer. While most of these responsibilities would be carried out by the ALJ under the OAH Rules, some responsibilities may be expected to be performed by the Agency, as noted throughout this document.</p> <p>While the OAH Rules allow delegation of most agency responsibilities, it may be appropriate to revise Council's delegated list if the Council chooses to have the OAH Rules apply to its proceedings.</p>
Interlocutory Appeal	345-015-0057	No Comparable Rules	No Comparable Rules	<p>The Model Rules and OAH Rules don't address interlocutory appeals. If Council were to adopt the OAH Rules and wanted to maintain this or another interlocutory appeal rule, it would be necessary to obtain authorization from the Attorney General (per OAR 137-003-0501(2)).</p>

DRAFT NOTICE OF PROPOSED RULEMAKING

CHAPTER 345

DEPARTMENT OF ENERGY, ENERGY FACILITY SITING COUNCIL

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

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 04/05/2024 5:00 PM

HEARING(S):

DATE: TBD

TIME: TBD

OFFICER: Christopher Clark

IN-PERSON HEARING DETAILS

ADDRESS: TBD, TBD, TBD, OR 97302

SPECIAL INSTRUCTIONS:

Location TBD

REMOTE HEARING DETAILS

PHONE NUMBER: TBD

SPECIAL INSTRUCTIONS:

Remote Instructions TBD

NEED FOR THE RULE(S):

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

This rulemaking effort is being done to increase the clarity and efficiency of EFSC's contested case process, both by updating language to add additional detail where needed and also by reordering and moving the contested case rules to a later block of Division 15 of OAR 345. Updated rules also reflect the adoption by the Council of the Attorney General's Office of Administrative Hearings model rules for contested cases.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

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

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

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

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

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

FISCAL AND ECONOMIC IMPACT:

Stakeholders consulted agreed there would be no fiscal impact as these changes are designed to be non-substantive in nature. These changes are primarily about making the rules that govern the contested case process for the Energy Facility Siting Council clearer. The rules are thus not expected to create additional expenditures or revenues for state agencies or units of local government. Efficiencies created by these changes could reduce application costs for some applicants, but these changes are not expected to be significant.

COST OF COMPLIANCE:

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

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

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

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

a site certificate in the future (which is not expected), our best estimate is that there are potentially 12-15 small businesses that could be affected by the proposed rules.

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

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

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

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

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

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RULES PROPOSED:

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

AMEND: 345-001-0005

RULE TITLE: Uniform and Model Rules

RULE SUMMARY: Amending which rules are being incorporated by reference.

RULE TEXT:

(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 (December 2023): OAR 137-001-0005 through 137-001-0100, 137-002-0010 through 137-002-0060, 137-003-0501 through 137-003-0700, and 137-005-0010 through 137-005-0070.

(2) Notwithstanding the provisions of OAR 137-003-0660(1), following the issuance of notice of a contested case, the Department of Energy shall enter into the record the substance of any significant contact between a Council member and any Department staff from that point forward, concerning facts in the record.

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 469.490

DRAFT

AMEND: 345-015-0001

RULE TITLE: Purpose and Authority

RULE SUMMARY: Removing redundant language as proposed rule 345-015-400 now contains the language about the adopted rules governing the contested case proceeding.

RULE TEXT:

The rules in this division, authorized by ORS 469.040, 469.470 and 469.440, establish procedures governing Department of Energy and Council review processes, including contested case proceedings.

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.310-550, 469.040, 469.370, 469.405, 469.440

DRAFT

REPEAL: 345-015-0012

RULE TITLE: Filing and Service of Documents in a Contested Case

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

RULE TEXT:

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440

AMEND: 345-015-0014

RULE TITLE: Contested Case Notices

RULE SUMMARY: Removed language as unnecessary given the proposed adoption of OAR 137-003-0505, which serves the same function.

RULE TEXT:

The Department must issue contested case notices for Council contested case proceedings as provided in OAR 137-003-0505. The notices must also include:

- (1) The deadline for the Department and applicant or certificate holder to respond to petitions for party or limited party status; and
- (2) A statement that active-duty service members have a right to stay a contested case proceeding under the federal Servicemembers Civil Relief Act as described in ORS 183.415(3)(g).

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415

REPEAL: 345-015-0016

RULE TITLE: Requests for Party or Limited Party Status in Contested Cases on Applications for a Site Certificate

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

RULE TEXT:

- (1) Notwithstanding OAR 137-003-0005(2), a person requesting to participate as a party or limited party in a contested case proceeding must submit a petition to the hearing officer by the date specified in the Department's notice issued under OAR 345-015-0230.
- (2) Persons who have an interest in the outcome of the Council's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties.
- (3) Except as described in section (4) of this rule, only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0220 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department did not follow the requirements of ORS 469.370(2) or (3) or unless the action recommended in the proposed order described in OAR 345-015-230, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer may not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue.
- (4) Following a Council decision to grant a contested case hearing under OAR 345-015-0310, only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0320 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer may not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue.
- (5) In a petition to request party or limited party status, the person requesting such status must include:
 - (a) The information required under OAR 137-003-0005(3);
 - (b) A short and plain statement of the issue or issues that the person desires to raise in the contested case proceeding; and

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.373, 469.470

STATUTES/OTHER IMPLEMENTED: ORS 469.370, 469.440, 469.605, 469.615, 469.992

DRAFT

REPEAL: 345-015-0018

RULE TITLE: Authorized Representative

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

RULE TEXT:

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

DRAFT

REPEAL: 345-015-0022

RULE TITLE: Petition for Indigent Status

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

RULE TEXT:

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

REPEAL: 345-015-0023

RULE TITLE: Duties of Hearing Officer

RULE SUMMARY: Repealing rule. See proposed rule 345-015-0405, which takes its place.

RULE TEXT:

- (1) The Council shall appoint a hearing officer to conduct a contested case proceeding on behalf of the Council or to compile the record and recommend resolution of objections to the record of a local land use proceeding held pursuant to ORS 469.503(2)(a). The Council may appoint a Council member, an employee of the Department of Energy, or some other person or persons as it sees fit.
- (2) A hearing officer shall take all necessary action to:
 - (a) Ensure a full, fair and impartial hearing;
 - (b) Facilitate presentation of evidence;
 - (c) Comply with statutory time limits on Council decisions;
 - (d) Maintain order; and
 - (e) Assist the Council in making its decision.
- (3) At the commencement of a contested case hearing, the hearing officer shall explain the issues involved in the hearing and the matters that the parties must either prove or disprove.
- (4) The hearing officer shall maintain a complete and current record of all motions, rulings, testimony and exhibits during the course of the hearing. The hearing officer shall keep the Council informed regularly on the status of the contested case.
- (5) The hearing officer is authorized to carry out the responsibilities assigned in this rule, including but not limited to the authority to:
 - (a) Administer oaths and affirmations;
 - (b) Rule on offers of proof and receive evidence;
 - (c) Order depositions and other discovery to be taken and to issue subpoenas;
 - (d) Order and control discovery, as provided in OAR 137-003-0025, and all other aspects of the contested case hearing, the order of proof, and the conduct of the participants;
 - (e) Dispose of procedural matters and rule on motions;
 - (f) Call and examine witnesses;
 - (g) Hold conferences, including one or more prehearing conferences as provided in OAR 137-003-

0035, before or during the hearing for settlement, simplification of issues, or any other purpose the hearing officer finds necessary. The hearing officer may limit the issues of the contested case including, for a contested case proceeding on an application for a site certificate, determining those issues that have been raised with sufficient specificity in the public hearing;

(h) Continue the hearing from time to time;

(i) Issue protective orders in accordance with the standards of Rule 36(C) of the Oregon Rules of Civil Procedure.

(j) At the request of the Council, or upon motion of a party or limited party for good cause shown as provided in OAR 345-015-0062, and with reasonable notice to all parties, reopen the hearing for reception of further evidence on issues identified in the notice at any time prior to final decision by the Council;

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

(l) Prepare and serve upon the parties a proposed order addressing those issues enumerated in the request for contested case hearing and any additional issues approved by the hearing officer, including findings of fact, findings of ultimate fact and conclusions of law; and

(m) Take any other action consistent with the Council's governing statutes and the Council's rules.

(6) Notwithstanding the provisions of OAR 137-003-0055(1), following the issuance of a notice of contested case, the hearing officer shall enter into the record the substance of any significant contact with Department staff or the parties from that point forward concerning facts in the record.

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

REPEAL: 345-015-0024

RULE TITLE: Suspension of Hearing and Exclusion of a Party

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

RULE TEXT:

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

REPEAL: 345-015-0038

RULE TITLE: Separate Hearings

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

RULE TEXT:

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

DRAFT

REPEAL: 345-015-0043

RULE TITLE: Evidence: Testimony Submitted in Writing

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

RULE TEXT:

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

DRAFT

REPEAL: 345-015-0046

RULE TITLE: Evidence: Official Notice

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

RULE TEXT:

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

- (a) All facts of which the courts of the State of Oregon may take judicial notice;
- (b) Administrative rulings and reports of the Council and other governmental agencies;
- (c) Facts contained in permits and licenses issued by the Council or any other government agency;
- (d) The factual results of the hearing officer's or the Council's personal inspection of physical conditions involved in the contested case; and
- (e) General, technical or scientific facts within the specialized knowledge of the Council or the Department of Energy.

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

REPEAL: 345-015-0051

RULE TITLE: Evidence: Resolutions of Cities, Counties and Tribes

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

RULE TEXT:

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

REPEAL: 345-015-0054

RULE TITLE: Motions

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

RULE TEXT:

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

REPEAL: 345-015-0057

RULE TITLE: Prohibitions on Interlocutory Appeals to Council

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

RULE TEXT:

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

REPEAL: 345-015-0059

RULE TITLE: Prohibitions on Stays

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

RULE TEXT:

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

DRAFT

REPEAL: 345-015-0062

RULE TITLE: Reopening Record Prior to Decision

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

RULE TEXT:

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

- (1) The evidence is material to the proceeding; or
- (2) The evidence would substantially affect the outcome of the proceeding.

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

REPEAL: 345-015-0080

RULE TITLE: Participation by Government Agencies

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

RULE TEXT:

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

REPEAL: 345-015-0083

RULE TITLE: Prehearing Conference and Prehearing Order

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

RULE TEXT:

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

REPEAL: 345-015-0085

RULE TITLE: Hearing Officer's Proposed Contested Case Order

RULE SUMMARY: Moving and updating rule as OAR 345-015-0475.

RULE TEXT:

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

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

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

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

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

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

(7) After the period for filing responses to exceptions, the Council shall issue a final order. The Council may adopt, modify or reject the hearing officer's proposed order.

(8) Following a contested case proceeding on an application for a site certificate, the Council, in its final order, shall either grant or deny issuance of a site certificate. If the Council grants issuance of a

site certificate, the Council shall issue a site certificate. The site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

AMEND: 345-015-0200

RULE TITLE: Notice to Agencies that the Application is Complete

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

RULE TEXT:

- (1) After receiving notification from the Department that the application is complete, the applicant must prepare an application supplement that includes all amendments to the preliminary application and all additional information requested by the Department before the determination of completeness.
- (2) The applicant must submit to the Department, two printed copies of the application supplement, and an electronic version of the application supplement in a non-copy-protected format acceptable to the Department. The applicant must submit additional printed copies of the application supplement to the Department upon request.
- (3) After receiving the application supplement, the Department must determine a distribution date and prepare a distribution list that includes, but is not limited to, the reviewing agencies for the application.
- (4) Except as described in OAR 345-015-0310, and unless the Department directs otherwise, the applicant must mail or email an electronic copy of the application supplement to each person on the distribution list provided by the Department on or before the distribution date. The applicant must provide a printed copy of all or part of the application supplement to a person on the mailing list upon request.
- (5) If the Department determines it is necessary to present the amendments and additional information described in section (1) of this rule clearly, the Department may require the applicant to provide a complete revision of the preliminary application in place of the application supplement under sections (2) and (4) of this rule.
- (6) After the date of filing, the Department must prepare a notice for distribution. In the notice, the Department must:
 - (a) State the date of filing;
 - (b) Explain that if a person intends to raise an issue in the contested case, the person must raise the issue in the manner described in OAR 345-015-0415;
 - (c) State a date by which the Department and the applicant must receive the reports described in sections (d) through (f) below;
 - (d) Request an agency report containing the following information:
 - (A) The agency's recommendations regarding any applications for permits administered by the agency that are applicable to construction or operation of the proposed facility;
 - (B) Issues significant to the agency;

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

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

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

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 469.350

AMEND: 345-015-0220

RULE TITLE: Public Hearing and Notice on the Draft Proposed Order

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

RULE TEXT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (g) A statement that to raise an issue on the record of the public hearing, a person must raise the issue in person at the public hearing or in a written comment submitted after the date of the notice and received by the Department before the deadline;
- (h) A statement that failure to raise an issue in person or in writing on the record of the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue precludes consideration of the issue in a contested case;
- (i) A statement that to raise an issue with sufficient specificity, the person must have identified the recommended findings of fact, conclusions of law, or conditions of approval to which they object, specified the Council standard or other applicable state and local requirements on which their objection is based, and presented facts or statements supporting that objection on the record of the draft proposed order; and
- (j) A statement that the Council will not accept or consider any further public comment on the site certificate application or on the draft proposed order after the close of the record of the public hearing.
- (4) During the public hearing, the Department must explain the application process, including the means and opportunities for the general public to participate in the process. The Department may provide this explanation by a written handout.
- (5) At the commencement of the public hearing, the presiding officer must state that:
- (a) A person who intends to raise any issue that may be the basis for a contested case must raise the issue in person at the hearing or in a written comment submitted to the Department before the deadline stated in the notice of the public hearing; and
- (b) A person who intends to raise any issue that may be the basis for a contested case must raise the issue with sufficient specificity to afford the Council, the Department, and the applicant an adequate opportunity to respond, including a statement of facts that support the person's position on the issue.
- (6) At the public hearing, any person may present information regarding the pending application without administration of an oath. The presiding officer must record all presentations made during the public hearing. The presentations are part of the decision record for the application and may be rebutted in the contested case proceeding.

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 469.370

ADOPT: 345-015-0400

RULE TITLE: Governing Provisions

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

RULE TEXT:

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440

ADOPT: 345-015-0405

RULE TITLE: Appointment and Duties of Hearing Officer

RULE SUMMARY: Moved for consistency, and language amended to increase clarity and consistency with other rules and statutes and also to reflect the incorporation of the Attorney General's Office of Administrative Hearings model rules for contested cases.

Former OAR 345-015-0023.

RULE TEXT:

(1) The Council shall appoint a hearing officer to conduct a contested case proceeding on behalf of the Council or to compile the record and recommend resolution of objections to the record of a local land use proceeding held pursuant to ORS 469.503(2)(a). The Council may refer a contested case to the Office of Administrative Hearings for appointment of a hearing officer, or Council may appoint a Council member, an employee of the Department of Energy, or some other person or persons as it sees fit.

(2) A hearing officer shall take all necessary action to:

- (a) Ensure a full, fair, impartial, and efficient proceeding;
- (b) Facilitate presentation of evidence;
- (c) Comply with statutory time limits on Council decisions;
- (d) Maintain order; and
- (e) Assist the Council in making its decision.

(3) The hearing officer shall keep the Council informed regularly on the status of the contested case and maintain a complete and current record of:

- (a) All pleadings, motions, and intermediate rulings;
- (b) Evidence received or considered;
- (c) Stipulations;
- (d) A statement of matters officially noticed;
- (e) Questions and offers of proof, objections, and rulings thereon;
- (f) Information about any ex parte communication with the hearing officer that must be made part of the record under OAR 137-003-0625(2);
- (g) Proposed findings and exceptions; and

(h) The proposed contested case order.

(4) The hearing officer is authorized to carry out the responsibilities assigned in this rule, including the authority to:

(a) Administer oaths and affirmations;

(b) Rule on offers of proof and receive evidence pursuant to the hearing officer's established schedule;

(c) Consider petitions for, authorize, and limit depositions, as provided in OAR 137-003-0572;

(d) Order and control discovery, as provided in OAR 137-003-0568, and all other aspects of the contested case proceeding, the order of proof, and the conduct of the participants;

(e) Dispose of procedural matters and rule on motions;

(f) Call and examine witnesses;

(g) Hold conferences, including one or more prehearing conferences as provided in OAR 137-003-0575, before or during the hearing for settlement, simplification of issues, or any other purpose the hearing officer finds necessary. The hearing officer may limit the issues of the contested case and, for a contested case proceeding on an application for a site certificate or for an amendment to a site certificate, shall limit the issues that have been raised with sufficient specificity in the public hearing;

(h) Continue the contested case proceeding from time to time;

(i) Issue protective orders in accordance with the standards of Rule 36(C) of the Oregon Rules of Civil Procedure.

(j) At the request of the Council, or upon motion of a party or limited party for good cause shown as provided in OAR 345-015-0470, and with reasonable notice to all parties, reopen the contested case proceeding for reception of further evidence on issues identified in the notice at any time prior to final decision by the Council;

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

(l) Prepare and serve upon the parties a proposed order addressing those issues enumerated in the request for contested case hearing and any additional issues approved by the hearing officer, including findings of fact, findings of ultimate fact and conclusions of law; and

(m) Take any other action consistent with the Council's governing statutes and the Council's rules.

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440,
ORS 469.605, ORS 469.615, ORS 469.992

DRAFT

ADOPT: 345-015-0410

RULE TITLE: Filing and Service

RULE SUMMARY: Formerly OAR 345-015-0012. Modifying language for clarity.

RULE TEXT:

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440

ADOPT: 345-015-0415

RULE TITLE: Requests for Party or Limited Party Status

RULE SUMMARY: Formerly OAR 345-015-0016. Updating rule for clarity.

RULE TEXT:

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

(2) Except as described in section (3) of this rule, only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0220 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department did not follow the requirements of ORS 469.370(2) or (3) or unless the action recommended in the proposed order described in OAR 345-015-230, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences.

(3) If a person has not raised an issue at the public hearing with sufficient specificity to afford the Council, the Department and the applicant an adequate opportunity to respond to the issue, the hearing officer may not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have identified the recommended findings of fact, conclusions of law, or conditions of approval to which they object, specified the Council standard or other applicable state and local requirements on which their objection is based, and presented facts or statements supporting that objection on the record of the draft proposed order.

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

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

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

(b) A short and plain statement for each issue that the person desires to raise in the contested case proceeding; the statement itself must identify the issue the person wishes to raise, it is not permissible to identify an issue a person wishes to raise only by referencing comments the person made on the record of the draft proposed order and

(c) A reference to the person's comments on the record of the draft proposed order showing that the

person raised the issue or issues on the record of the draft proposed order.

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

(7) A limited party is a person to whom the hearing officer grants standing to participate in one or more, but not all the issues to be addressed in the contested case, as established in a prehearing order on party status and issues described in OAR 345-015-0430. Except as detailed in OAR 345-015-0445(3), a limited party may participate in the contested case on the issues, including proposed site certificate conditions, for which the hearing officer has granted them standing to participate but may not participate on issues, including proposed site certificate conditions, for which the hearing officer has not granted them standing to participate.

STATUTORY/OTHER AUTHORITY: ORS 469.373 & ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 469.370, 469.440, 469.605, 469.615, & 469.992

ADOPT: 345-015-0420

RULE TITLE: Petition for Indigent Status

RULE SUMMARY: Formerly OAR 345-015-0022. Updating rule language for greater clarity.

RULE TEXT:

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

(2) "Indigent" means the person has an income level at or below 100 percent of the United States poverty level as defined by the most recently revised poverty income guidelines published by the U.S. Department of Health and Human Services for the person's household/family size, unless the hearing officer makes a determination as to the person's ability to pay for the cost to participate in the pending case based on other factors. In making the determination as to a person's ability to pay costs to participate in the case, the hearing officer shall consider not only the person's income, but also the availability of any assets, including, but not limited to, cash, stocks, bonds, and any other property that may be applied to the satisfaction of judgments, other financial obligations the person bears, and the nature and complexity of the case.

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0425

RULE TITLE: Participation by Government Agencies

RULE SUMMARY: Formerly OAR 345-015-0080. Updating rule language for greater clarity.

RULE TEXT:

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 469.370, 469.405, 469.440, 469.605, 469.615, & 469.992

ADOPT: 345-015-0430

RULE TITLE: Prehearing Conference and Prehearing Order

RULE SUMMARY: Formerly OAR 345-015-0083. Updating rule language for greater clarity.

RULE TEXT:

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

ADOPT: 345-015-0435

RULE TITLE: Suspension of Hearing and Exclusion of a Party

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

RULE TEXT:

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0440

RULE TITLE: Burden of Presenting Evidence

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

RULE TEXT:

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

STATUTORY/OTHER AUTHORITY: ORS 183.341, ORS 183.417, ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.450

DRAFT

ADOPT: 345-015-0445

RULE TITLE: Submission of Evidence and Proposed Site Certificate Conditions

RULE SUMMARY: Formerly OAR 345-015-0043. Moved and updated language for greater clarity.

Subsection (4) was formerly OAR 345-015-0083(2). Moved for clarity and consistency.

RULE TEXT:

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

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0450

RULE TITLE: Official Notice of Evidence

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

RULE TEXT:

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

- (a) All facts of which the courts of the State of Oregon may take judicial notice;
- (b) Administrative rulings and reports of the Council and other governmental agencies;
- (c) Facts contained in permits and licenses issued by the Council or any other government agency;
- (d) The factual results of the hearing officer's or the Council's personal inspection of physical conditions involved in the contested case; and
- (e) General, technical, or scientific facts within the specialized knowledge of the Council or the Department of Energy.

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0455

RULE TITLE: Motions

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

RULE TEXT:

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

- (1) Unless a motion is made orally on the record during a contested case hearing, or unless the hearing officer directs otherwise, the moving party shall submit the motion in writing and shall state with particularity the grounds and relief sought. The moving party shall submit with the motion any brief, affidavit or other document relied on, and, as appropriate, a proposed form of order. The moving party shall serve the motion on all parties and limited parties to the contested case.
- (2) Within seven calendar days after the date of service of a written motion, or such other period as the hearing officer may prescribe, a party or limited party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party shall have no right to reply, except as permitted by the hearing officer.
- (3) The parties shall not have oral argument on a motion unless permitted by the hearing officer. The hearing officer shall dispose of motions by written order served on all parties and limited parties or read into the record of the contested case proceeding.

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0460

RULE TITLE: Interlocutory Appeals to Council

RULE SUMMARY: Formerly OAR 345-015-0057. Updated and moved language for greater clarity.

RULE TEXT:

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0465

RULE TITLE: Stays

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

RULE TEXT:

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

DRAFT

ADOPT: 345-015-0470

RULE TITLE: Reopening Record Prior to Decision

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

RULE TEXT:

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

- (1) The evidence is material to the proceeding; or
- (2) The evidence would substantially affect the outcome of the proceeding.

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ADOPT: 345-015-0475

RULE TITLE: Hearing Officer's Proposed Contested Case Order

RULE SUMMARY: Formerly OAR 345-015-0085. Moved and updated language for greater clarity.

RULE TEXT:

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

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

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

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

(5) The filings described in (3) and (4) are only allowed to the extent they relate to issues on which parties have been granted standing by the hearing officer.

(6) After the period for filing responses to exceptions to the proposed order, the Council shall:

(a) Evaluate the exceptions and responses to the proposed order described in (3) and (4);

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

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

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

(7) In its final order, the Council shall either approve or deny the application. If the Council approves

the application, the Council shall issue a site certificate. The site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.

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

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

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

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