



# Oregon

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**To:** Oregon Energy Facility Siting Council

**From:** Thomas L. Jackman, Rules Coordinator

**Date:** September 06, 2024

**Subject:** Agenda Item H (Action Item): Contested Case Rules - Consideration of Revised Draft Rules for the September 19-20, 2024 EFSC Meeting

**Attachments:** Attachment 1: Redline of proposed contested case rules  
Attachment 2: Public Comments on Notice of Proposed Rulemaking  
Attachment 3: Summary of Public Comments

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## STAFF RECOMMENDATION

Oregon Department of Energy (Department or Staff) recommends that the Energy Facility Siting Council (EFSC or Council) authorize staff to file a permanent rulemaking order based on the proposed amendment to its contested case rules as found in Attachment 1.

## BACKGROUND AND SUMMARY

The Council authorized staff to begin work on revising and updating its rules for contested case proceedings, found primarily in OAR 345, Division 15, 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.

Staff invited a diversity of stakeholders to join a RAC and convened meetings on September 7, 2023, October 27, 2023 and again on February 1, 2024 to discuss various changes to the rules governing Council's contested case process. Staff took the feedback provided by the RAC members to develop a proposed draft of the rules.

On February 23, 2024, the Council authorized staff to issue a Notice of Proposed Rulemaking (NOPR) to begin the formal rulemaking process for this rulemaking project. A public comment period began, which ran through April 19, 2024. Commentors submitted 14 comments during this period, which the Council reviewed at its May, 2024 meeting.

At the Council's May 2024 meeting, Staff recommended Council issue a new notice of proposed rulemaking, updating both the proposed rules and the rule descriptions in the notice in response to public comment. The Council agreed with this recommendation and a new public comment period began, which ran through July 22, 2024. During the public comment period 118 comments were

submitted, 27 of which were distinct and 91 of which were identical, except for the name of the commentor.

The unique comments (and one representative copy of the identical group of comments) are included in Attachment 2 and discussed below along with staff's recommendations. The names of each person who submitted comments, including for those who submitted comments identical to each other, is listed in Attachment 3.

This report contains:

1. A summary of the proposed amended contested case rules, found in Division 15 of OAR 345, from Rule 12 through Rule 85.
2. A review of and response to comments received during the public comment period ending July 22, 2024.
3. The latest redline of the proposed language, which includes the most recent proposals (Attachment 1)
4. A copy of all unique feedback received during the public comment period (Attachment 2)
5. A complete list of commentors (Attachment 3)

### **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 and intended to be minor changes, whose goal is to ensure a more efficient resolution of the existing contested case process.

One efficiency change that many commentors argued was more significant was the removal of the ability for parties to file an interlocutory appeal in the event they are granted party status but denied consideration of one or more, but at all, issues on which the hearing officers allowed them to participate. This change was made to streamline the contested case proceedings and is discussed in more detail below.

For a more detailed review and explanation of each category of proposed changes, including illustrative examples, please refer to the [February 23, 2024 Staff Report for Item B](#).

## STAFF REVIEW OF COMMENTS RECEIVED DURING THE PUBLIC COMMENT PERIOD

What follows below is staff's proposed changes to the draft rules submitted with the most recent NOPR after careful consideration and review of every one of the comments provided during the public comment period. These changes are all very minor, in line with other proposed changes, or are clerical in nature. As such, they do not justify the issuance of a third notice of proposed rulemaking.<sup>1</sup>

### *Clear Distinction Between Limited Party v. Full Party*

Friends of the Columbia Gorge ("Friends") alleges that OAR 345-015-0430(3) as proposed in the most recent NOPR is unlawful, as it does not clearly distinguish between full and limited parties as directed by the Supreme Court. Staff proposes the following changes to -0430(3) to alleviate this concern:

#### **OAR 345-015-0430 Prehearing Conference and Prehearing Order**

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(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 parties, ~~or the~~ limited parties ~~who may participate on each issue~~, [the issue\(s\) on which each limited party may participate](#), the contested case procedures, and the schedule.

### *Improved Clarity for Contested Case Notice*

Stop B2H expressed concerns that the contested case notice described in OAR 345-015-0403 does not require the information needed by a would-be party member to know how to properly apply for party status. Staff recommends making the following change to the notice requirement in (2) to remedy this concern:

#### **345-015-0403 – Contested Case Notices**

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The notices must also include:

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(2) The deadline for [submitting a petition for party or limited party status in a contested case and the deadline for](#) the Department and applicant or certificate holder to respond to petitions for party or limited party status [as outlined in OAR 345-015-0415](#);

### *Updates to Rule References and Clarifying Ambiguity Re: Party Status Petition Recipients*

After its own additional review of the proposed rules, staff recommends making the following minor changes to OAR 345-015-0415 and OAR 345-015-0425 to correct the rule references to the new OAR 345-015-0403 and also – for 345-015-0415 – to clarify potential ambiguity about who needs to receive the petition for party status.

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<sup>1</sup> As noted by the Oregon Attorney General's APA Manual (2019), pg 45, "Absent an agency rule, the agency should consider what is reasonable under the circumstances in determining whether to adopt the rule or to provide new notice of rulemaking before adoption [after consideration of public comments]."

### **345-015-0415 - Requests for Party or Limited Party Status**

1) The Department and applicant or certificate holder are parties to the contested case proceeding, with the right to participate on all issues in the contested case proceeding. Notwithstanding OAR 137-003-0535(2) and (3), other persons 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~~ [Department](#) and the site certificate applicant [or certificate holder](#) by the date specified in the Department's notice issued under OAR 345-015-0230 and OAR 345-015-~~0014~~[0403](#).

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(7) 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 [and OAR 345-015-0403](#), providing copies to one another and the person who submitted the petition for party or limited party status

### **345-015-0425 - 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 345-015-0415. 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) [and OAR 345-015-0403](#).

#### *Clarifying Appeal of Issues*

Stop B2H expresses concerns that there is no clear path to appealing procedural issues, i.e., how a party member would proceed if their objection to a procedural issue was overruled.

Staff does not recommend making significant changes to this rule as there is no right to an interlocutory appeal for procedural concerns. However, staff does recommend making a small change to the use of the word "objection" in OAR 345-015-0430 (7) to make it clear that the waiver in (7) specifically relates to objections regarding procedural issues.

### **OAR 345-015-0430 Prehearing Conference and Prehearing Order**

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(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~~[objection](#).

### **STAFF RECOMMENDS NO CHANGES FOR THE FOLLOWING PUBLIC COMMENTS**

Stop B2H made several substantive comments during the first public comment period, and they participated in the latest public comment period as well. In addition to reiterating their concerns for all

changes not adopted by the Council after the first public comment period, they focused on a handful of concerns. Aside from these concerns, all other substantive comments (not just endorsing other commentors or generally urging the Council to follow the rule of law) were either addressed above, or related to the interlocutory appeal issue. Below, you will find staff's recommendations for Stop B2H's remaining comments, followed by a more detailed review of the interlocutory appeal issue that so many submitted comments on, all of whom are listed in Attachment 3.

#### *Ex Parte Communications*

Stop B2H expresses concerns regarding the proposed ex parte language in 345-001-0005, which adopts the Office of Administrative Hearing (OAH) model rules on ex parte communications. Stop B2H wants the rules to continue to refer to the first set of model rules for ex parte communications along with the new set of model rules.

Staff does not recommend this suggestion as citing two sets of model rules on the same point would lead to confusion about what rules apply. The OAH model rules, created by the attorney general, work without issue for the various agencies that have adopted these rules. Neither the OAH model rules nor the Council's rules exclude the communications Stop B2H is concerned about (i.e., with the Council, or the hearing officer) and the Department has always taken great pains to ensure that the contested case process occurs in a transparent manner.

#### *Filing and Serving of Documents*

Stop B2H reiterates its concerns about public access to the contested case record.

Staff does not recommend the Council take any actions regarding the contested case docket. The Council has no ability to force the OAH or its administrative law judges to use a publicly accessible docket system. Parties to a contested case are within their power to preserve and maintain all documents received throughout the proceeding and members of the public can submit a public record's request for any documents wish to review.

#### **Interlocutory Appeal – Removal of OAR 345-015-0016(6) and Adoption of 345-015-0430(4) and 345-015-0460(1)**

Over 120 comments were received on this issue, most of which appear to use a template, resulting in identical or substantially identical comments for most of them.

The substance of the many comments received is best understood by the following passage from the mass comment, which itself was submitted by around 100 people:

*“Please do not repeal the ability for interlocutory administrative appeals to the Council. If you do, then when an interested person wishes to challenge a ruling barring them from participating on a specific issue in a contested case, their only recourse will be to file one or more court cases, which will be expensive, inefficient, slow, and potentially very disruptive to the Council's administrative siting processes.*

*It is far better for you to retain your authority to quickly fix any errors made by hearing officers before a contested case is underway. Repealing the above-cited rules will only lead to more costly litigation in court, which nobody wants.”*

## *Staff Response*

Despite stating that the rules regarding interlocutory appeal have been in place for “decades,” commentators provide no actual data to support their claims that these rules as they exist today have been to the benefit of petitioners. Staff performed their own review and determined that interlocutory appeals are rarely filed, with the notable exception of the Boardman to Hemingway (B2H) project.

In the contested case proceeding on the Proposed Order for B2H, 26 petitioners filed appeals. The appeals related to the designation of petitioners as limited parties; denial of 17 distinct issues; and the wording of 3 issues. For the appeals related to denial of issues, 8 were reversed by the Council on appeal, 5 of which were ultimately dismissed on motion for summary determination. That means 3 issues out of 17, or roughly 18% were meaningfully reversed by an interlocutory appeal. This relatively low reversal rate and the impact that the delay has on the siting process is why staff is recommending no changes be made to the rules as proposed.

**It is important to remember that the interlocutory appeal right is not being fully revoked.** The loss of a right to an interlocutory appeal is only for petitioners who wish to participate on multiple issues and where some – but not all – of their issues are denied party status by the hearing officer. For participants who have singular or even multiple concerns about a project and the denial of party status on all their issues will remove them from the contested case process, **an interlocutory right remains.**

Finally, and perhaps most importantly, despite concerns about efficiency and judiciousness, the proposed change is simply in line with Oregon law, which states that review of party status does not happen until after the agency issues its final order. As described in ORS 183.310(7)(c) (emphasis added):

“The agency’s determination [of party or limited party status] is subject to judicial review in the manner provided by ORS 183.482 (Jurisdiction for review of contested cases) ***after the agency has issued its final order in the proceedings.***”

Despite claims to the contrary, participants are not being denied justice, as an appeal to the Supreme Court is ultimately where siting disputes are fully resolved, and these rules in no way remove the right to appeal to this Court.

Staff does recommend that the Council’s final orders should incorporate or adopt a hearing officer’s rulings on contested case issues, including on party and limited party status. This will make it clear that any appeal of the hearing officer’s rulings goes to the Supreme Court as an appeal of Council’s final order. This also addresses a desire expressed by Irene Gilbert in her comments that Council make it explicit how contested case matters are appealed and to what court.

## **Fiscal Impacts**

Several commentators indicated that the loss of the interlocutory appeal would create a financial burden on participants, but the issue of the interlocutory appeal has historically been very minimal, with the notable exception of the Boardman to Hemingway project as discussed above and it is not clear that the existence of an interlocutory appeal in the few cases affected by the proposed changes would serve as net financial loss for participants, as the ultimate appeal and consideration of all siting disputes ends up in the hands of the Oregon Supreme Court regardless.

The rules as presented do not otherwise substantively change the Council’s contested case process. What changes these updated rules do effect are designed to make the contested case process more efficient. Overall, the fiscal impact of the proposed rules is estimated to be minimal.

**Next Steps**

If the Council is satisfied with the draft proposed rules, included as attachment 1, staff requests authorization to file a permanent rule order in line with the previously filed notice of proposed rulemaking, with the minor changes identified above.