Attachment 4

ENERGY FACILITY SITING COUNCIL

■ Kent Howe, Chair ■ Cindy Condon, Vice-Chair ■ Marcy Grail ■ Katie Imes ■ Perry Chocktoot ■ Ann Beier ■ Richard Devlin

Energy Facility Siting Council
Meeting Minutes

Friday March 22, 2024

A. **Contested Case Rulemaking (Public Hearing)[1] –** Christopher Clark, Senior Siting Analyst and Alternate Rules Coordinator presided over a rulemaking hearing to solicit public comments on the Council's proposed new Contested Case Rulemaking. Written comments must be received by 5:00 pm on April 19, 2024 to be considered.

Mr. Clark, acting as the Presiding Officer, called the hearing to order and open for comments at 9:13 am.

Ms. Irene Gilbert
Ms. Gilbert began by suggesting that if EFSC meetings are going to be 4-5 hours, they should be held in 1 day, rather than Thursday evening and Friday (2-day meeting), in an effort to reduce pollution from traveling.

Ms. Gilbert stated one of her concerns in the administration rules is the set of rules that goes from 0001 through 0090 was noted for cases where there was not a hearings officer from the administrative hearing's decision. She stated that is incorrect. The first section of rules in the Model rules talks about the rights of parties to contest the cases. It is focused on specific information about the people who are applying for a contested case. The second set of rules relates to the role of the hearings officer in handling contested cases. If the second set of rules removes all the information regarding the details about the rights of the parties, she believes that would be a problem.

Ms. Gilbert also stated: There was a court decision from the Boardman to Hemingway case on the original application that the interpretation by EFSC is incorrect. The interpretation that's being presented is the council has a right to limit everybody, making them simply limited parties. That is not correct. The order says that the hearings officer had looked at all of the issues that are required to limit someone and they had determined that it was legitimate in this instance to limit parties to limited party status. They did not say that the council had the authority to just make a blanket statement and say everybody is going to be a limited party. The

[1] Audio/Video for Agenda Item C = 01:40:29 – 2024-01-26-EFSC-Meeting-Audio/Video

ALJ specifically went through all of the information in 137-003 and 137-005, which gives that criteria that must be considered. There must be some criteria that is met to make someone a limited party.

Ms. Gilbert further states: that the new rules make it appear that there are some groups that are not going to be allowed to have lay representation. ORS 183.457 states no rule adopted by a state agency shall have the effect of precluding lay representation. It also states agencies before which an authorized representative may appear, and it lists the State Department of Energy.

Another issue Ms. Gilbert is concerned about the discovery rules. In the ORS for civil actions, it states parties may inquire regarding any matters not privileged that is relevant to a claim or reference of any party. The EFSC rules state the hearing officer can limit discovery. If the Administrative Judge is limiting or changing anything with discovery, they're required to issue an order. Once they issue an order currently, people can appeal to the county courts based on previous decisions of the courts. There must be an explanation of how the discovery is likely to produce information that is generally relevant and necessary to the case.

Another issues Ms. Gilbert is concerned about is that the burden of proof is more on the administrative law judge to say why is that person justified in limiting discovery and why is it not going to perhaps provide information that's relevant to the issue that's being argued. If someone is not satisfied with the decision on discovery, they must ask the chief administrative law judge for a review of the decision. She suggested Council may want to consider this.

Ms. Gilbert further explained her concerns with the Contested Case Rulemaking. She felt the notice did not accurately reflect the impact of the changes proposed. She feels there are substantial changes being made which should be provided in the notice. It is a rule that the public gets a copy of the red line version which was not provided.

Ms. Gilbert stated that when EFSC refuses the public an opportunity to have a contested case, there is no opportunity for the petitioner to develop a full file of their arguments to submit to the Oregon Supreme Court. The Oregon Supreme Court rules say that they review the contested case file when they're deciding on contested cases, which results in cases being contested in the county courts. The county then is the vehicle whereby the public can develop a file that can be appealed to the Oregon Supreme Court. Department of Energy's recommendations to EFSC on these rules, she believes is discretionary to a point that it exceeds the authority in the statutes. The Oregon statute 409.501 states EFSC has the right to develop rules. It states specifically what kind of rules you're allowed to establish and EFSC establishes the rules for the application. The authority EFSC has is for developing building rules, it does not include changing the contested case process. There is nothing in there about denying people's rights that are in statues.

Ms. Gilbert further states that: in OAR 345-015-405(4)(G) it states that the hearing officer can limit the issues, which are raised with sufficient specificity in the public hearing for any purpose

the hearing officer finds. She stated that statement clearly exceeds the power of the agency. There's a requirement that the administrative law judge issue an order on these decisions. The order would mean that there's an opportunity for people to appeal their decision on how they're limiting a party status and how they're limiting issues. It is Ms. Gilbert's understanding that this would go to the Circuit Court.

Referring to the requirements of raising issues with sufficient specificity, Ms. Gilbert suggested a numbering system would make it clearer for the public to understand and navigate the requirements. She also suggested the rules should state that people can frame their issue however they want. This should just be a one liner.

Ms. Gilbert feels the criteria being placed on people who are identified as limited parties is incredibly structured and it denies the limited party's access to a lot of different things that they ought to be able to respond to. She suggested removing the statement in 345-15-415(7) which states that you are now allowed to respond to respond to proposed site certificate conditions. She expressed her gratitude that some of her suggestions during the RAC have been included in the rulemaking.

She also stated the use of the word "indigent" has several different definitions between different agencies. She suggested that it would be wise to be more flexible about who is indigent under the rules.

Council Member Beier reminded members of the public that the department does work with a rules advisory committee that includes people from the energy industry and representatives from the public. The department does rely heavily on input from outside with every rulemaking. She thanked Ms. Gilbert for serving on multiple RAC committees.

Council Member Grail stated Council has talked about the specific specificity in comments. She expressed her appreciation for Ms. Gilberts suggestion about a numbering system as it may be a helpful tool in making things more orderly.

Vice Chair Condon asked if Ms. Gilbert provided the references to rules she referred to in her public comments in the written comments she provided.

Ms. Gilbert responded she had to the best of her ability.

Mr. John Luciani

Mr. Luciani stated he has provided Council with public comments at previous meetings but is frustrated that there is not an opportunity to ask Council questions and get responses.

He noted he was involved with the Boardman to Hemingway Contested Case but was one of the first people to be "kicked out" of the proceedings. He expressed his view that, under the current rules, a normal person can't participate in contested case proceedings. He would like to see the rules changed and everyone who was not allowed to participate in the contested case

proceedings on the Boardman to Hemingway Transmission Line be allowed to participate and to start the process over. He urged the Council to consider giving "normal people a chance to state what we want to state and to be heard."

Ms. Anne March
Ms. March noted her participation as a limited party in the Boardman to Hemingway Contested Case. She stated that it was a very frustrating process as she is not a lawyer. She stated that the contested case process was intimidating and anything the Council can do to make the process smoother, clearer, and more equitable for people is a good thing.

Ms. March referred to the filing and service section in the rules. She stated emailing documents is a problem due to technical issues. She recommended the Council establish some kind of docket system that the public can file and easily access in an organized way. She also noted finding information within documents on the website was a nightmare due to the volume of information. She expressed her frustration that an ALJ denied her request to change the deadline for filing documents from Fridays at 5:00 pm to Sundays at 5:00 pm because it made it difficult for working people to participate.

Regarding the request for party status in the rules, Ms. March stated that the department and the ALJ should not be writing the issue statement, unless the party wants that to happen. She commented that the issue statements included in the Boardman to Hemingway contested case proceeding were narrower than those intended by petitioners. She commented that there are members of the public who have no idea how important the issue statement is in a contested case. The section needs clearer language about notifying parties regarding their ability to object to an issue statement.

In the section referring to Prehearing Conference and Prehearing Order, Ms. March commented that it is her understanding that the ALJ may hold a pre-hearing conference, but parties do not necessarily have the right to clarify their issues during the conference. There is therefore a huge problem if decisions are final and parties didn't know that as a limited party, they could object to the language that the department and the ALJ chose for the issue statement. She feels there must be a way for the public to know they can appeal the issue statement before the prehearing order is issued.

Referring to the Hearing Officer's Proposed Contested Case Order and the language "the final order may adopt modify or reject the hearing officers proposed order and also the Department's proposed order" which means it is an EFSC decision. Ms. March commented that in the contested case proceeding on Boardman to Hemingway, the public did not perceive that the Council had fully considered the issues in the Proposed Contested Case Order, and suggested as the information provided to Council is large and difficult to understand, and Council receives the information from ODOE staff and legal counsel, that is not going to happen with the current system of the department being paid by and working for the applicant. She noted that in the hearing process, the public should have additional rebuttal time after the attorney's rebuttal statements to clarify their statements.

Ms. March commended the video by Ms. Tardaewhether Senior Siting Analyst, regarding the Amendment process as being extremely helpful. She would like to see additional videos as they can provide the public with information and education about the EFSC process.

Vice Chair Condon asked if the issue statement that was narrowed down she referred to in the Boardman to Hemingway Contested Case had originally mentioned mitigation and fish passage.

> *Ms. March stated it had. She was unaware that fish passage was defined by structures being built in the streams or not being built in the streams and thought it was a broader term.*

Council Member Beier thanked Ms . March for the feedback on the Amendment video as it helps to inform the Council and the Department of useful ways to provide information to the public.

<u>Mr. Jim Kreider</u>
Mr. Kreider, stated in his opinion as a member of the Rulemaking Advisory Committee, that the RAC's positions are not properly reflected in the red line. He stated his belief that the proposed rules include carefully crafted guardrails with the purpose of speeding up the process for developers. He stated that the process has not been about striking a balance, but about changing the balance in support of the developers and not the people of the state. Mr. Kreider expressed frustration that his edits to the organization of the rules were not adequately considered by staff or discussed by the RAC. He believes staff did what they were told to do by attorneys, to limit, also known as streamline, the process for developers.

Referencing the second goal of the RAC committee, to update the rules to reflect a proposed adoption of the office of administrator hearings model rules, Mr. Kreider questioned why EFSC needs to keep their own set of rules in addition to the office of administrative hearings model. The Staff memo to the RAC states "The council is not bound by OAH rules through this adoption". Language in OAR 345-015-041 states "In any conflict between the office of administrative hearing rules and council rules, the council shall apply its own rules." He questioned what, when, how and who will make the decision to change from the office of administrative hearings model rules for contested cases to ODOE rules. He noted his opinion that several sections of the rules and meetings used in the red line were incorrect and he had submitted detailed clarifications that he believes were not utilized.

Referencing the fourth directive of the RAC, to improve the clarity of the rules by providing or enhancing definitions where appropriate, Mr. Kreider stated he had provided examples of his suggestions for improving clarity from a pro se participant's point of view that were not incorporated into the rules. He stated the discretion given to ODOE and DOJ staff working together come down on the side of the developer and speed. He feels justice and fairness do not seem to factor into the decision making.

Referencing the fifth goal of the RAC, to improve the efficiency of the contested case process by providing additional guidance to all parties and perspective parties who are affected by the

rules. Mr. Kreider suggested that cannot be done if a review of several contested cases isn't done to determine what was done incorrectly and what can be improved. He believes this RAC is about helping develop site facilities more rapidly. It is not about learning and listening to the public about better right-siting. He questions how the Council is going to integrate the right-sighting work of the Department of Land Conservation and Development in their current RAC on finding opportunities for reducing conflict, in siting agrivoltaic solar power generating facilities? He also commented that he believes the public needs intervener funding for proper public representation to make the process more effective and efficient.

Mrs. Fuji Kreider

Ms. Kreider noted that all the comments received during the hearing have been from members of the public who were involved in the Boardman to Hemingway Project Contested Case. She noted that was a big case and was difficult. They have learned a lot and have a lot to share with Council. She is hoping that the Council, with the interest of protecting the public interest in addition to securing energy supplies, will read, listen, and consider all of the information provided to them by those members of the public. She agreed with Ms. March's comment regarding a new docket system which would greatly help members of the public. In reference to Ms. March's comments on limited status, she stated because the issue statement was brought down to fish passage, it limited the ability to argue the issue of habitat mitigation in the contested case. She stated that she would be providing written comments, and as an example of what would be included commented on the model rules and referenced the subsections that relates to ex parte communication. She explained that there are three rules within the model rules that address ex parte communication. One applies during the pendency of the proceeding, another addresses when there's ex parte communications with the ALJ, and another addresses ex parte communications to the agency during the contested case review. She stated her recommendation is to leave all three of those in the contested case rule and not just pick one because ex parte communication can happen any place during the proceeding of the case.

Mr. Clark concluded the hearing at 10:24 am.

ODOE Public Comment Contested Case Rulemaking Public Hearing – verbal comments in written form

My name is Jim Kreider 60366 Marvin Rd and I am a member of this Rules Advisory Committee (RAC). And that is just what this RAC was – advisory. Tom Jackman, ODOE Rules Coordinator, listened and heard what we said. However, those discussions are not properly reflected in the red line.

The RAC has carefully crafted guardrails with the purpose of speeding up the process for developers so they could have more certainty. It has not been about striking a balance but its about changing the balance in support of the developers and not the people of the state, in my opinion.

Let me remind everyone of the guardrails for this RAC per Tom Jackmans January 3, 2024 memo to RAC members:

The proposed changes to the Council's contested case rules 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.
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.

The first, Reorder and reorganize the rules to better match the flow of the contested case process, is completed.

I spent a good deal of time reordering the rule sections to match work flow based on my practical experience with these rules and the lack of logic in their current organization. My reorganization was never discussed by the RAC, ODOE staff, or EFSC. Staff did what they were told to do by attorneys to limit, aka stream line the process for developers. If anyone had taken the time to look at these suggestions there would have had some questions because some of them made sense.

The second, Update the rules to reflect a proposed adoption of the Office of Administrative Hearing's model rules for contested cases is being discussed in this specific rulemaking.

A question you will see asked over and over in my red line comments is why does EFSC also need to keep their set of rules in addition to the Office of Administrative Hearing's model rules? Staffs memo states, "The Council

is not bound by OAH model rules through this adoption. As laid out in OAR 345-015-0401(3)[2], "In any conflict between the Office of Administrative Hearing rules and Council rules, the Council shall apply its own rules."[3]

When, how, why, and who will make the decision to change from the Office of Administrative Hearing's model rules for contested cases to ODOE's rules? How can the rules change mid-stream in a contested case? This and other questions were never discussed much less answered. Staff again did what the attorneys told them to do.

The third, Improve the consistency of the rules, both internally and to ensure they properly match Oregon laws and other administrative rules.

Several citations and meanings of rules used in the red line were incorrect. Detailed clarifications were given by me in writing but still don't know what if any were incorporated in this rule set. I'll let you know these in my written comments.

Forth, Improve the clarity of the rules by providing or enhancing definitions where appropriate.

Many examples were given for rule clarification. These examples were from a pro ses point of view who were run through the rules interpretation gauntlet in the B2H contested case. The discretion given to ODOE and DOJ staff working as one come down on the side of the developer and speed. Justice and fairness does not seem to factor into the decision making.

Fifth, Improve the efficiency of the contested case process by providing additional guidance to all parties and prospective parties who are affected by these rules.

Until a case study is done on several of the contested cases this goal will not be achieved. If one does not look at what was done right and what has been done wrong how can one improve? As I sit on this RAC this is about helping the developers site facilities more rapidly and is not about learning and listening to the public about better "right siting".

How is EFSC going to integrate the "right sighting" work of the Department of Land Conservation and Development (DLCD) in their current RAC on Finding Opportunities and Reducing Conflict in Siting Photovoltaic Solar Power Generation Facilities? In the legislatures infinite wisdom this was to be a statewide assessment but in order to get enough votes from the west side legislatures the west side was dropped for "right sighting" and only central and eastern Oregon were targeted for this privilege. How are EFSC rules going to address their selection of only solar sites in central and eastern Oregon?

Developers don't want the public throwing spagetti on the wall to see what sticks. And the public doesn't want to throw spagetti on the wall either. So we need interviner funding for propor public representation. The developer pays millions of dollars to ODOE for staff time so why not for the public too? It will speed up the process. If not spagetti will be what we eat at all contested cases.

This concludes my verbal comments and will follow up with more detailed written ones.

Comments Regarding the Proposed Amendments of Energy Facility Contested Case Rules

Anne March <amarch@eoni.com>

Sun 3/24/2024 2:09 PM

To:EFSC Rulemaking * ODOE <EFSC.RULEMAKING@energy.oregon.gov>

1 attachments (60 KB)

Comments- Proposed Ammendments of Energy Facitlity Contested Case Rules.pdf;

[You don't often get email from amarch@eoni.com. Learn why this is important at https://aka.ms/LearnAboutSenderIdentification]

Thank you for the opportunity to comment. I submitted the following comments via the online portal, but the format became jumbled so this format may be easier to read. Please find attached my comments.

Sincerely

Anne March
206 Main Avenue
La Grande, Oregon
541-786-0802

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Comments Regarding Proposed Amendments of Energy Facility Contested Case Rules

Anne March
206 Main Avenue
La Grande, OR 97850
541-786-0802

1) **Section ending in 0410 (Filing and Service) #1**
   a) Page 5
      i) Emailing documents a problem
      ii) Large mailing list, Emails bounced back, spam blockers, clogged email box
      iii) Received many emails not related to our case
      iv) Often wondered whether our emails made it to the right people
      v) A different system is needed (docket?)
      vi) Finding information within the documents within the application and ODOE website was a nightmare (thousands of pages).
   b) A Filing deadline of 5 p.m. on Fridays was not helpful for working people. **Allow parties and limited parties to submit documents by Sunday night deadlines.** This made it hard for working people such as myself and my husband), and was it really necessary? Department and Applicant lawyers argued against it, but the simple answer to that issue is to turn documents in on Fridays by 5 if that works better for you.

2) **Section ending in 0415 (Requests for party status)**
   a) Page 6
      i) The Department and later the ALJ wrote our issue statement for us after we submitted a letter.
      ii) We did not know at the time how important that was and that we could object
      iii) This impacted us greatly because our letter, which mentioned concerns about fish habitat disruption was reduced to fish passage. Consequently, we were very limited regarding what we could actually talk about and argue. By the time we realized it, it was too late to change anything. This was very convenient for the Department and the Applicant.
      iv) The Department and the ALJ should not be writing the issue statement unless the party wants that to happen.
      v) **This section needs clearer language about notifying parties regarding an ability to object to an issue statement.**

a) Page 7, b needs to indicate how IMPORTANT an issue statement is and that there is an opportunity to object and request a revision

3) Section ending in 0430 (Prehearing Conference and Pre-Hearing Order)

a) Page 9

   i) Parties don't necessarily have the right to clarify their issues for the ALJ? - this doesn't seem right. **The word "may" in this section leaves too much up to the ALJ.**

   ii) Subsection 4 is therefore a huge problem if decisions are final and parties didn't know they could object to the language that the Department / ALJ (one and the same in our case) chose.

   iii) We didn't know that by being granted limited party status we would be able to ONLY discuss Fish passage and not the broader issue of habitat that we raised in our original letter asking for party status. Again, this was very convenient for the Department and the Applicant in the end, and it felt like the ALJ was doing their bidding. This made the whole process seem unfair.

   iv) Subsection 7: There must be a way to let people know they can appeal before it's too late.

3) Section ending in 0475 (Hearings Officer's Proposed Contested Case Order)

a) Page 14

   i) Subsection 6, Part d

      (1) Nice of you to say that, but that is never going to happen with the current system of the Department being paid by and working for the Applicant. The Council relies heavily on the Department's advice because they can't consume the amount of information needed in the time period they are given.

         (a) At a public EFSC hearing in La Grande, committee members had an 8 inch binder to read. They relied heavily, maybe exclusively by all appearances on advice from the Department's lawyer and their own. Have other jobs? Volunteers? This committee appeared to be a sham, and for their own self-preservation and sanity (8-inch binder!) they simply did what the Department said they should do. We spent 3 years on this case, and this committee could never, without a ton of time and legal knowledge, do their jobs properly.

         (b) At that same meeting:

            (i) Jessie Radcliff gave the committee the introduction to our issue

            (ii) He mis-stated something (that ODFW studies were being completed, which they weren't)

            (iii) Then, during our 3 minute turn, we pointed out the error.

(iv) Then ODOE's lawyer Patrick Rowe came back and also told the committee inaccurate information related to Jessie Radcliff's (clearly backing him up)

(v) We were never allowed to point that out to the committee because no rebuttal was allowed for us, only for ODOE.

(vi) At EFSC public hearings, parties need to be allowed to respond after the Department speaks

(vii) In 2 days of hearings, EFSC committee members only asked limited parties a few questions. On day one I witnessed only 2 committee members, (Condon and Byars) each asking 1 question to limited parties. No one else did, which was discouraging to say the least. However, the EFSC committee asked ODOE and the Applicant's lawyers plenty of questions. It felt like we were there so that they could check a box and rubberstamp what they needed to that day. **The straw vote that happened immediately after not being completely educated made it look like a ludicrous process.**

4) Something that would help the process:

a) make a video for each step of the contested case. Emphasize the rights of the parties and limited parties. Kellen T from ODOE made one recently and sent it out regarding Amendment 2 and it was very helpful to watch and learn from. The whole process is currently intimidating and appears to be designed to be so.

Comments Submitted to Public Comment Portal on 3/24/2024

345-015-0410 / Section 1

(Filing and Service)

Emailing documents a problem
Large mailing list, Emails bounced back, spam blockers, clogged email box
Received many emails not related to our case
Often wondered whether our emails made it to the right people
A different system is needed (docket?)
Finding information within the documents within the application and ODOE website was a nightmare (thousands of pages).
A Filing deadline of 5 p.m. on Fridays was not helpful for working people. Allow parties and limited parties to submit documents by Sunday night deadlines. This made it hard for working people such as myself and my husband), and was it really necessary? Department and Applicant lawyers argued against it, but the simple answer to that issue is to turn documents in on Fridays by 5 if that works better for you.

345-015-0415

(Requests for party status)
Page 6
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We did not know at the time how important that was and that we could object
This impacted us greatly because our letter, which mentioned concerns about fish habitat disruption was reduced to fish passage. Consequently, we were very limited regarding what we could actually talk about and argue. By the time we realized it, it was too late to change anything. This was very convenient for the Department and the Applicant.
The Department and the ALJ should not be writing the issue statement unless the party wants that to happen.
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345-015-0430

(Prehearing Conference and Pre-Hearing Order)
Page 9
Parties don't necessarily have the right to clarify their issues for the ALJ? - this doesn't seem right. The word "may" in this section leaves too much up to the ALJ.
Subsection 4 is therefore a huge problem if decisions are final and parties didn't know they could object to the language that the Department / ALJ (one and the same in our case) chose.
We didn't know that by being granted limited party status we would be able to ONLY discuss Fish passage and not the broader issue of habitat that we raised in our original letter asking for party status. Again, this was very convenient for the Department and the Applicant in the end, and it felt like the ALJ was doing their bidding. This made the whole process seem unfair.

Subsection 7: There must be a way to let people know they can appeal before it's too late.

345-015-0475 / Section 6, part d

(Hearings Officer's Proposed Contested Case Order)

Nice of you to say that, but that is never going to happen with the current system of the Department being paid by and working for the Applicant. The Council relies heavily on the Department's advice because they can't consume the amount of information needed in the time period they are given. At a public EFSC hearing in La Grande, committee members had an 8 inch binder to read. They relied heavily, maybe exclusively by all appearances on advice from the Department's lawyer and their own. Have other jobs? Volunteers? This committee appeared to be a sham, and for their own self-preservation and sanity (8-inch binder!) they simply did what the Department said they should do. We spent 3 years on this case, and this committee could never, without a ton of time and legal knowledge, do their jobs properly.

At that same meeting:
Jessie Radcliff gave the committee the introduction to our issue
He mis-stated something (that ODFW studies were being completed, which they weren't)
Then, during our 3 minute turn, we pointed out the error.
Then ODOE's lawyer Patrick Rowe came back and also told the committee inaccurate information related to Jessie Radcliff's (clearly backing him up)
We were never allowed to point that out to the committee because no rebuttal was allowed for us, only for ODOE.
At EFSC public hearings, parties need to be allowed to respond after the Department speaks

In 2 days of hearings, EFSC committee members only asked limited parties a few questions. On day one I witnessed only 2 committee members, (Condon and Byars) each asking 1 question to limited parties. No one else did, which was discouraging to say the least. However, the EFSC committee asked ODOE and the Applicant's lawyers plenty of questions. It felt like we were there so that they could check a box and rubberstamp what they needed to that day. The straw vote that happened immediately after not being completely educated made it look like a ludicrous process.

General Suggestion

Something that would help the process:

Make a video for each step of the contested case. Emphasize the rights of the parties and limited parties. Kellen T from ODOE made one recently and sent it out regarding Amendment 2 and it was very helpful to watch and learn from. The whole process is currently intimidating and appears to be designed to be so.

Thank you for the opportunity to comment.

Comments regarding the Proposed Contested Case Rule Chages.

Irene Gilbert <ott.irene@frontier.com>
Thu 4/11/2024 3:24 AM
To:JACKMAN Tom * ODOE <Tom.JACKMAN@energy.oregon.gov>
Cc:HATCH Nancy * ODOE <Nancy.HATCH@energy.oregon.gov>

Comments on Contested Case Rules.docx;

Tom:
Attache is my formal comments regarding the Proposed Contested Case Rule changes. Please see that these comments are included in the record of comments to protect the opportunity for appeal.
I will check to see if I can locate my original notes which prompted my verbal comments and send them to you tomorrow.
I am sure it is clear that I find these rules conflict with rights of parties to such a great extent that they should be filed in a circular file and the agency should simply adopt the Model Rules in their entirety. These rules will result in keeping circuit courts throughout the state busy hearing cases that ODOE should be hearing if they were not focused on assuming that denial of access to agency held contested cases will mean that appeal is pointless since there is no contested case record to rely upon.

Nothing personal. I know you are only the messenger, and I appreciate the effort you exert in listening to concerns. Unfortunately, you lack the authority to address the most critical issues.
Irene

On Wednesday, April 10, 2024 at 02:55:33 PM PDT, JACKMAN Tom * ODOE <tom.jackman@energy.oregon.gov> wrote:

Irene,

c
If you still have it, can you please send me a digital copy of the comments you submitted at the March 22, 2024 hearing regarding the contested case rulemaking? Just attach the document to your response to this email.

Thanks,

Tom

Thomas L. Jackman
Rulemaking Coordinator

550 Capitol St. NE | Salem, OR 97301
tom.jackman@energy.oregon.gov

P: 503-551-7603

Stay connected!

To: Energy Facility Siting Council April 11, 2024

From: Irene Gilbert on my behalf and representing the public interest

Subject: Amendment to Rules regarding Contested Cases Public Comments

I am making these comments based upon having been involved on an ongoing basis with the decisions of EFSC and ODOE regarding Site Certificates and Amended Site Certificates for Energy Developments for over a dozen years representing both my own issues and as representative of the public interest. I have participated as Legal Research Analyst for Friends of the Grande Ronde Valley and as co-chair of Stop B2H. More importantly, I am one of many individuals who experienced first-hand the contested case process from start to finish with the B2H application including appeal of the final order to the Oregon Supreme Court. In addition, I am in the process of obtaining an order on a Request for Reconsideration of a Procedural Issue before the Union County Circuit Court.

I also spent many years working for state agencies as a line worker, supervisor, and trainer responsible for the interpretation, implementation and training regarding state agency rules. During one of those years I was the Medical Issues Coordinator for Workers Compensation Department working directly under the Administrator as a part of her Executive Staff. I was the agency contact person for medical providers, insurers, injured workers and others regarding questions related to a large workers compensation reform bill passed that year. I provided the director with interpretations, and impacts of the bill and amendments to the bill, participated in development of rules

supporting the final bill and developed and presented training to insurers and employers regarding the new recordkeeping requirements.

My comments are based on the plain language of the proposed rule, how the changes will impact the public's ability to access a fair and impartial contested case process, and whether or not the changes comply with Oregon Statutes, Rules and Court decisions. I

I have incorporated my comments to council during the March 22, 2024 EFSC meeting, comments from my review of additional pages of the proposed rule changes, and comments from my participation in the RAC for this rule which were not incorporated into the draft provided to the council. The yellow areas are areas I ask the council to pay particular attention to.

OVERARCHING CONCERNS

1.

This rule revision removes OAR 137-003-0001 through OAR 137-003-0092.

The removed section covers topics important preserving the rights of the public such as what must be included in Contested Case Notices, public Rights, participation as a "full party" or "limited party"; procedures included in contested case hearings, rules regarding Discovery, what can be provided as Evidence; and rights to reconsideration or rehearing. The revision added OAR 137-003-0501 through OAR 137-003-0700 addresses the role and responsibilities of hearings officers. The section is entitled, "Rules for Office of Administrative Hearings" and the remainder of

the rules provide information regarding the actions and authority of Hearings Officers. OAR 137-003-0001 through OAF 137-003-0092 and OAR 137-003-0501 through OAR 137-003-0700 are not mutually exclusive. One set establishes rules regarding the public and their role and the other establishes rules for the hearings officer.

2.

1. OAR 345-027-0375(4) requires the Department to explain the amendment process, including the means and opportunities for the general public to participate in the process. ORS 183.341(4) states that agencies rules must provide a reasonable opportunity for interested persons to be notified of the agencies intention to adopt, amend or repeal a rule.

The notice described the changes as being insignificant stating they would reorganize rules, improve consistency by matching them with Oregon law and other admin. rules, provide additional definitions' and enhancing existing ones.

The description included in the Public Notice of the Opportunity to comment on this rule revision fails to state that the new rule removes the public rights or what rights and information are being removed or substantially changed. This document identifies areas that I have identified which should have been identified in the notice to the public of the rule changes which includes:

a. The rules proposed do not match or substantially comply with existing Oregon law contained in ORS 183 due to removing requirements that protect the rights and information that must be provided to the public.
b. The multiple "additions" and "clarifications" change the procedures and make public participation in the siting process are significantly stricter than the rules from the Office of Admin Hearings Model Rules.

My pending Motion for Reconsideration is due to EFSC and ODOE failing to inform the public with information necessary for them to understand the changes proposed and determine how and if they wanted to participate in the processing of site certificates. This rule revision demonstrates a failure to inform the public as it is evident in the notice regarding this revision as it is in the processing of site certificats. The notice for this rule change stated that the changes are not significant, when in fact they are. The Original public notice regarding this change also did not include a red lined copy of the changes to the current Contested Case Rules. It was not until March 20, 2024 that the public notice was reissued and included the red-lined rule revisions after I brought it to the attention of ODOE. The revised notice still retained the inaccurate statements of the impacts of the rules.

3.

ORS 183.332 requires rules to substantially comply with corresponding federal laws. Federal law requires timely notice and that individuals be informed of their rights to due process. ORS 183.335(2)(B)

The rule changes must include the requirement that an order be issued when the decision regarding what issues will be heard, and the standing of individuals is decided which includes the parties appeal rights. The rules do not include the statutory requirement that an order be issued when a decision is made which impacts an individual's rights including denials of contested case requests, inclusion, exclusion or modification of issues regarding processing of applications for energy developments. In the Boardman to Hemingway procedures individuals were denied access to contested cases, denied full party status, had their contested case issue statements changed from the one requested, and had issues thrown out through Summary Determination. The decisions were implemented immediately with no Order being issued or identification of appeal rights. The denials were not issued until months after the action was taken. Orders regarding these kinds of issues are required to be issued when the decision is made and implemented and the rules need to require compliance with ORS 183.335.

4.

Notices must state that appeals for denied contested case requests or other instances which do not provide for a contested case hearing lies with the Circuit Court under ORS 183.484.

5.

. This revision will result in virtually all contested cases on the procedures used by ODOE and EFSC in the processing of applications and amendments to be denied. The rules already limit contested cases to only requirements of Ch. 21, 22, or 24. This limitation was arbitrarily recommended by previous

council member Hanley Jenkins with no discussion regarding why the council should have inserted it in the rules. The council should include in this amendment removal of this limitation unless the Council truly is unwilling to hear contested cases which address any other rules of the council.

6.

As you are aware, I filed a Request for Reconsideration of the denial of my contested case request on Amendment I of the B2H Site Certificate. The request became one of jurisdiction when the Oregon Department of Energy, the Energy Facility Siting Council and Idaho Power filed motions stating that the Circuit Court lacked jurisdiction for hearing the denial issue. The circuit Court denied their motion due to my request being for an issue that was denied a contested case process. Then the Oregon Department of Energy and Idaho Power filed a Mandamus motion asking the Oregon Supreme Court to overrule the Circuit Court decision and take jurisdiction over my request. The Oregon Supreme Court Denied the request for transfer. What their actions did is confirm that the agency has been referring people denied access to Contested Cases to the Oregon Supreme Court in error. It is important for the Council to be cognizant of the fact that promulgating these rules rather than simply adopting the Attorney General's Model Rules used by most other agencies will create multiple occasions that by definition are "other than contested cases". Approving rules that result in denying access to contested cases does not mean that the public will not have access to due process through development of a contested case file. It simply means that due process will be provided through the Circuit Courts providing the opportunity

for the issue to be heard. It will not serve to streamline the Contested Case Process.

Denied requests for contested cases regarding site certificate conditions are heard by the Circuit Court under ORS 183.484. Orders in decisions that do not challenge the approval of a site certificate, but rather decisions in the processing of applications have been stating that appeal rights are addressed by the Oregon Supreme Court under ORS 469.403 in error.

The decisions of the Circuit Court and the Oregon Supreme Court considering my arguments which referenced the following cases:

> --Forelaws on Board v. EFSC, 311 Or 350, 358-60, 811 P2d 636 (1991) the Oregon Supreme Court stated they lacked jurisdiction proceeding "because the **order here involved is not an order approving or rejecting an application** for an energy facility certificate." That opinion also **rejected the argument that "the court must treat any EFSC decision that relates to whether a site certification proceeding is required as if it were the functional equivalent of EFSC action on a site certificate application."**
>
> --Save our Rural Oregon v. EFSC, 339 Or 353, 377, 121 P3d 1141 (2005) the Oregon Supreme Court reviewed their authority over EFSC project-related decisions under ORS 469.403(3) and determined their authority "is limited to review of the council' **approval or rejection** of an application for a site certificate or amended site certificate.

--*Friends of The Columbia Gorge v. Energy Facility Siting Council* 314 Or. App. 143 Or. Ct. App (2021) 498 P3d 875 determined that **jurisdiction for review by the Oregon Supreme Court depends on whether petitioners were entitled to a contested case hearing. If not, the court concluded that Orders are not "contested case" orders.**

--Solomon v State Land Board 25 Ot App 311, 548 P2d 1335 (1976) states that **until an order is preceded by a contested case hearing, it is reviewed in circuit court, not the Court of Appeals.** The courts have provided additional documentation regarding jurisdiction for orders other than contested cases in Buena Dairy Associates v. State Dept.of Agriculture, 25 Or App 381, 549 P2d 689 (1976) That case established that the circuit court has jurisdiction to hear a claim regarding situations where a contested case proceeding should have been conducted, but was not.

7.

2. ODOE has recommended extensive additional requirements beyond those established through Oregon Statutes and the Administrative Procedures Act rather than simply adopting the Administrative Procedures Act requirements which are used by other agencies.
    a. ODOE is leveraging their "discretion" regarding these changes to Contested Case Statutes and Rules to the point that it exceeds the statutes providing them the authority to promulgate rules as

provided in ORS 469.501. EFSC is allowed to adopt standards for the siting construction, operation and retirement of facilities. The statute does not provide them with the authority to dictate whether and under what conditions the public is able to access due process. EFSC should adopt the Model Rules used by other agencies and any changes or additions made should require a description of the change, why it is needed and what problem it is intended to address.

8.

3. Throughout this rule revision it is clear that the intent or ODOE and EFSC, should they approve these rules is:

    1. Establish that only the developers and ODOE be allowed full party status. That all petitioners be designated as only "limited parties.

    2. Limit the role and opportunities for "limited parties" to participate fully in contested case proceedings to the extent that the rules waive rights provided to all petitioners under the Oregon Statutes.

    For example: ORS 183.413(2) states; "Prior to the commencement of a contested case hearing before any agency including those agencies identified in ORS 183.315 the agency shall serve personally or by mail a written notice to each party to the hearing that includes the following:"

"A statement that the party has the right to respond to all issues properly before the presiding officer and present evidence and witnesses on those issues."

10.

SPECIFIC COMMENTS AND REFERENCES TO SECTIONS OF THE RED LINED AMENDMENT RULES WHERE CHANGES ARE PROPOSED.

11.

OAR 345-001-0005 Page 1

Removing the requirement to comply with OAR 137-003-0005 removes the evaluation required to limit petitioner participation to "limited party" status. There is no indication in the legislative record that supports an agency arbitrarily deciding to limit participation of everyone who objects to their action to being designated as "limited parties". The extensive language in the statutes regarding the rights of "parties" to contested cases would not be included in statutes if no one from the public was to be allowed to be full parties. The Oregon Supreme Court decision in the Final Order for the Stop B2H Appeal of the B2H Site Certificate does not give unbridled authority to EFSC to allow them to require all petitioners for contested cases to be Limited Parties as is the case in the proposed rules. The Supreme Court decision identifies the specific criteria stated in OAR 137-003-0005 and determined that the hearings officer reviewed the criteria prior to deciding to make petitioners "limited parties". This rule revision removes the requirement for the limitation to be justified based upon specific decision criteria. Removing adherence to the rules protecting the rights of petitioners is an exceedance of

legislative authority provided under ORS 469.490 and ORS 469.501. Limiting parties to "limited party" status who request "full party" status constitutes an agency decision that will adversely affect the petitioner and they are entitled to receipt of a final order stating the criteria considered in the decision. ORS 183.480 requires that "any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form.".

12.

Arbitrarily issuing a rule that denies petitioners the opportunity to be full parties to contested cases adversely affects and aggrieves the person's opportunity to participate fully in the contested case process. EFSC is not provided the authority to establish a contested case process that denies the public access to a fair and impartial evaluation of their requests for legal recourse and access to due process under the law.

13.

-- OAR 345-015-0014 Page 2

Removed and changed to relying on OAR 135-003-0505 . This makes a change that will preclude multiple non-profits from being able to participate in Contested Cases due to the financial demands. The change is not described in the material provided to the public. It makes the following changes:

a. Removes the statements in the Contested Case Notice that petitioners can request to participate as limited or full parties.

b. Notice is no longer required to be sent by registered or certified mail to those who can request contested cases.

--OAR 135-015-0014 (1)(h) requires non-profits to be represented by an attorney licensed in Oregon. Non profits can either be registered as unincorporated associations or nonprofit corporations. This change flies in the face of the stated intent of Oregon Energy Facility Siting Council Contested Cases being a Quasi-Legal process available to everyone.

This rule conflicts with Oregon Statute ORS183.457 (2) "Representation of persons other than agencies participating in contested case hearings." Which states "No rule adopted by a state agency shall have the effect of precluding lay representation."
This is a major change that is not identified in the public notice regarding these proposed rule revisions.

14.

--345-015-0403: Page 3

Including this statement misleads the reader into believing that petitioners may be allowed to be full parties. This rule revision states that all petitioners will be "limited parties" unless they are the only one participating in a contested case. The only ones given full party status are the developer and EFSC. All parties should be allowed to respond to requests for party status.

This is a major change that is not identified in the public notice regarding these proposed rule changes and as noted above, exceeds

the legislative authority provided to EFSC which does not allow them to control contested case procedures to limit access to due process .

Due to the extensive research required to request and argue a contested case, individuals often agree to have individuals take responsibility for a single topic and others focus on other issues rather than duplicating efforts. In the event that participants are not allowed to comment on issues brought forward by another petitioner, all parties with a similar issue who may have different objections to the issue or additional arguments will have to submit the same comments to establish standing and all parties will need to request contested cases and be allowed to argue the issue separately. Allowing only the developer and ODOE to comment on party status means all parties with the same issue must be allowed to argue the issue based upon the same public comments. These comments can be incorporated in multiple parties public comments by reference. The current practice as documented in the Contested Case Process for the B2H Amendment I states that one individual cannot rely upon the testimony of another one by reference. This interpretation conflicts with Oregon Statute 183.450(2) which states, "Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference."

14.

Restricting petitioners to "limited party" status as these rules currently propose requires that no contested case issues be combined under one presenter and no issues restated absent the agreement of

the person requesting the contested case. Currently full party status provides opportunities for concerns that may have been restated or combined under one petitioner the ability to argue when the issue is also one of their concerns. Combining issues or restating them denies limited parties the opportunity to argue issues which are combined and cannot be allowed under the amended rules if petitioners requesting full party status are going to be required to only be limited parties since doing so will deny them due process regarding those issues combined.

15.

--OAR 345-015-0405(4)(g) Page 4

The wording of this section exceeds the authority of hearings officers in any civil action in Oregon, let alone a "quasi-legal" process. This wording indicates that the hearings officer can limit the issues which are raised with sufficient specificity in the public hearing for "any purpose the hearings officer finds necessary ". This language is not included in OAR 137-003-0575. The section needs to be consistent with the rule being referenced. A decision that precludes an otherwise entitled petitioner from access to a contested case hearing or limits access to a contested case hearing on an issue that was raised with sufficient specificity requires an order identifying the reasons and including appeal rights. Such a decision is a "final order" based upon the fact that it results in immediate action to deny the petitioner the right to have their issue heard.

All verbiage following "Hold conferences, including one or more prehearing conferenc-003-0575 before or during the hearing.es as provided in OAR 137" should be deleted.

16.

--OAR 345-01-0415(3) Page 6

The presentation of this information is confusing and makes it less clear. Please change the rule to appear as follows:

"To have raised an issue with sufficient specificity, the person must:

1) Identify the recommended findings of fact or conclusions of law or conditions of approval which they object to
2) Identify the Council standard or other applicable state and local requirements on which their objection is based (and)
3) Present facts or statements supporting the objection on the record of the public hearing for the draft proposed order."

You are requiring 3 specific items. When they are listed in paragraph style it is not clear what the individual requirements are. This suggestion is intended to make the material more in line with requirements that rules be written in a clear manner.

17.

--OAR 345-015-0415(5)(b) Page 7

For purposes of understandability and clarity, suggest the following change from "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," change to "The issue statement is to be worded the way the person wants their issue to be stated for the contested case."

This suggestion is to increase the clarity of what is being requested.

18.

--OAR 345-015-0415(6) Page 7

As stated earlier, if the petitioner and EFSC are allowed to provide argument regarding party status, so should all petitioners.

19.

--OAR 345-015-0415(7) Page 7

This reflects substantial changes in several areas and should not be incorporated into the rules as it is prejudicial toward limited parties and precludes the provision of a "fair and unbiased hearing which allows participants to fully present their issues."

The language does not appear to allow limited parties to respond to or use material that is relevant to their issue, but is included in another parties contested case issue, filings, exhibits, discovery, etc. Given the overlap of issues, material presented or responded to in another contested case may be relevant to a limited parties issue. In addition, interrogatories, discovery, and opportunities to interview parties who may have information relevant to the issue a limited party is arguing

have previously been accessible to all parties and issues where the information is relevant to any issue being heard.

The paragraph should not state, “including proposed site certificate conditions”. As noted in other comments to the council, in the past Site Certificate Conditions have been added, removed and changed through such actions as Summary Determinations. Site Certificate Conditions establish the requirements for developers to meet council standards. Changes that occur in Site Certificate Contested Case actions do not legitimately preclude the opportunity for public review, comment and objection to the changes. All limited or full parties participating in any contested case action should be provided the opportunity to respond to any and all changes to these conditions proposed or occurring at any time during a contested case procedure.

20.

--OAR 345-015-0018 Page 7

This language should not be removed. It is consistent with the requirement in ORS 183.457(2) which states that no rule adopted by an agency can preclude lay representation.

21.

--OAR 345-015-0420(2) Page 8

This paragraph should be removed. It defines “indigent” as having an income level that is less than the income levels used in Oregon to determine eligibility

for public assistance, medical assistance, food assistance, heating assistance. It also requires the liquidation of resources that Oregon Assistance Programs do not require.

The determination of "indigent" should not be determined by a hearings officer. There are multiple state agencies with the expertise who are in the business of determining need based upon being "indigent". According to the United States Department of Health and Human Services indigent is when income falls below 125% of the federal poverty level. In a court setting "indigent" is an individual who lacks means to hire a private attorney per Gideon v. Winwright. In court cases it is also an individual who may rely on government assistance programs, community support, or charitable organizations to alleviate their poor circumstances. A determination of indigent status in the legal realm means the individual is to be provided an attorney without cost. EFSC is already failing to comply with requirements pertaining to an individual being indigent since they fail to provide an attorney without cost. Little accommodation is provided to "indigent" individuals in EFSC rules without defining it more restrictive than the courts. This rule needs to be revised to define indigent consistent with public assistance agencies. In addition, the rule must provide for funding the petitioners to pay for Legal representation for those individuals who are indigent as is required in Oregon courts.

> Item 2 should be revised to state: "Indigent" means the person has been determined eligible for a state program providing benefits to low income individuals and households or who document that their

income level is below the standard for eligibility for a state program providing benefits to low income citizens.

22.

--OAR 345-015-0425(l) Page 8

I commented during the RAC regarding the fact that government agencies and groups who provide input regarding the application as Special Advisory Groups should not be required to repeat their concerns during the public hearings on the Draft Proposed Order to request a contested case. They should be allowed to rely upon the written input they provided as SAG's. I continue to question why the rules require this additional requirement given the fact that the information was requested as part of the evaluation of the application.

23.

OAR 345-015-0430 (4)

The hearings officer's order on party or limited party status and issues to be heard as contested cases is a final order under ORS 183.310(6).

This rule requires the issuance of a timely Order of Denial meeting the requirements of ORS 183.470 including referencing ORS 183.484 as the appeal opportunity for a non contested case.

ORS 183.484 states that orders on other than contested cases are provided consistent with ORS 183.470.

24.

The rule stating that those denied standing or issues can only appeal to the Council when the individual would have no standing and no other issues remain to be heard needs to also include the requirement that an Order addressing all issues denied access to a contested case be issued including the right to appeal the denial under ORS 183.484.

25.

OAR 345-015-0430 (7):

Objections to the description of an issue should not be included here. Petitioners are not aware of the final wording of issues until the hearings officer issues their Order stating party status and issues. The opportunity to object needs to occur after the order is issued and the petitioners see the language being proposed.

Item 7 needs to require hearings officers to notify the participants in writing prior to the pre-hearing conference that objections to procedures discussed during the pre-hearing conference will be waived if not objected to during the pre-hearing conference.

26.

OAR 345-015-0430(8):

This requirement appears to be unnecessary and repetitious. Petitioners are required to state their issues in their requests for contested cases. Requiring them to raise them again during the pre-hearing conference is not necessary. If there is some reason the issues need to be confirmed, the hearings officer

should be required to confirm that the issues remain as stated in petitioners requests for contested cases.

29.

OAR 345-015-0440 Page 10

The list of enabling statutes including ORS 183.341, ORS 183.417 and ORS 183.470 do not appear to include information related to this new rule.

This new rule places the burden of proof on the petitioners. The burden of proof lies equally upon the developer and the agency as it does on the petitioners. All parties must prove their position or document facts being claimed. ORS 183.450(2) 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."

30.

OAR 345-015-0475 which replaces ORS 345-015-0085 Pages 13 and 14

This rule involves a wholesale removal of rights of all parties in contested case hearings are provided under Oregon Statutes including ORS 183.413(2)(e) as described previously.

This rule change removes the previous right of all parties to propose site certificate conditions necessary or appropriate to comply with the policy of ORS 469.310 and to meet the requirements of other statutes, administrative rules and ordinances.

The new rule denies parties the opportunity to respond to other parties recommended site certificate conditions.

31.

Item 5 states that parties to contested cases can only object to the hearings officer orders related to the specific issues they have been granted standing on as opposed to the rights provided in ORS 469.413.

32.

Following are some rules and statutes which conflict with the rule revisions being planned or which are being overlooked in the proposed language. Council should read the content and requirements of these rules and statutes and compare them with the language they are being asked to approve:

OAR 345-027-0371(9) sets the standard used to determine whether a party is entitled to a contested case proceeding.

OAR 345-027-0371(10) the action EFSC must take in responding to requests for contested cases.

ORS 183.310(2) (a) defines "contested cases" as a proceeding before an agency

"(A) In which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing in which uc specific parties are entitled to appear and be heard."

"(D) Where the agency by rule or order provides for hearings substantially of the character required by ORS 183.415,(Notice, hearing and record in

contested cases) 183.417(contested case hearing procedures), 183.425(testimony and discovery in contested cases), 183.450(evidence in contested cases), 183.460(agency examination of evidence in contested cases) and 183.470.(orders in contested cases)"

According to the Statutes and rules cited above, Orders denying a party access to a contested case are not "contested case orders". They are "other than contested cases" addressed under ORS 183.484, ORS 183.310(2)(a) and are addressed by the Circuit Court under 14.165(5)(a) A timely notice of denial must be issued which complies with ORS 183.470.

ORS 183.413(2)(e) and ORS 183.413(l) "party has the right to respond to all issues properly before the presiding officer and present evidence and witnesses on those issues."

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

This rule does not allow an agency to deny full or limited parties the rights that state and federal statutes and laws provide them including ORS 183

ORS 183.450(3) "Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence.

While the agency can by rule establish limitations on limited parties, they cannot preclude limited parties from cross-examination or submitting rebuttals of any witnesses who are testifying on issues that are included in the limited parties issues accepted for contested cases.

23 Comments regarding the Contested Case Rule Revisions

ORS 469.370(7) Requiring the public to comment on Council changes to the Proposed Order and/or site certificate conditions during the same meeting that the changes are made meets the strict language of ORS 469.370(7). It does not, however, meet the intent of providing the public an opportunity to consider and comment on the impacts of the changes. If council would allow the public to have 3 or 4 days following the council meeting to comment on the changes prior to approving the Final Order it would likely avoid some contested cases by allowing the public to have concerns heard without having to ask for a contested case. The council could do their final approval by teleconference following receipt and consideration of public comments on the changes they make.

32.

CONCLUSION

Council should promulgate rules which incorporate the language of the Model Rules in their entirety rather than stating they are using the model rules and then promulgating pages of changes that are focused entirely on denying the public access to contested cases and due process.

This proposed rule change represents an extreme abuse of Power on the part of the Oregon Department of Energy. The rules codify actions which provide an overreach of agency discretion identified previously in documents such as the Amicus Brief submitted by Anne Morrison to the Oregon Supreme Court which documented the following concerns with the Oregon Department of Energy actions in the B2H contested case process:

They "Disregarded Public input; Argued against allowing the public standing in a contested case; rephrased petitioners contested case issues; argued that all petitioners should be limited parties; Blocked petitioners attempts to obtain discovery; argued that petitioners failed to raise valid issues; Moved for Summary Determinations against petitioners; Supported Idaho Power's summary determination requests to remove site certificate requirements; argued against petitioners based upon merits; advised council to deny all contested case requests."

Contested Case rulemaking comments

fkreider@campblackdog.org <fkreider@campblackdog.org>

Fri 4/12/2024 5:26 PM

To:EFSC Rulemaking * ODOE <EFSC.RULEMAKING@energy.oregon.gov>;CORNETT Todd * ODOE <Todd.CORNETT@energy.oregon.gov>;JACKMAN Tom * ODOE <Tom.JACKMAN@energy.oregon.gov>
Cc:Jim-campblackdog <jkreider@campblackdog.org>;loisbarry31@gmail.com <loisbarry31@gmail.com>;Matt Cooper <mcooperpiano@gmail.com>;'Irene Gilbert' <ott.irene@frontier.com>;Charlie Gillis <charlie@gillis-law.com>

2024-04-12_CC RulemakingComment_Stop B2H Coalition.pdf;

Dear Thom and Todd,

Please accept these comments on behalf of the Stop B2H Coalition regarding the Contested Case rulemaking. I hope that you can forward these to Council members ASAP. They are complex and I'd like for them to have plenty of time in advance to read them. Sorry I missed 5:00 pm – in case you were sending them their packets for the meeting. Still, I know the deadline isn't until next week. I verbally told them at the hearing that I'd send these detailed comments as soon as I had them together and approved, because it's a lot.

Hope all is well over there. It's spring here—all four seasons in one day!

Thanks,
Fuji Kreider
541-406-0921
PS: I am going to submit these via the portal too (for practicing & testing) – but, it will be an identical submission.

STOP B2H Coalition
60366 Marvin Road
La Grande, Oregon 97850
www.stopb2h.org
info@stopb2h.org
541-406-0727

April 12, 2024

Thank you for the opportunity to comment on the proposed rules for Contested Cases under the Energy Facilities Siting Council (EFSC). As mentioned during oral comments last month, the Stop B2H Coalition and many of its members, experienced a full and lengthy contested case process under the old rules which also included the blended Model DoJ and OHA rules. From what we've been told, this was one of the largest and most complex contested cases in a very long time.

As "guinea pigs" in a way, we can speak with first-hand knowledge about living through a contested case, mainly as "pro se" petitioners. We hope that these comments and our experience will be taken under serious consideration. The public is depending on the Council to adopt rules that not only site clean energy facilities but also protect Oregonians, our public health and safety, and our precious natural and cultural resources.

Our comments (below) are organized to align with the chronological order of the redlined version of the proposed rules. They are NOT organized by importance or priority.

1. Division 1 General Provisions – Ex Parte Communications.

Location in Redline: Under Division 1 General Provisions, 345-001-0005 – Uniform Model Rules Subsection "(2) Notwithstanding the provisions of OAR 137-003-~~0055~~ 0660(1), following…"

Recommendation: Do not omit this Subsection "-0055," and include two additional provisions: OAR 137-003-0625 and -0660. The latter is proposed in the staff redline version.

Rationale: There are three rules addressing ex parte communications. These three provisions deal with different parts of the process: 137-003-0055 Ex Parte Communications, applies during the pendency of the proceeding; OAR 137-003-0625 addresses Ex Parte Communications with an Administrative Law Judge; and 137-003-0660 is about Ex Parte Communications to Agency during Review of Contested Case (review of the contested case). They all apply and should be retained in these rules.

Since they are all the OAH's rules and you can't change them, our advice is to just cite them all under your changes to: 345-001-0005(2), because ex parte can take many shapes and forms: to the ALJ, to ODOE, or EFSC, or even in another proceeding; therefore, it is better to include them all.

We share this example from our experience with ex parte communications during our contested case. Interestingly, it occurred during a rulemaking process – it was not directly within the contested case proceeding. However, the outcome of the rulemaking was going to impact some petitioners' contested case. Idaho Power testified and advocated at the rulemaking directly to EFSC. The ALJ in our contested case (and to her credit) found out and ruled that ex parte had occurred by IPC's attorney and that petitioners in the case could submit a response (7 petitioners did so.) This example shows that one never knows where and when an ex parte could occur.

2. Division 15 (i.e.: the EFSC specific rules) - Overall Comments.

- STOP endorses the use of the word "proceedings" rather than "hearings" for contested cases, since there are many types of hearings (e.g.: public comment hearings, cross-examination hearings, exceptions hearings) within a contested case proceeding.
- For the most part, STOP likes the re-arrangement of Division 15; having the order of sub-sections match as close as possible to the flow of contested case proceedings. However, we do not understand why "Notice" (345-015-0014) is not part of the 400 series (new rules and/or numbering for the EFSC contested case rules.)
- We suggest the use the full name of the Energy Facility Siting Council (EFSC) in all rules and only use the shortened vernacular: "the Council" in subsequent sentences within the same rule. It is confusing for people new to EFSC otherwise.
- The use of a Naming Convention or numbering system for all documents and evidence needs to be conveyed from the start. This could occur under: 5. Filing and Service of Documents; or 9. Prehearing Conference and Prehearing Order; or 12. Submission of Evidence.
- The descriptions of "specific specificity" such as in 345-015-0220, is greatly improved, and warrants a special call-out.

3. Notice.

Location in Redline: Under Division 15: 345-015-0014.

Recommendations:

1) In keeping in line with the rulemaking goals of "consistency" and "efficiency," STOP recommends that "Notice" (OAR 345-015-0014) and "Requests for Party or Limited Party Status" (OAR 345-015-~~0016~~ 0415) contain the same required information AND that you adopt the more detailed requirements, if you will be holding people to the higher standard. If the "short and plain statement" and/or the use of the Template would suffice, then STOP believes that it (the template) would be much more user-friendly and palatable to the general public.

Rationale and Comment:

The proposed language states: “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 proceedings under the federal Servicemembers Civil Relief Act as described in ORS 183.415(3)(g).” **Emphasis added.**

Under OAR 137-003-0505, subsection (2) states: “A short and plain statement of the matters asserted or charged and a reference to the particular sections of the statute and rules involved;”

We believe that this is reasonable. The template that staff had developed as a tool, will also be good. The problem that we see is that, “plain statements” even with OARs cited, often do not meet the high bar of “specific specificity” that seems to be a criteria for all ODOE/EFSC decisions. Under: 345-015-~~0016~~ 0415 - Requests for Party or Limited Party Status (discussed more below) has much more specific language regarding petitioning for a contested case.

> (4~~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~~0535(~~3~~4);
>
> (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.

2) Nonprofit organizations or associations should not be required to have legal representation to participate in a contested case, per OAR 137-003-0505 (1)(h), which would be adopted under this blended rule.

Rationale: Nonprofit organizations should be encouraged to have an attorney representing them considering the complexity and high bar that is involved in a contested case. However, it should not be a mandatory requirement because it conflicts with ORS 183.457(1) “…The Attorney General shall prepare model rules for proceedings with lay representation that do not have the effect of precluding lay representation. No rule adopted by a state agency shall have the effect of precluding lay representation.”

We believe that EFSC and the values of the State are to strive for more inclusiveness and participation, not less. In our case, the need for an attorney nearly bankrupted our organization, and we even received reduced rates. Meanwhile, another nonprofit, was allowed to participate in the case without an attorney. We did not call-out this bias because we knew that they couldn’t afford attorneys either, and we were happy that they, a member organization of the Stop B2H Coalition, was actively participating. We feared that they would have been denied participation if we raised the issue.

4. Appointment and Duties of Hearing Officer.

Location in Redline: 345-015-0~~023~~405

Recommendations:

1) See Recommendations under "Filing and Service of Documents in a Contested Case" (below). If the Council chooses to adopt our recommendation, then duties will need to be added here, such as maintaining the docket.
2) Under Redlined Subsection "(3) The hearing officer shall maintain a complete and current record of all motions…"-- or as a stand-alone Subsection-- STOP recommends ADDING that the record be maintained and available for all to access - throughout the duration of the case.

Rationale: One of the worst parts of the entire contested case experience, for all petitioners in our case, was the lack of a transparent record! Everyone had to share and keep their own files, as well as other petitioners' files (if they chose) – on their own; using their own hard drives, with attachments and emails. Many files posted by ODOE or the developer used names so long that personal computers couldn't save the files without changing the name. What a mess. The point is that there was not a transparent or publicly available site where a petitioner or member of the public could go and see what was filed, by whom, including exhibits.

Comment: Alignment with the OAH's rules is helpful here, particularly since EFSC contemplates predominately using Administrative Law Judges from the OAH.

5. Filing and Service of Documents in a Contested Case

Location in Redline: Under Division 15: 345-015-0~~012~~410

Recommendations:

1) STOP strongly recommends that the Department acquire and use a fully-docketed system for contested cases. This type of a system supports Filing and Service of Documents in a legal way, provides more efficient and effective record keeping throughout the contested case, enables transparency, and reduces confusion.

2) If the Department is unable to purchase or acquire such system on its own, our recommendation is to add a condition (i.e.: utilization and maintenance of a docket system for the case) to the terms of the contract with the Department of Justice (DoJ) or any other entity contracted with for the purpose of conducting a contested case for EFSC.

3) The naming conventions or other marking of documents in the record should be explained thoroughly. This could occur under this subsection or under another. We recommend that be clarified here under this subsection.

4) Finally, we have no recommendation specific to the rule language. The rule currently reads:

(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. **[Emphasis added.]** With the wording "but are not limited to," we feel that would cover any new electronic docket system.

Rationale: See above under "Appointment and Duties of Hearing Officer"

Comment and Concerns: The new ODOE portal is being promoted for public comment filings (in ODOE's Public Guide and recent notices). This is fine, but it is not a substitute for a docketed system for contested cases. The new portal system is not being used very well; and it appears to only be for public comments – not for a contested case docket where it is expected to have the ability to upload large attachments, like maps and other evidence. This is a big concern and we cannot urge the Department and Council enough, that you MUST get a better system (a full docketed system).

6. <u>Requests for Party or Limited Party Status</u>

Location in Redline: Under Division 15: 345-015-0~~016~~415

Recommendations and Rationale:

1) The section begins with the removal of the OAH model rule 137-003-0005(2) and substituting various EFSC and other OAH rules. However, that model rule in full: OAR 137-003-0005 covers the topic of Party or Limited Party very well and should simply be adopted, rather than the convoluted combination and omission of clauses.

   Rationale: It is apparent, that these proposed rules are intended to make everyone a limited party unless they are the sole petitioner in opposition for the case. We even heard as much during RAC meetings, and it is a complete disservice to the public. Just because the B2H case started with 51 petitioners is not fair to people or organizations going forward. The number of requests or petitions for party status should not prescribe the type of party status. Criteria should apply to the decision and petitioners should be formally notified of the decision/order on party status by the ALJ, as stated in the full model rule 137-003-0005.

   The Oregon Supreme Court decision in the Final Order for the Stop B2H Coalition's appeal of the B2H Site Certificate identifies the specific criteria stated in OAR 137-003-0005 and determined that the hearings officer reviewed the criteria prior to deciding to make petitioners "limited parties." We have grave concerns that the new rules, removing these criteria, give the Department and an ALJ too much discretion without having to justify the decision to limit someone's status, when they have requested full party status.

2) We urge the Council, to better protect the resources of the state, to amend proposed Subsection (6) which states: "…but may not participate on issues, including proposed site certificate conditions, for which the hearing officer has not granted them standing to participate." We understand limited party status parameters around specific and narrow issues as proposed; however, we firmly object

to limiting any parties' recommendations on site conditions. (This is also discussed below under "12. Submission of Evidence and Site Conditions.")

Rationale: We have learned that over the course of a contested case, so much is learned. It is iterative in many ways: discovery processes, overlapping issues reveal new evidence, and protective measures that cross-disciplines or resources, can and should be heard, and considered. We believe that better decisions are made when broader perspectives are considered, rather than silo-ed decision making that occurs when input is limited by strictly prescribing recommendations.

Take for example: a petitioner has a contested case regarding something about fish and wildlife habitat (e.g.: fish surveys, fish plans or passages); but when it comes to recommending mitigation measures (site conditions) under Roads, or Weed Control/Vegetation Management, or Public Services, this fish petitioner may have a lot to contribute. However, this fish petitioner chose not to go through a whole contested case on roads and weeds—only on fish. When it comes to recommending site conditions, there should never be a limitation on who can contribute. This fish petitioner may have a lot to share.

The dedicated people/petitioners that already have standing of some kind, and have participated through the whole process, should be able to make final recommendations on the Site Conditions. Therefore, STOP recommends that there not be any limitations placed on parties in terms of their recommendations on Site Conditions.

3) There needs to be a final Subsection addressing Appeal Rights for Parties.

   Rationale: If a petitioner is denied access to a contested case or there are procedural disputes, parties need to be informed of their appeal rights. This is particularly important given recent court precedence set in Union County, i.e.: that appeals may be heard in the local jurisdiction. Only final orders on site certificates or amendments are appealed to the Supreme Court.

   Example on impacts: During our contested case, we had an unfortunate experience with: the lack of the ability to appeal procedural issues or party status on an issue. One of the petitioners was told that since he still had another issue pending in the case—but not his primary issue--he could not appeal. Rather, he had to wait until the entire contested case was over and then he could appeal to the Supreme Court (that was 2 years later!) This was a complete disregard for the public's due process. The delay not only jeopardized the whole case, it was a set-up for a Supreme Court ruling for mootness since the case had already occurred. A terrible disservice to rule of law and the rights of due process.

7. <u>Petition for Indigent Status</u>

Location in Redline: Under Division 15: 345-015-0~~022~~420

Recommendation: Under proposed Subsection (2) the definition of indigent, should not be used.

Rationale: 100% of poverty is rarely used these days, and especially not in Oregon. STOP recommends that ODOE use a definition more aligned with its other energy programs. Or, at least be consistent with another state agency, OHA (for Oregon Health Plan); DHS (for SNAP); etc.

8. <u>Participation by Government Agencies</u>

Location in Redline: Under Division 15: 345-015-0~~080~~425

Recommendation: Omit.

Rationale: We do not see that there is anything different for government agencies than there is for the public. Why have this Section? Unless there is something new for SAGs, we think this can be omitted.

9. <u>Prehearing Conference and Prehearing Order</u>

Location in Redline: 345-015-0~~083~~430

Recommendations and Rationale:

1) Keeping within a logical flow and order, we suggest re-arranging the order of some of the clauses within this subsection:

   a) Switching/reverse the order of (1) and (2).

      Rationale: Subsection (2) as proposed, is the big picture and cites the OAH rule governing. It describes the manner in which the pre-conference hearings are conducted, including noticing and purposes. This should be number/subsection (1). Then, what is proposed in redline as (1) should become (2) because it is a deeper clarification and more of a subset.

   b) Inserting both (7) the drafted new redlined clause, and newly numbered (7) (confusing-due to misnumbering), BEFORE subsection (3).

      Rationale: The point being that these subsections: 'failure to raise the issues' or 'object to procedures' has to happen at this pre-hearing conference. Again, the importance of this "hearing" cannot be stressed enough. We recommend that these two clauses be moved here, before the discussion of the ALJ finally issuing "The Order" (which is in subsection (3)). This would improve the "flow" or order of the clauses under this Subsection.

2) Then, assuming these are re-ordered, under (2), it should begin with: "At the first (or series of first) pre-conference hearings, the ALJ will be making decisions on standing, party status, issues and issue statements. "

   Rationale: This would emphasize the important of this first "hearing." In our experience as pro se's, we were completely blind-sided by the importance of that pre-hearing conference (the name "pre-hearing" even implies lesser weight). Petitioners were not at all prepared for presenting or defending their status and issues. When they answered questions of the ALJ, they did not realize the issue statements would become their case.

3) STOP also recommends additional clarity under this re-ordered subsection (2), for example: is attendance at pre conference mandatory? What rights are in jeopardy by non-attending? If these procedures are discretionary for the ALJ, or if they are mandatory, it must be noticed as such.

4) Finally, STOP objects to the last sentence as proposed in the re-ordered, subsection (2). It states:
   "The hearing officer shall consolidate one or more issues raised by the same or multiple parties if the hearing officer determines the issues raised are substantially similar to one another and consolidation would expedite the hearing while still ensuring a full, fair, and impartial hearing."

   Rather, STOP recommends the following: a) make this a separate subsection from the rest of the clause; and b) omit the word "shall" and make this optional, and ONLY if the parties agree with the ALJ regarding the co-joining of the parties and/or issues.

   Suggested edits in **bold**: "The hearing officer **may** consolidate one or more issues raised by the same or multiple parties if the **parties agree to the consolidation and the** hearing officer determines the issues raised are substantially similar to one another and consolidation would expedite the hearing while still ensuring a full, fair, and impartial hearing."

Rationale: This co-joining or consolidation of issues & parties should only be allowed if the parties agree to it, or request it. While it may sound efficient for the Department or ALJ, it completely disregards the rights of public. Consider that most petitioners either: do not know each other, or if they do, it's not like they've worked together in one organization or team. Can you imagine getting pushed into a case with someone: who you don't know, who may not bring value to your case, who has different motivations or frameworks (eg: hunter vs bird-watcher), or who takes up more precious time (for better or worse) because of the necessary coordination. This does NOT create efficiency!

In our case, the ALJ attempted to co-join a number of cases, but it became so obvious to the ALJ's credit, that there wasn't a way she could do this fairly. Some people lived hundreds of miles away from each other, some had good internet and some don't; some put a ton of work into their case already and needed to be heard but their co-petitioner was louder, and some had a related issue, but with a slight twist, and on and on…

It wasted more time trying to co-join, then objecting, and then finalizing some. We had one issue that was co-joined because it was with another Stop B2H member. However, we are all volunteers; we never worked together before and we started from very different knowledge levels. It took time to learn from each other and try to coordinate tasks. In the end, it was added stress, a lot of wasted time, and was not more efficient.

10. <u>Suspension of Hearing and Exclusion of a Party</u>

Location in Redline: Under Division 15: 345-015-0~~024~~435
No comments

11. <u>Burden of Presenting Evidence (NEW RULE)</u>

Location in Redline: Under Division 15: 345-015-0440

Recommendation: STOP has no disagreement with this new rule. However, in the spirit of clarity and reducing confusion, we recommend that an additional subsection clarify this "burden of proof." The

reality is that the burden is iterative throughout the process; in other words, the burden goes back and forth in the contested case depending on the phase of the case and/or which party is making the motion against the other.

Rationale: In our experience, the burden of proof was continually going back and forth because the developer was relentless in filing intervening motions (e.g.: motion to dismiss, motion to object, motion to omit, etc.) after every step in the process (or so it felt that way for the pro se's). Therefore, rather than working on presenting their evidence for the next phase, parties were forced to respond in seven days to the objectionable motions. This was a huge distraction; creating confusion and complications for many.

12. <u>Submission of Evidence and Proposed Site Certificate Conditions</u>

Location in Redline: Under Division 15: 345-015-0~~043~~445

Recommendations and Rationale:

1) At the very end of subsection (1) ADD: "per the schedule and means set forth by the ALJ."
Rationale: This helps to reduce confusion. It can include explanations such as: is it allowable to use a link to a storage device for excessively large documents, what needs to be copied/shared in full or if excerpts of documents are allowable, and more. This could also be a place for naming/marking conventions – if not covered already (see above under 2. Overall comments and 5. Filing of Documents…).

2) STOP strongly opposes the newly proposed subsections (2) and (3) with regard to who can propose Site Conditions and when in the proceedings. We suggest two possible resolutions to this:

2a) Strike-out the sentences as shown below:

(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 respond to any other party's proposed site certificate conditions ~~related to issues for which the responding party or limited party has been granted standing~~ according to a schedule set by the hearing officer.

Rationale: Similar to above, "6. Requests for Party or Limited Party Status," we object to limitations being applied to the limited parties in these proposed rules regarding Site Conditions.

These limitations (under (2) and (3) and under 345-015-0~~016~~415) are new statements and clearly benefit the Department and developer to expedite proceedings and limit parties' contributions to

Site Conditions. Those being the protective mitigation and/or other conditions designed to assure protections to Oregonians and our precious resources.

We have learned that over the course of a contested case, much is learned, clarified and disposed of. It is iterative in many ways, and the final recommendations for site conditions should be the "capstone" or final step in concluding the case. Ideally, the "Submission of Evidence and Proposed Site Certificate Conditions" would be separate rules. In the latter, the procedure would include the time and manner for recommendations to site conditions and if response briefs will be accepted.

Or,

2b) Peel away the Site Conditions from this Rule and make a unique Rule for Site Conditions. We recommend the new rule could include language such as: "notwithstanding any draft site conditions that are the subject of a contested case by a party, the ALJ will allow recommendations on any site condition by any party or limited party before the conclusion of the case (or before the draft proposed contested case order is issued by the ALJ.)"

Rationale: The point being is that after the all the facts, evidence, and lessons learned, all participants in the case have gained new insights and should be afforded the opportunity to recommend conditions. They should be provided with evidence, per the rules and means that the ALJ sets out, for the ALJ's consideration (and those of the other parties), near the end of the case as a stand-alone step (preferable) or as part of closing briefs. One response brief could also be provided, if fairness was assured.

13. <u>Official Notice of Evidence</u>

Location in Redline: Under Division 15: 345-015-0~~046~~450

Recommendation: Unless "officially noticed" is defined somewhere else, it may be helpful to define it or insert (see Bold) under: "(2) The hearing officer shall notify parties of facts officially noticed **and entered into the record,** and shall allow parties an opportunity to contest the facts so noticed."

Rationale: More clarity of legal terms is helpful to the public.

14. <u>Motions</u>

Location in Redline: 345-015-0~~054~~455

Comment: There may be confusion regarding timeframes, since the OAH rules mention 14 days, not 7. Albeit, the ALJ has discretion on longer or shorter timeframes.

15. <u>Interlocutory Appeals to Council</u>

Location in Redline: 345-015-0~~057~~460

Recommendation: STOP recommends that appeals be allowed regardless of status in the pending contested case. And, that all Council decisions be formally issued as an Order of Denial/Approval of the Appeal.

Rationale: At face value this proposed rule seems very reasonable. But in practice we experienced differently. The "wrongs" that many public pro se petitioners felt had to do with procedural mis-steps or perceived improprieties. The inability to appeal their grievance to Council thwarted cases (e.g.: Soil protection issue evidence), and worse, where an issue never got heard (as described above under Party and Limited Party Status.

In that case it was suspicious that the weakest of the petitioner's issues was given standing, maintaining his participation as a limited party. He felt railroaded by this decision but could not appeal (i.e.: take the issue to court) to seek resolution on his issue—until two years later. But by that point the issue was moot. The site certificate was granted. The primary issue never got a full hearing due to this rule on interlocutory Appeals.

Therefore, STOP believes that this rule is problematic based on simple fairness. Just because a petitioner may have standing on one issue should not preclude them from being able to bring a timely appeal before the Council if they feel they have been harmed.

16. Stays - 345-015-0465

No comments.

17. Reopening Record Prior to Decision - 345-015-0470

No comments.

18. Hearing Officer's Proposed Contested Case Order

Location in Redline: 345-015-0~~085~~475

Recommendations:

1) Consider breaking into two rules: one with the Exceptions phase and the Actions of the ALJ; and the other addressing the Council's decisions and Final Order. Or alternatively, change the title to incorporate everything within.
2) Appeal rights should be included in the Final Order rule as well.

Rationale: Greater clarity of title to contents. This rule goes beyond the Hearing Officer's actions and moves into the actions/decisions of the Council. Appeal rights at the conclusion is an important due process step.

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

No comments; or See Above under 3. Notice. Use the same language everywhere.

20. Council Review and the Department of Energy's Proposed Order - 345-015-0230
No comments.

21. The Decision-Making Record

Location in Redline: 345-015-0~~085~~475

Recommendation:

1) This should include "who" maintains and is the keeper of the record; and how the record will be accessible to the parties, and the public.

Rationale: Is it the ODOE or is it the DOJ during the contested case? Often in our case, STOP and other parties were asking ODOE staff for documents and the answer was that it was the DoJ responsibility to maintain the case record. The problem was that the DoJ did not have a transparent system, and there was no way to access the records/files in the case from the steps prior unless you kept your own records.

2) Do not remove case files or other materials from the ODOE project website; or archive them in the One Drive but allow access.

Rationale: Plain and simple this has been another unnecessary hassle and barrier for the public and parties involved in the case. The older files get removed and those were the ones that we may have been citing in the past or we want to compare and contrast something we remembered from earlier, and more. People go to where they have gone before only to find it inaccessible. This removes the transparent record that we believe EFSC is striving to achieve.

Conclusion and Final Recommendation

At the end of the B2H contested case, the idea of Intervenor Funding was raised and some Council members wanted to learn more as it sounded like a way to level the playing field—at least somewhat—for nonprofit petitioners and possibly individuals. In particular, if attorneys are being required, some kind of intervenor funding or pro bono program is essential for contested case petitioners and ensuring a fair proceeding. The Oregon Public Utility Commission administers an intervenor program, so models exist.

Stop B2H Coalition has many concerns about these proposed rules as detailed above, and we urge the Council not to approve them. The draft should go back to staff and the RAC for more work. The convoluted combination of rules is not reaching the goal of simplifying and clarifying the procedures for the public, or for the parties involved. Worse, we believe these rules are a smoke screen of confusion when in reality they are reducing the rights of the petitioners.

It may be prudent to simply adopt the model rules, contract the ALJ's from the OAHs, and be done.

Attorneys in Oregon are more versed in the procedures used by the OAH and other state agencies; therefore, it could facilitate smoother proceedings as well.

If you have any questions, we would be more than happy to answer them or discuss based on our experiences. Fairness within these rules is essential for leveling the playing field among developers, the public and the Department.

Thank you for your attention to this important rulemaking.

Sincerely,

C. Fuji Kreider
Secretary/Treasurer
On behalf of the Stop B2H Coalition Board of Directors

Comments regarding the Proposed Contested Case Rule Changes.

Greg Larkin <larkingreg34@gmail.com>

Thu 4/18/2024 10:14 AM

To:JACKMAN Tom * ODOE <Tom.JACKMAN@energy.oregon.gov>
Cc:HATCH Nancy * ODOE <Nancy.HATCH@energy.oregon.gov>

IRENE GILBERT Comments on Contested Case Rules.docx;

[Some people who received this message don't often get email from larkingreg34@gmail.com. Learn why this is important at https://aka.ms/LearnAboutSenderIdentification]

Tom:
Attached is my formal comments regarding the Proposed Contested Case Rule changes. Please see that these comments are included in the record of comments to protect the opportunity for appeal.

Note: Irene Gilbert has given me permission to use her comments submitted on April 11, 2024. I fully concur with and support her comments in the document that I am submitting.

Thank you,
Greg Larkin
59655 Morgan Lake Road
La Grande, OR 97850
(541) 805-1474

To: Energy Facility Siting Council April 11, 2024

From: Irene Gilbert on my behalf and representing the public interest

Subject: Amendment to Rules regarding Contested Cases Public Comments

I am making these comments based upon having been involved on an ongoing basis with the decisions of EFSC and ODOE regarding Site Certificates and Amended Site Certificates for Energy Developments for over a dozen years representing both my own issues and as representative of the public interest. I have participated as Legal Research Analyst for Friends of the Grande Ronde Valley and as co-chair of Stop B2H. More importantly, I am one of many individuals who experienced first-hand the contested case process from start to finish with the B2H application including appeal of the final order to the Oregon Supreme Court. In addition, I am in the process of obtaining an order on a Request for Reconsideration of a Procedural Issue before the Union County Circuit Court.

I also spent many years working for state agencies as a line worker, supervisor, and trainer responsible for the interpretation, implementation and training regarding state agency rules. During one of those years I was the Medical Issues Coordinator for Workers Compensation Department working directly under the Administrator as a part of her Executive Staff. I was the agency contact person for medical providers, insurers, injured workers and others regarding questions related to a large workers compensation reform bill passed that year. I provided the director with interpretations, and impacts of the bill and amendments to the bill, participated in development of rules

supporting the final bill and developed and presented training to insurers and employers regarding the new recordkeeping requirements.

My comments are based on the plain language of the proposed rule, how the changes will impact the public's ability to access a fair and impartial contested case process, and whether or not the changes comply with Oregon Statutes, Rules and Court decisions. I

I have incorporated my comments to council during the March 22, 2024 EFSC meeting, comments from my review of additional pages of the proposed rule changes, and comments from my participation in the RAC for this rule which were not incorporated into the draft provided to the council. The yellow areas are areas I ask the council to pay particular attention to.

OVERARCHING CONCERNS

1.

This rule revision removes OAR 137-003-0001 through OAR 137-003-0092.

The removed section covers topics important preserving the rights of the public such as what must be included in Contested Case Notices, public Rights, participation as a "full party" or "limited party"; procedures included in contested case hearings, rules regarding Discovery, what can be provided as Evidence; and rights to reconsideration or rehearing. The revision added OAR 137-003-0501 through OAR 137-003-0700 addresses the role and responsibilities of hearings officers. The section is entitled, "Rules for Office of Administrative Hearings" and the remainder of

the rules provide information regarding the actions and authority of Hearings Officers. OAR 137-003-0001 through OAF 137-003-0092 and OAR 137-003-0501 through OAR 137-003-0700 are not mutually exclusive. One set establishes rules regarding the public and their role and the other establishes rules for the hearings officer.

2.

1. OAR 345-027-0375(4) requires the Department to explain the amendment process, including the means and opportunities for the general public to participate in the process. ORS 183.341(4) states that agencies rules must provide a reasonable opportunity for interested persons to be notified of the agencies intention to adopt, amend or repeal a rule.

The notice described the changes as being insignificant stating they would reorganize rules, improve consistency by matching them with Oregon law and other admin. rules, provide additional definitions' and enhancing existing ones.

The description included in the Public Notice of the Opportunity to comment on this rule revision fails to state that the new rule removes the public rights or what rights and information are being removed or substantially changed. This document identifies areas that I have identified which should have been identified in the notice to the public of the rule changes which includes:

a. The rules proposed do not match or substantially comply with existing Oregon law contained in ORS 183 due to removing requirements that protect the rights and information that must be provided to the public.
b. The multiple “additions” and “clarifications” change the procedures and make public participation in the siting process are significantly stricter than the rules from the Office of Admin Hearings Model Rules.

My pending Motion for Reconsideration is due to EFSC and ODOE failing to inform the public with information necessary for them to understand the changes proposed and determine how and if they wanted to participate in the processing of site certificates. This rule revision demonstrates a failure to inform the public as it is evident in the notice regarding this revision as it is in the processing of site certificats. The notice for this rule change stated that the changes are not significant, when in fact they are. The Original public notice regarding this change also did not include a red lined copy of the changes to the current Contested Case Rules. It was not until March 20, 2024 that the public notice was reissued and included the red-lined rule revisions after I brought it to the attention of ODOE. The revised notice still retained the inaccurate statements of the impacts of the rules.

3.

ORS 183.332 requires rules to substantially comply with corresponding federal laws. Federal law requires timely notice and that individuals be informed of their rights to due process. ORS 183.335(2)(B)

The rule changes must include the requirement that an order be issued when the decision regarding what issues will be heard, and the standing of individuals is decided which includes the parties appeal rights. The rules do not include the statutory requirement that an order be issued when a decision is made which impacts an individual's rights including denials of contested case requests, inclusion, exclusion or modification of issues regarding processing of applications for energy developments. In the Boardman to Hemingway procedures individuals were denied access to contested cases, denied full party status, had their contested case issue statements changed from the one requested, and had issues thrown out through Summary Determination. The decisions were implemented immediately with no Order being issued or identification of appeal rights. The denials were not issued until months after the action was taken. Orders regarding these kinds of issues are required to be issued when the decision is made and implemented and the rules need to require compliance with ORS 183.335.

4.

Notices must state that appeals for denied contested case requests or other instances which do not provide for a contested case hearing lies with the Circuit Court under ORS 183.484.

5.

. This revision will result in virtually all contested cases on the procedures used by ODOE and EFSC in the processing of applications and amendments to be denied. The rules already limit contested cases to only requirements of Ch. 21, 22, or 24. This limitation was arbitrarily recommended by previous

council member Hanley Jenkins with no discussion regarding why the council should have inserted it in the rules. The council should include in this amendment removal of this limitation unless the Council truly is unwilling to hear contested cases which address any other rules of the council.

6.

As you are aware, I filed a Request for Reconsideration of the denial of my contested case request on Amendment I of the B2H Site Certificate. The request became one of jurisdiction when the Oregon Department of Energy, the Energy Facility Siting Council and Idaho Power filed motions stating that the Circuit Court lacked jurisdiction for hearing the denial issue. The circuit Court denied their motion due to my request being for an issue that was denied a contested case process. Then the Oregon Department of Energy and Idaho Power filed a Mandamus motion asking the Oregon Supreme Court to overrule the Circuit Court decision and take jurisdiction over my request. The Oregon Supreme Court Denied the request for transfer. What their actions did is confirm that the agency has been referring people denied access to Contested Cases to the Oregon Supreme Court in error. It is important for the Council to be cognizant of the fact that promulgating these rules rather than simply adopting the Attorney General's Model Rules used by most other agencies will create multiple occasions that by definition are "other than contested cases". Approving rules that result in denying access to contested cases does not mean that the public will not have access to due process through development of a contested case file. It simply means that due process will be provided through the Circuit Courts providing the opportunity

for the issue to be heard. It will not serve to streamline the Contested Case Process.

Denied requests for contested cases regarding site certificate conditions are heard by the Circuit Court under ORS 183.484. Orders in decisions that do not challenge the approval of a site certificate, but rather decisions in the processing of applications have been stating that appeal rights are addressed by the Oregon Supreme Court under ORS 469.403 in error.

The decisions of the Circuit Court and the Oregon Supreme Court considering my arguments which referenced the following cases:

> --Forelaws on Board v. EFSC, 311 Or 350, 358-60, 811 P2d 636 (1991) the Oregon Supreme Court stated they lacked jurisdiction proceeding "because the **order here involved is not an order approving or rejecting an application** for an energy facility certificate." That opinion also **rejected the argument that "the court must treat any EFSC decision that relates to whether a site certification proceeding is required as if it were the functional equivalent of EFSC action on a site certificate application."**
>
> --Save our Rural Oregon v. EFSC, 339 Or 353, 377, 121 P3d 1141 (2005) the Oregon Supreme Court reviewed their authority over EFSC project-related decisions under ORS 469.403(3) and determined their authority "is limited to review of the council' **approval or rejection** of an application for a site certificate or amended site certificate.

--*Friends of The Columbia Gorge v. Energy Facility Siting Council* 314 Or. App. 143 Or. Ct. App (2021) 498 P3d 875 determined that **jurisdiction for review by the Oregon Supreme Court depends on whether petitioners were entitled to a contested case hearing. If not, the court concluded that Orders are not "contested case" orders.**

--Solomon v State Land Board 25 Ot App 311, 548 P2d 1335 (1976) states that **until an order is preceded by a contested case hearing, it is reviewed in circuit court, not the Court of Appeals.** The courts have provided additional documentation regarding jurisdiction for orders other than contested cases in Buena Dairy Associates v. State Dept.of Agriculture, 25 Or App 381, 549 P2d 689 (1976) That case established that the circuit court has jurisdiction to hear a claim regarding situations where a contested case proceeding should have been conducted, but was not.

7.

2. ODOE has recommended extensive additional requirements beyond those established through Oregon Statutes and the Administrative Procedures Act rather than simply adopting the Administrative Procedures Act requirements which are used by other agencies.
    a. ODOE is leveraging their "discretion" regarding these changes to Contested Case Statutes and Rules to the point that it exceeds the statutes providing them the authority to promulgate rules as

provided in ORS 469.501. EFSC is allowed to adopt standards for the siting construction, operation and retirement of facilities. The statute does not provide them with the authority to dictate whether and under what conditions the public is able to access due process. EFSC should adopt the Model Rules used by other agencies and any changes or additions made should require a description of the change, why it is needed and what problem it is intended to address.

8.

3. Throughout this rule revision it is clear that the intent or ODOE and EFSC, should they approve these rules is:

    1. Establish that only the developers and ODOE be allowed full party status. That all petitioners be designated as only "limited parties.

    2. Limit the role and opportunities for "limited parties" to participate fully in contested case proceedings to the extent that the rules waive rights provided to all petitioners under the Oregon Statutes.

    For example: ORS 183.413(2) states; "Prior to the commencement of a contested case hearing before any agency including those agencies identified in ORS 183.315 the agency shall serve personally or by mail a written notice to each party to the hearing that includes the following:"

"A statement that the party has the right to respond to all issues properly before the presiding officer and present evidence and witnesses on those issues."

10.

SPECIFIC COMMENTS AND REFERENCES TO SECTIONS OF THE RED LINED AMENDMENT RULES WHERE CHANGES ARE PROPOSED.

11.

OAR 345-001-0005 Page 1

Removing the requirement to comply with OAR 137-003-0005 removes the evaluation required to limit petitioner participation to "limited party" status. There is no indication in the legislative record that supports an agency arbitrarily deciding to limit participation of everyone who objects to their action to being designated as "limited parties". The extensive language in the statutes regarding the rights of "parties" to contested cases would not be included in statutes if no one from the public was to be allowed to be full parties. The Oregon Supreme Court decision in the Final Order for the Stop B2H Appeal of the B2H Site Certificate does not give unbridled authority to EFSC to allow them to require all petitioners for contested cases to be Limited Parties as is the case in the proposed rules. The Supreme Court decision identifies the specific criteria stated in OAR 137-003-0005 and determined that the hearings officer reviewed the criteria prior to deciding to make petitioners "limited parties". This rule revision removes the requirement for the limitation to be justified based upon specific decision criteria. Removing adherence to the rules protecting the rights of petitioners is an exceedance of

legislative authority provided under ORS 469.490 and ORS 469.501. Limiting parties to “limited party” status who request “full party” status constitutes an agency decision that will adversely affect the petitioner and they are entitled to receipt of a final order stating the criteria considered in the decision. ORS 183.480 requires that “any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form.”.

12.

Arbitrarily issuing a rule that denies petitioners the opportunity to be full parties to contested cases adversely affects and aggrieves the person’s opportunity to participate fully in the contested case process. EFSC is not provided the authority to establish a contested case process that denies the public access to a fair and impartial evaluation of their requests for legal recourse and access to due process under the law.

13.

-- OAR 345-015-0014 Page 2

Removed and changed to relying on OAR 135-003-0505 . This makes a change that will preclude multiple non-profits from being able to participate in Contested Cases due to the financial demands. The change is not described in the material provided to the public. It makes the following changes:

a. Removes the statements in the Contested Case Notice that petitioners can request to participate as limited or full parties.

b. Notice is no longer required to be sent by registered or certified mail to those who can request contested cases.

--OAR 135-015-0014 (1)(h) requires non-profits to be represented by an attorney licensed in Oregon. Non profits can either be registered as unincorporated associations or nonprofit corporations. This change flies in the face of the stated intent of Oregon Energy Facility Siting Council Contested Cases being a Quasi-Legal process available to everyone.

This rule conflicts with Oregon Statute ORS183.457 (2) "Representation of persons other than agencies participating in contested case hearings." Which states "No rule adopted by a state agency shall have the effect of precluding lay representation."
This is a major change that is not identified in the public notice regarding these proposed rule revisions.

14.

--345-015-0403: Page 3

Including this statement misleads the reader into believing that petitioners may be allowed to be full parties. This rule revision states that all petitioners will be "limited parties" unless they are the only one participating in a contested case. The only ones given full party status are the developer and EFSC. All parties should be allowed to respond to requests for party status.

This is a major change that is not identified in the public notice regarding these proposed rule changes and as noted above, exceeds

the legislative authority provided to EFSC which does not allow them to control contested case procedures to limit access to due process .

Due to the extensive research required to request and argue a contested case, individuals often agree to have individuals take responsibility for a single topic and others focus on other issues rather than duplicating efforts. In the event that participants are not allowed to comment on issues brought forward by another petitioner, all parties with a similar issue who may have different objections to the issue or additional arguments will have to submit the same comments to establish standing and all parties will need to request contested cases and be allowed to argue the issue separately. Allowing only the developer and ODOE to comment on party status means all parties with the same issue must be allowed to argue the issue based upon the same public comments. These comments can be incorporated in multiple parties public comments by reference. The current practice as documented in the Contested Case Process for the B2H Amendment I states that one individual cannot rely upon the testimony of another one by reference. This interpretation conflicts with Oregon Statute 183.450(2) which states, “Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.”

14.

Restricting petitioners to “limited party” status as these rules currently propose requires that no contested case issues be combined under one presenter and no issues restated absent the agreement of

the person requesting the contested case. Currently full party status provides opportunities for concerns that may have been restated or combined under one petitioner the ability to argue when the issue is also one of their concerns. Combining issues or restating them denies limited parties the opportunity to argue issues which are combined and cannot be allowed under the amended rules if petitioners requesting full party status are going to be required to only be limited parties since doing so will deny them due process regarding those issues combined.

15.

--OAR 345-015-0405(4)(g) Page 4

The wording of this section exceeds the authority of hearings officers in any civil action in Oregon, let alone a "quasi-legal" process. This wording indicates that the hearings officer can limit the issues which are raised with sufficient specificity in the public hearing for "any purpose the hearings officer finds necessary ". This language is not included in OAR 137-003-0575. The section needs to be consistent with the rule being referenced. A decision that precludes an otherwise entitled petitioner from access to a contested case hearing or limits access to a contested case hearing on an issue that was raised with sufficient specificity requires an order identifying the reasons and including appeal rights. Such a decision is a "final order" based upon the fact that it results in immediate action to deny the petitioner the right to have their issue heard.

All verbiage following “Hold conferences, including one or more prehearing conferenc-003-0575 before or during the hearing.es as provided in OAR 137” should be deleted.

16.

--OAR 345-01-0415(3) Page 6

The presentation of this information is confusing and makes it less clear. Please change the rule to appear as follows:

“To have raised an issue with sufficient specificity, the person must:

1) Identify the recommended findings of fact or conclusions of law or conditions of approval which they object to
2) Identify the Council standard or other applicable state and local requirements on which their objection is based (and)
3) Present facts or statements supporting the objection on the record of the public hearing for the draft proposed order.”

You are requiring 3 specific items. When they are listed in paragraph style it is not clear what the individual requirements are. This suggestion is intended to make the material more in line with requirements that rules be written in a clear manner.

17.

--OAR 345-015-0415(5)(b) Page 7

For purposes of understandability and clarity, suggest the following change from “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," change to "The issue statement is to be worded the way the person wants their issue to be stated for the contested case."

This suggestion is to increase the clarity of what is being requested.

18.

--OAR 345-015-0415(6) Page 7

As stated earlier, if the petitioner and EFSC are allowed to provide argument regarding party status, so should all petitioners.

19.

--OAR 345-015-0415(7) Page 7

This reflects substantial changes in several areas and should not be incorporated into the rules as it is prejudicial toward limited parties and precludes the provision of a "fair and unbiased hearing which allows participants to fully present their issues."

The language does not appear to allow limited parties to respond to or use material that is relevant to their issue, but is included in another parties contested case issue, filings, exhibits, discovery, etc. Given the overlap of issues, material presented or responded to in another contested case may be relevant to a limited parties issue. In addition, interrogatories, discovery, and opportunities to interview parties who may have information relevant to the issue a limited party is arguing

have previously been accessible to all parties and issues where the information is relevant to any issue being heard.

The paragraph should not state, “including proposed site certificate conditions”. As noted in other comments to the council, in the past Site Certificate Conditions have been added, removed and changed through such actions as Summary Determinations. Site Certificate Conditions establish the requirements for developers to meet council standards. Changes that occur in Site Certificate Contested Case actions do not legitimately preclude the opportunity for public review, comment and objection to the changes. All limited or full parties participating in any contested case action should be provided the opportunity to respond to any and all changes to these conditions proposed or occurring at any time during a contested case procedure.

20.

--OAR 345-015-0018 Page 7

This language should not be removed. It is consistent with the requirement in ORS 183.457(2) which states that no rule adopted by an agency can preclude lay representation.

21.

--OAR 345-015-0420(2) Page 8

This paragraph should be removed. It defines “indigent” as having an income level that is less than the income levels used in Oregon to determine eligibility

for public assistance, medical assistance, food assistance, heating assistance. It also requires the liquidation of resources that Oregon Assistance Programs do not require.

The determination of "indigent" should not be determined by a hearings officer. There are multiple state agencies with the expertise who are in the business of determining need based upon being "indigent". According to the United States Department of Health and Human Services indigent is when income falls below 125% of the federal poverty level. In a court setting "indigent" is an individual who lacks means to hire a private attorney per Gideon v. Winwright. In court cases it is also an individual who may rely on government assistance programs, community support, or charitable organizations to alleviate their poor circumstances. A determination of indigent status in the legal realm means the individual is to be provided an attorney without cost. EFSC is already failing to comply with requirements pertaining to an individual being indigent since they fail to provide an attorney without cost. Little accommodation is provided to "indigent" individuals in EFSC rules without defining it more restrictive than the courts. This rule needs to be revised to define indigent consistent with public assistance agencies. In addition, the rule must provide for funding the petitioners to pay for Legal representation for those individuals who are indigent as is required in Oregon courts.

> Item 2 should be revised to state: "Indigent" means the person has been determined eligible for a state program providing benefits to low income individuals and households or who document that their

income level is below the standard for eligibility for a state program providing benefits to low income citizens.

22.

--OAR 345-015-0425(l) Page 8

I commented during the RAC regarding the fact that government agencies and groups who provide input regarding the application as Special Advisory Groups should not be required to repeat their concerns during the public hearings on the Draft Proposed Order to request a contested case. They should be allowed to rely upon the written input they provided as SAG's. I continue to question why the rules require this additional requirement given the fact that the information was requested as part of the evaluation of the application.

23.

OAR 345-015-0430 (4)

The hearings officer's order on party or limited party status and issues to be heard as contested cases is a final order under ORS 183.310(6).

This rule requires the issuance of a timely Order of Denial meeting the requirements of ORS 183.470 including referencing ORS 183.484 as the appeal opportunity for a non contested case.

ORS 183.484 states that orders on other than contested cases are provided consistent with ORS 183.470.

24.

The rule stating that those denied standing or issues can only appeal to the Council when the individual would have no standing and no other issues remain to be heard needs to also include the requirement that an Order addressing all issues denied access to a contested case be issued including the right to appeal the denial under ORS 183.484.

25.

OAR 345-015-0430 (7):

Objections to the description of an issue should not be included here. Petitioners are not aware of the final wording of issues until the hearings officer issues their Order stating party status and issues. The opportunity to object needs to occur after the order is issued and the petitioners see the language being proposed.

Item 7 needs to require hearings officers to notify the participants in writing prior to the pre-hearing conference that objections to procedures discussed during the pre-hearing conference will be waived if not objected to during the pre-hearing conference.

26.

OAR 345-015-0430(8):

This requirement appears to be unnecessary and repetitious. Petitioners are required to state their issues in their requests for contested cases. Requiring them to raise them again during the pre-hearing conference is not necessary. If there is some reason the issues need to be confirmed, the hearings officer

should be required to confirm that the issues remain as stated in petitioners requests for contested cases.

29.

OAR 345-015-0440 Page 10

The list of enabling statutes including ORS 183.341, ORS 183.417 and ORS 183.470 do not appear to include information related to this new rule.

This new rule places the burden of proof on the petitioners. The burden of proof lies equally upon the developer and the agency as it does on the petitioners. All parties must prove their position or document facts being claimed. ORS 183.450(2) 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.”

30.

OAR 345-015-0475 which replaces ORS 345-015-0085 Pages 13 and 14

This rule involves a wholesale removal of rights of all parties in contested case hearings are provided under Oregon Statutes including ORS 183.413(2)(e) as described previously.

This rule change removes the previous right of all parties to propose site certificate conditions necessary or appropriate to comply with the policy of ORS 469.310 and to meet the requirements of other statutes, administrative rules and ordinances.

The new rule denies parties the opportunity to respond to other parties recommended site certificate conditions.

31.

Item 5 states that parties to contested cases can only object to the hearings officer orders related to the specific issues they have been granted standing on as opposed to the rights provided in ORS 469.413.

32.

Following are some rules and statutes which conflict with the rule revisions being planned or which are being overlooked in the proposed language. Council should read the content and requirements of these rules and statutes and compare them with the language they are being asked to approve:

OAR 345-027-0371(9) sets the standard used to determine whether a party is entitled to a contested case proceeding.

OAR 345-027-0371(10) the action EFSC must take in responding to requests for contested cases.

ORS 183.310(2) (a) defines "contested cases" as a proceeding before an agency

"(A) In which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing in which uc specific parties are entitled to appear and be heard."

"(D) Where the agency by rule or order provides for hearings substantially of the character required by ORS 183.415,(Notice, hearing and record in

contested cases) 183.417(contested case hearing procedures), 183.425(testimony and discovery in contested cases), 183.450(evidence in contested cases), 183.460(agency examination of evidence in contested cases) and 183.470.(orders in contested cases)"

According to the Statutes and rules cited above, Orders denying a party access to a contested case are not "contested case orders". They are "other than contested cases" addressed under ORS 183.484, ORS 183.310(2)(a) and are addressed by the Circuit Court under 14.165(5)(a) A timely notice of denial must be issued which complies with ORS 183.470.

ORS 183.413(2)(e) and ORS 183.413(l) "party has the right to respond to all issues properly before the presiding officer and present evidence and witnesses on those issues."

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

This rule does not allow an agency to deny full or limited parties the rights that state and federal statutes and laws provide them including ORS 183

ORS 183.450(3) "Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence.

While the agency can by rule establish limitations on limited parties, they cannot preclude limited parties from cross-examination or submitting rebuttals of any witnesses who are testifying on issues that are included in the limited parties issues accepted for contested cases.

ORS 469.370(7) Requiring the public to comment on Council changes to the Proposed Order and/or site certificate conditions during the same meeting that the changes are made meets the strict language of ORS 469.370(7). It does not, however, meet the intent of providing the public an opportunity to consider and comment on the impacts of the changes. If council would allow the public to have 3 or 4 days following the council meeting to comment on the changes prior to approving the Final Order it would likely avoid some contested cases by allowing the public to have concerns heard without having to ask for a contested case. The council could do their final approval by teleconference following receipt and consideration of public comments on the changes they make.

32.

CONCLUSION

Council should promulgate rules which incorporate the language of the Model Rules in their entirety rather than stating they are using the model rules and then promulgating pages of changes that are focused entirely on denying the public access to contested cases and due process.

This proposed rule change represents an extreme abuse of Power on the part of the Oregon Department of Energy. The rules codify actions which provide an overreach of agency discretion identified previously in documents such as the Amicus Brief submitted by Anne Morrison to the Oregon Supreme Court which documented the following concerns with the Oregon Department of Energy actions in the B2H contested case process:

They “Disregarded Public input; Argued against allowing the public standing in a contested case; rephrased petitioners contested case issues; argued that all petitioners should be limited parties; Blocked petitioners attempts to obtain discovery; argued that petitioners failed to raise valid issues; Moved for Summary Determinations against petitioners; Supported Idaho Power’s summary determination requests to remove site certificate requirements; argued against petitioners based upon merits; advised council to deny all contested case requests.”

Re: Contested Case rulemaking comments

Irene Gilbert <ott.irene@frontier.com>

Thu 4/18/2024 1:34 PM

To:EFSC Rulemaking * ODOE <EFSC.RULEMAKING@energy.oregon.gov>;CORNETT Todd * ODOE <Todd.CORNETT@energy.oregon.gov>;JACKMAN Tom * ODOE <Tom.JACKMAN@energy.oregon.gov>
Cc:Jim-campblackdog <jkreider@campblackdog.org>;loisbarry31@gmail.com <loisbarry31@gmail.com>;Matt Cooper <mcooperpiano@gmail.com>;Charlie Gillis <charlie@gillis-law.com>;Fuji Kreider <fkreider@campblackdog.org>

Incorporation of RulemakingComment_Stop B2H Coalition.docx; Additional Information regarding my comments related to the Amendment to Div.docx;

Please accept these additional documents as comments for the Div. 15 rule changes proposed. I am including the document provided as the Stop B2H input in order to access and use the information in the future if needed. In addition, I included a short addition to my previous comments. Thank you in advance for the work you are doing to attempt to reconcile areas which you have the authority to address.

To: Energy Facility Siting Council Date: Aprill 18, 2024

From: Irene Gilbert,addressing the public interest and myself as an individual

Subject: Additional Information regarding my comments related to the Amendment to Div. 15 Contested Case Rules

1. I am attaching and incorporating the comments submitted on behalf of Stop B2H in their entirety. This is due to the Oregon Department of Energy incorporating in these rules a denial of full party status to all petitioners in contested case proceedings before the agency. Only the petitioner and ODOE will be allowed full party status unless there is only one petitioner participating in a contested case proceeding. In the event that Stop B2H determines that they will not be able to address critical issues, this incorporation provides the opportunity for me as co-chair of Stop B2H and a representative of the public interest to address issues as a pro se petitioner without being required to pay for legal representation.
2. A court decision supporting the requirement that an order of denial be issued when a party is denied standing or other determinations that remove them from being allowed to participate in a contested case when the decision is implemented is Oregon Health Care Association v Health Div., 329 Or 480, 992 P2d 434 (1999).
    a. "If an agency is proceeding in a contested or non contested case, claims that the agency is proceeding without cause or that irreparable harm will result from nonfinal order is be resolved through injunctive process or other power of circuit court."

i. Denying a petitioner access to a contested case proceeding for an issue they have requested standing on when the action being proposed will be included in a site certificate will result in irreparable harm to the petitioner and the public.

3. The most recent public notice of the opportunity to comment on the B2H Amendment II lists the legal requirement for comments meeting the definition for "raise it or waive it". On a later page, the notice lists additional requirements that EFSC has added to be allowed a contested case hearing. These two different standards should be listed together on public notices so the public is informed that ODOE and EFSC are requiring a more stringent standard than other agencies to access a contested case.
4. Overall, the rule is unacceptable. It is clearly intended to limit and deny the public access to the contested case process through ODOE and will transfer most objections to the Circuit Courts for development of a contested case file. Limiting agency contested cases to those addressing Ch. 22,23 and 24 and those which could change the decision to approve the site certificate results in nearly all objections to site certificate conditions to be heard by the Circuit Courts.
   The requirement also conflict with OAR 345-027-0367(5) regarding the information which must be provided during a public comment period to provide the basis for a contested case proceeding. That rule states that the presiding officer must state, "A person who intends to raise an issue that may be the basis for granting a contested case proceeding must

raise the issue on the record of the public hearing with sufficient specificity to afford the Council, the Department, and the certificate holder an adequate opportunity to respond to the issue. To raise an issue with sufficient specificity, a person must present facts, on the record of the public hearing, that support the person's position on the issue." This statement is substantially in compliance with court decisions regarding what can be required in public comments in "raise it or waive it". It is not, however, consistent with the decision process used by EFSC which also requires that the issue be reasonably likely to affect whether the facility meets law and EFSC standards included in Division 22, 23 and 24.

5. Many members of the public fail to understand the specificity requirements for their comments during the public hearing phase. When these hearings are held on the final day of the comment period, council can have difficulty determining if the comments comply with the rules and the public has difficulty understanding whether or not their comments are adequate. ORS 469 requires public notice of the in person hearing at least 20 days prior to the hearings. Please insert in the rules a requirement that the public be provided at least 5 days following the in-person hearing to submit written comments meeting the specificity requirements. This would provide time for council to consider the in-person comments and for the public who may not be good at presenting their issues time to provide written clarification.

I appreciate the fact that there has been time to refine and submit written comments to council after the public hearing and the presentation regarding

the changes proposed in these rules. Doing this provides the time necessary to research whether or not my recollection of Statutes, rules and legal decisions exist which should be considered by council in deciding whether changes should be implemented. As you know, I take the role of reviewing and considering the impacts of rule revisions very seriously.

I hope to be included in the upcoming RAC regarding Contested Case Rules for Amendments and the review of the Chapter 21 requirements.

STOP B2H Coalition
60366 Marvin Road
La Grande, Oregon 97850
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info@stopb2h.org
541-406-0727

Please also include these comments on behalf of the public interest and Irene Gilbert as an individual.
April 12, 2024

Thank you for the opportunity to comment on the proposed rules for Contested Cases under the Energy Facilities Siting Council (EFSC). As mentioned during oral comments last month, the Stop B2H Coalition and many of its members, experienced a full and lengthy contested case process under the old rules which also included the blended Model DoJ and OHA rules. From what we've been told, this was one of the largest and most complex contested cases in a very long time.

As "guinea pigs" in a way, we can speak with first-hand knowledge about living through a contested case, mainly as "pro se" petitioners. We hope that these comments and our experience will be taken under serious consideration. The public is depending on the Council to adopt rules that not only site clean energy facilities but also protect Oregonians, our public health and safety, and our precious natural and cultural resources.

Our comments (below) are organized to align with the chronological order of the redlined version of the proposed rules. They are NOT organized by importance or priority.

1. Division 1 General Provisions – Ex Parte Communications.

Location in Redline: Under Division 1 General Provisions, 345-001-0005 – Uniform Model Rules Subsection "(2) Notwithstanding the provisions of OAR 137-003-~~0055~~ 0660(1), following…"

Recommendation: Do not omit this Subsection "-0055," and include two additional provisions: OAR 137-003-0625 and -0660. The latter is proposed in the staff redline version.

Rationale: There are three rules addressing ex parte communications. These three provisions deal with different parts of the process: 137-003-0055 Ex Parte Communications, applies during the pendency of the proceeding; OAR 137-003-0625 addresses Ex Parte Communications with an Administrative Law Judge; and 137-003-0660 is about Ex Parte Communications to Agency during Review of Contested Case (review of the contested case). They all apply and should be retained in these rules.

Since they are all the OAH's rules and you can't change them, our advice is to just cite them all under your changes to: 345-001-0005(2), because ex parte can take many shapes and forms: to the ALJ, to ODOE, or EFSC, or even in another proceeding; therefore, it is better to include them all.

We share this example from our experience with ex parte communications during our contested case. Interestingly, it occurred during a rulemaking process – it was not directly within the contested case proceeding. However, the outcome of the rulemaking was going to impact some petitioners' contested case. Idaho Power testified and advocated at the rulemaking directly to EFSC. The ALJ in our contested case (and to her credit) found out and ruled that ex parte had occurred by IPC's attorney and that petitioners in the case could submit a response (7 petitioners did so.) This example shows that one never knows where and when an ex parte could occur.

2. Division 15 (i.e.: the EFSC specific rules) - Overall Comments.

- STOP endorses the use of the word "proceedings" rather than "hearings" for contested cases, since there are many types of hearings (e.g.: public comment hearings, cross-examination hearings, exceptions hearings) within a contested case proceeding.
- For the most part, STOP likes the re-arrangement of Division 15; having the order of sub-sections match as close as possible to the flow of contested case proceedings. However, we do not understand why "Notice" (345-015-0014) is not part of the 400 series (new rules and/or numbering for the EFSC contested case rules.)
- We suggest the use the full name of the Energy Facility Siting Council (EFSC) in all rules and only use the shortened vernacular: "the Council" in subsequent sentences within the same rule. It is confusing for people new to EFSC otherwise.
- The use of a Naming Convention or numbering system for all documents and evidence needs to be conveyed from the start. This could occur under: 5. Filing and Service of Documents; or 9. Prehearing Conference and Prehearing Order; or 12. Submission of Evidence.
- The descriptions of "specific specificity" such as in 345-015-0220, is greatly improved, and warrants a special call-out.

3. Notice.

Location in Redline: Under Division 15: 345-015-0014.

Recommendations:

1) In keeping in line with the rulemaking goals of "consistency" and "efficiency," STOP recommends that "Notice" (OAR 345-015-0014) and "Requests for Party or Limited Party Status" (OAR 345-015-~~0016~~ 0415) contain the same required information AND that you adopt the more detailed requirements, if you will be holding people to the higher standard. If the "short and plain statement" and/or the use of the Template would suffice, then STOP believes that it (the template) would be much more user-friendly and palatable to the general public.

Rationale and Comment:

The proposed language states: "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 proceedings under the federal Servicemembers Civil Relief Act as described in ORS 183.415(3)(g)." **Emphasis added.**

Under OAR 137-003-0505, subsection (2) states: "A short and plain statement of the matters asserted or charged and a reference to the particular sections of the statute and rules involved;"

We believe that this is reasonable. The template that staff had developed as a tool, will also be good. The problem that we see is that, "plain statements" even with OARs cited, often do not meet the high bar of "specific specificity" that seems to be a criteria for all ODOE/EFSC decisions. Under: 345-015-~~0016~~ 0415 - Requests for Party or Limited Party Status (discussed more below) has much more specific language regarding petitioning for a contested case.

(4~~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~~0535(~~3~~4);

(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.

2) Nonprofit organizations or associations should not be required to have legal representation to participate in a contested case, per OAR 137-003-0505 (1)(h), which would be adopted under this blended rule.

Rationale: Nonprofit organizations should be encouraged to have an attorney representing them considering the complexity and high bar that is involved in a contested case. However, it should not be a mandatory requirement because it conflicts with ORS 183.457(1) "…The Attorney General shall prepare model rules for proceedings with lay representation that do not have the effect of precluding lay representation. No rule adopted by a state agency shall have the effect of precluding lay representation."

We believe that EFSC and the values of the State are to strive for more inclusiveness and participation, not less. In our case, the need for an attorney nearly bankrupted our organization, and we even received reduced rates. Meanwhile, another nonprofit, was allowed to participate in the case without an attorney. We did not call-out this bias because we knew that they couldn't afford attorneys either, and we were happy that they, a member organization of the Stop B2H Coalition, was actively participating. We feared that they would have been denied participation if we raised the issue.

4. Appointment and Duties of Hearing Officer.

Location in Redline: 345-015-0~~023~~405

Recommendations:

1) See Recommendations under "Filing and Service of Documents in a Contested Case" (below). If the Council chooses to adopt our recommendation, then duties will need to be added here, such as maintaining the docket.
2) Under Redlined Subsection "(3) The hearing officer shall maintain a complete and current record of all motions…"-- or as a stand-alone Subsection-- STOP recommends ADDING that the record be maintained and available for all to access - throughout the duration of the case.

Rationale: One of the worst parts of the entire contested case experience, for all petitioners in our case, was the lack of a transparent record! Everyone had to share and keep their own files, as well as other petitioners' files (if they chose) – on their own; using their own hard drives, with attachments and emails. Many files posted by ODOE or the developer used names so long that personal computers couldn't save the files without changing the name. What a mess. The point is that there was not a transparent or publicly available site where a petitioner or member of the public could go and see what was filed, by whom, including exhibits.

Comment: Alignment with the OAH's rules is helpful here, particularly since EFSC contemplates predominately using Administrative Law Judges from the OAH.

5. Filing and Service of Documents in a Contested Case

Location in Redline: Under Division 15: 345-015-0~~012~~410

Recommendations:

1) STOP strongly recommends that the Department acquire and use a fully-docketed system for contested cases. This type of a system supports Filing and Service of Documents in a legal way, provides more efficient and effective record keeping throughout the contested case, enables transparency, and reduces confusion.

2) If the Department is unable to purchase or acquire such system on its own, our recommendation is to add a condition (i.e.: utilization and maintenance of a docket system for the case) to the terms of the contract with the Department of Justice (DoJ) or any other entity contracted with for the purpose of conducting a contested case for EFSC.

3) The naming conventions or other marking of documents in the record should be explained thoroughly. This could occur under this subsection or under another. We recommend that be clarified here under this subsection.

4) Finally, we have no recommendation specific to the rule language. The rule currently reads:

(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. **[Emphasis added.]** With the wording "but are not limited to," we feel that would cover any new electronic docket system.

Rationale: See above under "Appointment and Duties of Hearing Officer"

Comment and Concerns: The new ODOE portal is being promoted for public comment filings (in ODOE's Public Guide and recent notices). This is fine, but it is not a substitute for a docketed system for contested cases. The new portal system is not being used very well; and it appears to only be for public comments – not for a contested case docket where it is expected to have the ability to upload large attachments, like maps and other evidence. This is a big concern and we cannot urge the Department and Council enough, that you MUST get a better system (a full docketed system).

6. Requests for Party or Limited Party Status

Location in Redline: Under Division 15: 345-015-0~~016~~415

Recommendations and Rationale:

1) The section begins with the removal of the OAH model rule 137-003-0005(2) and substituting various EFSC and other OAH rules. However, that model rule in full: OAR 137-003-0005 covers the topic of Party or Limited Party very well and should simply be adopted, rather than the convoluted combination and omission of clauses.

   Rationale: It is apparent, that these proposed rules are intended to make everyone a limited party unless they are the sole petitioner in opposition for the case. We even heard as much during RAC meetings, and it is a complete disservice to the public. Just because the B2H case started with 51 petitioners is not fair to people or organizations going forward. The number of requests or petitions for party status should not prescribe the type of party status. Criteria should apply to the decision and petitioners should be formally notified of the decision/order on party status by the ALJ, as stated in the full model rule 137-003-0005.

   The Oregon Supreme Court decision in the Final Order for the Stop B2H Coalition's appeal of the B2H Site Certificate identifies the specific criteria stated in OAR 137-003-0005 and determined that the hearings officer reviewed the criteria prior to deciding to make petitioners "limited parties." We have grave concerns that the new rules, removing these criteria, give the Department and an ALJ too much discretion without having to justify the decision to limit someone's status, when they have requested full party status.

2) We urge the Council, to better protect the resources of the state, to amend proposed Subsection (6) which states: "…but may not participate on issues, including proposed site certificate conditions, for which the hearing officer has not granted them standing to participate." We understand limited party status parameters around specific and narrow issues as proposed; however, we firmly object

to limiting any parties' recommendations on site conditions. (This is also discussed below under "12. Submission of Evidence and Site Conditions.")

Rationale: We have learned that over the course of a contested case, so much is learned. It is iterative in many ways: discovery processes, overlapping issues reveal new evidence, and protective measures that cross-disciplines or resources, can and should be heard, and considered. We believe that better decisions are made when broader perspectives are considered, rather than silo-ed decision making that occurs when input is limited by strictly prescribing recommendations.

Take for example: a petitioner has a contested case regarding something about fish and wildlife habitat (e.g.: fish surveys, fish plans or passages); but when it comes to recommending mitigation measures (site conditions) under Roads, or Weed Control/Vegetation Management, or Public Services, this fish petitioner may have a lot to contribute. However, this fish petitioner chose not to go through a whole contested case on roads and weeds—only on fish. When it comes to recommending site conditions, there should never be a limitation on who can contribute. This fish petitioner may have a lot to share.

The dedicated people/petitioners that already have standing of some kind, and have participated through the whole process, should be able to make final recommendations on the Site Conditions. Therefore, STOP recommends that there not be any limitations placed on parties in terms of their recommendations on Site Conditions.

3) There needs to be a final Subsection addressing Appeal Rights for Parties.

Rationale: If a petitioner is denied access to a contested case or there are procedural disputes, parties need to be informed of their appeal rights. This is particularly important given recent court precedence set in Union County, i.e.: that appeals may be heard in the local jurisdiction. Only final orders on site certificates or amendments are appealed to the Supreme Court.

Example on impacts: During our contested case, we had an unfortunate experience with: the lack of the ability to appeal procedural issues or party status on an issue. One of the petitioners was told that since he still had another issue pending in the case—but not his primary issue--he could not appeal. Rather, he had to wait until the entire contested case was over and then he could appeal to the Supreme Court (that was 2 years later!) This was a complete disregard for the public's due process. The delay not only jeopardized the whole case, it was a set-up for a Supreme Court ruling for mootness since the case had already occurred. A terrible disservice to rule of law and the rights of due process.

7. Petition for Indigent Status

Location in Redline: Under Division 15: 345-015-0~~022~~420

Recommendation: Under proposed Subsection (2) the definition of indigent, should not be used.

Rationale: 100% of poverty is rarely used these days, and especially not in Oregon. STOP recommends that ODOE use a definition more aligned with its other energy programs. Or, at least be consistent with another state agency, OHA (for Oregon Health Plan); DHS (for SNAP); etc.

8. Participation by Government Agencies

Location in Redline: Under Division 15: 345-015-0~~080~~425

Recommendation: Omit.

Rationale: We do not see that there is anything different for government agencies than there is for the public. Why have this Section? Unless there is something new for SAGs, we think this can be omitted.

9. Prehearing Conference and Prehearing Order

Location in Redline: 345-015-0~~083~~430

Recommendations and Rationale:

1) Keeping within a logical flow and order, we suggest re-arranging the order of some of the clauses within this subsection:

    a) Switching/reverse the order of (1) and (2).

    Rationale: Subsection (2) as proposed, is the big picture and cites the OAH rule governing. It describes the manner in which the pre-conference hearings are conducted, including noticing and purposes. This should be number/subsection (1). Then, what is proposed in redline as (1) should become (2) because it is a deeper clarification and more of a subset.

    b) Inserting both (7) the drafted new redlined clause, and newly numbered (7) (confusing-due to misnumbering), BEFORE subsection (3).

    Rationale: The point being that these subsections: ‘failure to raise the issues’ or ‘object to procedures’ has to happen at this pre-hearing conference. Again, the importance of this “hearing” cannot be stressed enough. We recommend that these two clauses be moved here, before the discussion of the ALJ finally issuing “The Order” (which is in subsection (3)). This would improve the “flow” or order of the clauses under this Subsection.

2) Then, assuming these are re-ordered, under (2), it should begin with: “At the first (or series of first) pre-conference hearings, the ALJ will be making decisions on standing, party status, issues and issue statements. “

    Rationale: This would emphasize the important of this first “hearing.” In our experience as pro se’s, we were completely blind-sided by the importance of that pre-hearing conference (the name “pre-hearing” even implies lesser weight). Petitioners were not at all prepared for presenting or defending their status and issues. When they answered questions of the ALJ, they did not realize the issue statements would become their case.

3) STOP also recommends additional clarity under this re-ordered subsection (2), for example: is attendance at pre conference mandatory? What rights are in jeopardy by non-attending? If these procedures are discretionary for the ALJ, or if they are mandatory, it must be noticed as such.

4) Finally, STOP objects to the last sentence as proposed in the re-ordered, subsection (2). It states:
   "The hearing officer shall consolidate one or more issues raised by the same or multiple parties if the hearing officer determines the issues raised are substantially similar to one another and consolidation would expedite the hearing while still ensuring a full, fair, and impartial hearing."

   Rather, STOP recommends the following: a) make this a separate subsection from the rest of the clause; and b) omit the word "shall" and make this optional, and ONLY if the parties agree with the ALJ regarding the co-joining of the parties and/or issues.

   Suggested edits in **bold**: "The hearing officer **may** consolidate one or more issues raised by the same or multiple parties if the **parties agree to the consolidation and the** hearing officer determines the issues raised are substantially similar to one another and consolidation would expedite the hearing while still ensuring a full, fair, and impartial hearing."

Rationale: This co-joining or consolidation of issues & parties should only be allowed if the parties agree to it, or request it. While it may sound efficient for the Department or ALJ, it completely disregards the rights of public. Consider that most petitioners either: do not know each other, or if they do, it's not like they've worked together in one organization or team. Can you imagine getting pushed into a case with someone: who you don't know, who may not bring value to your case, who has different motivations or frameworks (eg: hunter vs bird-watcher), or who takes up more precious time (for better or worse) because of the necessary coordination. This does NOT create efficiency!

In our case, the ALJ attempted to co-join a number of cases, but it became so obvious to the ALJ's credit, that there wasn't a way she could do this fairly. Some people lived hundreds of miles away from each other, some had good internet and some don't; some put a ton of work into their case already and needed to be heard but their co-petitioner was louder, and some had a related issue, but with a slight twist, and on and on…

It wasted more time trying to co-join, then objecting, and then finalizing some. We had one issue that was co-joined because it was with another Stop B2H member. However, we are all volunteers; we never worked together before and we started from very different knowledge levels. It took time to learn from each other and try to coordinate tasks. In the end, it was added stress, a lot of wasted time, and was not more efficient.

10. Suspension of Hearing and Exclusion of a Party

Location in Redline: Under Division 15: 345-015-0~~024~~435
No comments

11. Burden of Presenting Evidence (NEW RULE)

Location in Redline: Under Division 15: 345-015-0440

Recommendation: STOP has no disagreement with this new rule. However, in the spirit of clarity and reducing confusion, we recommend that an additional subsection clarify this "burden of proof." The

reality is that the burden is iterative throughout the process; in other words, the burden goes back and forth in the contested case depending on the phase of the case and/or which party is making the motion against the other.

Rationale: In our experience, the burden of proof was continually going back and forth because the developer was relentless in filing intervening motions (e.g.: motion to dismiss, motion to object, motion to omit, etc.) after every step in the process (or so it felt that way for the pro se's). Therefore, rather than working on presenting their evidence for the next phase, parties were forced to respond in seven days to the objectionable motions. This was a huge distraction; creating confusion and complications for many.

12. Submission of Evidence and Proposed Site Certificate Conditions

Location in Redline: Under Division 15: 345-015-0~~043~~445

Recommendations and Rationale:

1) At the very end of subsection (1) ADD: "per the schedule and means set forth by the ALJ."
Rationale: This helps to reduce confusion. It can include explanations such as: is it allowable to use a link to a storage device for excessively large documents, what needs to be copied/shared in full or if excerpts of documents are allowable, and more. This could also be a place for naming/marking conventions – if not covered already (see above under 2. Overall comments and 5. Filing of Documents…).

2) STOP strongly opposes the newly proposed subsections (2) and (3) with regard to who can propose Site Conditions and when in the proceedings. We suggest two possible resolutions to this:

2a) Strike-out the sentences as shown below:

(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 respond to any other party's proposed site certificate conditions ~~related to issues for which the responding party or limited party has been granted standing~~ according to a schedule set by the hearing officer.

Rationale: Similar to above, "6. Requests for Party or Limited Party Status," we object to limitations being applied to the limited parties in these proposed rules regarding Site Conditions.

These limitations (under (2) and (3) and under 345-015-0~~016~~415) are new statements and clearly benefit the Department and developer to expedite proceedings and limit parties' contributions to

Site Conditions. Those being the protective mitigation and/or other conditions designed to assure protections to Oregonians and our precious resources.

We have learned that over the course of a contested case, much is learned, clarified and disposed of. It is iterative in many ways, and the final recommendations for site conditions should be the "capstone" or final step in concluding the case. Ideally, the "Submission of Evidence and Proposed Site Certificate Conditions" would be separate rules. In the latter, the procedure would include the time and manner for recommendations to site conditions and if response briefs will be accepted.

Or,

2b) Peel away the Site Conditions from this Rule and make a unique Rule for Site Conditions. We recommend the new rule could include language such as: "notwithstanding any draft site conditions that are the subject of a contested case by a party, the ALJ will allow recommendations on any site condition by any party or limited party before the conclusion of the case (or before the draft proposed contested case order is issued by the ALJ.)"

Rationale: The point being is that after the all the facts, evidence, and lessons learned, all participants in the case have gained new insights and should be afforded the opportunity to recommend conditions. They should be provided with evidence, per the rules and means that the ALJ sets out, for the ALJ's consideration (and those of the other parties), near the end of the case as a stand-alone step (preferable) or as part of closing briefs. One response brief could also be provided, if fairness was assured.

13. Official Notice of Evidence

Location in Redline: Under Division 15: 345-015-0~~046~~450

Recommendation: Unless "officially noticed" is defined somewhere else, it may be helpful to define it or insert (see Bold) under: "(2) The hearing officer shall notify parties of facts officially noticed **and entered into the record,** and shall allow parties an opportunity to contest the facts so noticed."

Rationale: More clarity of legal terms is helpful to the public.

14. Motions

Location in Redline: 345-015-0~~054~~455

Comment: There may be confusion regarding timeframes, since the OAH rules mention 14 days, not 7. Albeit, the ALJ has discretion on longer or shorter timeframes.

15. Interlocutory Appeals to Council

Location in Redline: 345-015-0~~057~~460

Recommendation: STOP recommends that appeals be allowed regardless of status in the pending contested case. And, that all Council decisions be formally issued as an Order of Denial/Approval of the Appeal.

Rationale: At face value this proposed rule seems very reasonable. But in practice we experienced differently. The "wrongs" that many public pro se petitioners felt had to do with procedural mis-steps or perceived improprieties. The inability to appeal their grievance to Council thwarted cases (e.g.: Soil protection issue evidence), and worse, where an issue never got heard (as described above under Party and Limited Party Status.

In that case it was suspicious that the weakest of the petitioner's issues was given standing, maintaining his participation as a limited party. He felt railroaded by this decision but could not appeal (i.e.: take the issue to court) to seek resolution on his issue—until two years later. But by that point the issue was moot. The site certificate was granted. The primary issue never got a full hearing due to this rule on interlocutory Appeals.

Therefore, STOP believes that this rule is problematic based on simple fairness. Just because a petitioner may have standing on one issue should not preclude them from being able to bring a timely appeal before the Council if they feel they have been harmed.

16. Stays - 345-015-0465

No comments.

17. Reopening Record Prior to Decision - 345-015-0470

No comments.

18. Hearing Officer's Proposed Contested Case Order

Location in Redline: 345-015-~~0085~~475

Recommendations:

1) Consider breaking into two rules: one with the Exceptions phase and the Actions of the ALJ; and the other addressing the Council's decisions and Final Order. Or alternatively, change the title to incorporate everything within.
2) Appeal rights should be included in the Final Order rule as well.

Rationale: Greater clarity of title to contents. This rule goes beyond the Hearing Officer's actions and moves into the actions/decisions of the Council. Appeal rights at the conclusion is an important due process step.

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

No comments; or See Above under 3. Notice. Use the same language everywhere.

20. Council Review and the Department of Energy's Proposed Order - 345-015-0230
No comments.

21. The Decision-Making Record

Location in Redline: 345-015-0~~085~~475

Recommendation:

1) This should include "who" maintains and is the keeper of the record; and how the record will be accessible to the parties, and the public.

Rationale: Is it the ODOE or is it the DOJ during the contested case? Often in our case, STOP and other parties were asking ODOE staff for documents and the answer was that it was the DoJ responsibility to maintain the case record. The problem was that the DoJ did not have a transparent system, and there was no way to access the records/files in the case from the steps prior unless you kept your own records.

2) Do not remove case files or other materials from the ODOE project website; or archive them in the One Drive but allow access.

Rationale: Plain and simple this has been another unnecessary hassle and barrier for the public and parties involved in the case. The older files get removed and those were the ones that we may have been citing in the past or we want to compare and contrast something we remembered from earlier, and more. People go to where they have gone before only to find it inaccessible. This removes the transparent record that we believe EFSC is striving to achieve.

Conclusion and Final Recommendation

At the end of the B2H contested case, the idea of Intervenor Funding was raised and some Council members wanted to learn more as it sounded like a way to level the playing field—at least somewhat—for nonprofit petitioners and possibly individuals. In particular, if attorneys are being required, some kind of intervenor funding or pro bono program is essential for contested case petitioners and ensuring a fair proceeding. The Oregon Public Utility Commission administers an intervenor program, so models exist.

Stop B2H Coalition has many concerns about these proposed rules as detailed above, and we urge the Council not to approve them. The draft should go back to staff and the RAC for more work. The convoluted combination of rules is not reaching the goal of simplifying and clarifying the procedures for the public, or for the parties involved. Worse, we believe these rules are a smoke screen of confusion when in reality they are reducing the rights of the petitioners.

It may be prudent to simply adopt the model rules, contract the ALJ's from the OAHs, and be done.

Attorneys in Oregon are more versed in the procedures used by the OAH and other state agencies; therefore, it could facilitate smoother proceedings as well.

If you have any questions, we would be more than happy to answer them or discuss based on our experiences. Fairness within these rules is essential for leveling the playing field among developers, the public and the Department.

Thank you for your attention to this important rulemaking.

Sincerely,

C. Fuji Kreider
Secretary/Treasurer
On behalf of the Stop B2H Coalition Board of Directors

Comments on Contested Case Rulemaking

Nathan Baker <Nathan@gorgefriends.org>

Fri 4/19/2024 4:29 PM

To:EFSC Rulemaking * ODOE <EFSC.RULEMAKING@energy.oregon.gov>;EFSC Rulemaking * ODOE <EFSC.RULEMAKING@energy.oregon.gov>

1 attachments (196 KB)

2024.04.19 Friends' Comments on Contested Case Rulemaking.pdf;

To Whom It May Concern:

Please find attached the comments of Friends of the Columbia Gorge on the above-referenced rulemaking.

Thank you.

Nathan Baker
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GORGEFRIENDS.ORG

SUBMITTED VIA E-MAIL ONLY

April 19, 2024

Oregon Energy Facility Siting Council
c/o EFSC Rules Coordinator
Via email to EFSC.rulemaking@oregon.gov and EFSC.rulemaking@energy.oregon.gov

Re: Comments on Proposed Amendments to EFSC's Contested Case Rules

Dear Chair Howe and Council Members:

Friends of the Columbia Gorge ("Friends") submits the following comments regarding the proposed amendments to EFSC's contested case rules. Friends is a nonprofit organization with approximately 5,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge, and with strong interests in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Oregon.

The Council's current rules at OAR 345-015-0083 are unlawful in that they require the prehearing order for a contested case to "limit[] parties to those issues they raised on the record of the public hearing described in OAR 345-015-0220." This language, currently in the Council's rules, is unlawful in that it applies to all parties, and not just limited parties. This language violates the Oregon Administrative Procedures Act for the same reasons as explained by the Oregon Supreme Court for a different set of rules in *Friends of the Columbia Gorge v. EFSC*, 368 Or 123, 127–33 (2021). In that case, the Oregon Supreme Court held that the Council's rules must not limit full parties to participate only on certain issues, and that any Council rule that purports to do so, without differentiating between full parties and limited parties, is unlawful. The above-quoted language in OAR 345-015-0083 cannot apply to full parties.

The Proposed Rules would compound the unlawful nature of the above-discussed language in the current rules at OAR 345-015-0083 by replacing that language with new language requiring a hearing officer within the prehearing order or orders to "stat[e] the issues to be addressed in the contested case hearing" and "*the persons with standing on each issue*." Proposed Rule 345-015-0430(4) (emphasis added). As with the above-quoted language in the existing rules at OAR 345-015-0083, this language in Proposed Rule 345-015-0430(4) does not differentiate between full parties and limited parties, and therefore would unlawfully limit the participation of full parties in a contested case.

To solve both of these problems, the Council should modify the language in Proposed Rule 345-015-0430(4) to limit only *limited parties* to the issues they have properly raised in their petitions for limited party status.

The Proposed Rules would also improperly introduce the word "standing" into the Council Rules, along with an improper notion of a hearing officer "granting" standing to parties and limited parties. *See, e.g.*, Proposed Rules 345-015-0415(7), 345-015-0430(1), (3), 345-015-0440, 345-015-0445(2), 345-015-0475(5). The Council's Rules absolutely should not use the word "standing" to refer to participation in contested cases. "Standing" in Oregon means either constitutional standing or statutory standing. In other words, "standing" can be conferred by the Legislature or by the Constitution. *See generally Kellas v. Dept. of Corrections*, 341 Or 471, 145 P3d 139 (2006); *Waterwatch of Or. v. Water Resources Comm'n*, 199 Or App 598, 112 P3d 443 (2005). "Standing" is *not* the proper term to use within an administrative agency's contested case procedures.

Moreover, the Council Rules should not confer on a hearing officer any powers to "grant" standing or participation rights in a contested case. To do so would effectively give a single person, a hearing officer, unfettered discretionary authority to decide on a case-by-case basis who may participate in each contested case and on which issues. No single person should be given such superpowers, which would effectively match or exceed the powers of the entire Oregon Legislature. The proposed language that would authorize the "granting" of standing is arbitrary and capricious on its face and is also unconstitutionally vague in that it provides no parameters or criteria under which a hearing officer might "grant standing."

The Council should avoid injecting any concepts of "standing" and "granting standing" into the Council Rules. Rather, as discussed above, the Council should consistently use language in its rules confirming, consistent with *Friends v. EFSC*, that full parties may participate on all issues in a contested case, while limited parties may participate on the issues they have properly raised in their petitions (or requests) for limited party status.

The Proposed Rules would further exacerbate the above-discussed problems by stripping from participating persons their current rights to file interlocutory appeals to the Council challenging hearing officer rulings on petitions for party status or limited party status, unless such rulings would completely terminate their participation in a contested case. Currently, the Rules authorize such interlocutory appeals: "The hearing officer's determination on a request to participate as a party or limited party is final unless the requesting person submits an appeal to the Council within seven days after the date of service of the hearing officer's determination." OAR 345-015-0016(6). This provision allows, for example, a limited party to file an interlocutory appeal of a hearing officer ruling that the limited party may not participate on certain issues. Elsewhere, the current rules recognize these appeal rights established in OAR 345-015-0016(6): "*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." OAR 345-015-0057(1) (emphasis added). The bottom line is that currently, persons may interlocutorily appeal to the Council determinations of which issues the

person may participate on. The Proposed Rules would change that current rule by repealing OAR 345-015-0016(6) and expressly forbidding such interlocutory appeals unless the person is being denied any opportunity to participate in a contested case: "The hearing officer's order on a request to participate as a party or limited party is final and may not be appealed to [the] Council unless the ruling would terminate the petitioner's ability to participate in the contested case proceeding." Proposed Rule 345-015-0430(4); *see also* Proposed Rule 345-015-0460(1) (similar language). The exception proviso at the beginning of OAR 345-015-0057(1) and the exception language itself in OAR 345-015-0016(6) would be repealed from the rules entirely, thus stripping rights that the public currently enjoy.

Friends opposes these proposed changes to strip from the public their current rights to file interlocutory appeals of rulings determining which issues they may participate on. First, the fact that the Council's Rules would be changed in this way (to remove appeal rights that currently exist in the rules) is not disclosed in the Notice of the Proposed Rulemaking, and in fact the rulemaking materials falsely imply that there are no such rights in the current rules. Second, the Council should retain its current rules allowing interlocutory appeals to the Council on which issues a person may participate on in the contested case because it is far more efficient to allow these threshold procedural questions to be raised and resolved at the outset, before the contested case is fully underway, rather than forcing interested persons to potentially have to wait until the entire contested case is finished, then appeal to the courts, only to then obtain a remand back to the Council for a new contested case with the participation of the appellant on the requested issue(s). Rather than taking away existing rights enjoyed by persons interested in energy projects, the Council should preserve its current rules governing the limited situations under which interlocutory appeals may be filed. (If anything, these rules should be clarified to expressly state that a limited party may file an interlocutory appeal of the hearing officer's determination of which issues that party may participate on, thus leaving no room for doubt as to whether this is currently the law.) Retaining these current rules will promote judicial economy and foster public participation.

Failure to make the above-requested changes to the Proposed Rules will violate the Oregon Constitution, the Oregon Administrative Procedures Act, and precedent of the Oregon appellate courts, including the cases cited above. In addition, for the issues outlined above, EFSC's Notice of Proposed Rulemaking ("Notice") violates ORS 183.335(2)(a)(B), which requires "[a]n objective, simple and understandable statement summarizing the subject matter and purpose of the intended action in sufficient detail to inform a person that the person's interests may be affected, and the time, place and manner in which interested persons may present their views on the intended action." The summaries included within the Notice at the top of each proposed rule for this rulemaking fail to provide sufficient detail to inform interested persons that their interests may be affected, in that these summaries downplay the nature of the proposed rules by using words and phrases like "[u]pdating rule for clarity," "[u]pdating rule language for greater clarity," and "[m]oving and updating rule." These summaries cannot possibly be characterized as advising the public how their rights and interests would be affected by the proposed rule changes discussed above. EFSC's March 4, 2024 "Comments Requested" email is not any better; it merely states innocuous intent like to "[r]eorder and reorganize the rules to better match the flow of the contested case process" to "[i]mprove the clarity of the rules by providing additional definitions or enhancing existing ones," and to "[i]mprove the efficiency

of the contested case process by providing additional guidance to prospective parties." Simply put, EFSC must not proceed with the rule changes objected to in this letter without providing "[a]n objective, simple and understandable statement summarizing the subject matter and purpose of the intended action in sufficient detail to inform a person that the person's interests may be affected." ORS 183.335(2)(a)(B); *Ass'n of Oregon Loggers, Inc. v. Dep't of Ins. & Fin.*, 130 Or App 594, 596, 883 P2d 859, 861 (1994) (referring to this requirement of ORS 183.335(2)(a) as the very "purpose of the [rulemaking] notice"). Adoption of the rule changes objected to in this letter, without first issuing a new notice of proposed rulemaking containing an adequate summary for each of these rule changes, will violate the Oregon APA. *See City of Cornelius v. Dep't of Land Conservation & Dev.,* 331 Or App 349 (2024) (rule was invalid because the subject matter summary of the proposed rule was inadequate to apprise persons how their interests may be affected).

In conclusion, Friends objects to the specific rule changes discussed above and requests that the Council instead make the following changes to the Proposed Rules:

- Modify the language in Proposed Rule 345-015-0430(4) to limit only *limited parties* to the issues they have properly raised in their petitions for limited party status.
- Remove all instances of "standing" and "granting standing" (and all similar derivations of the word "grant") from the Proposed Rules.
- Use clear and consistent language in the Proposed Rules differentiating between full parties and limited parties, in particular by explaining that full parties may participate on all issues in a contested case, while limited parties may participate on the issues they have properly raised in their requests for limited party status.
- Retain the current Council Rules that already authorize interlocutory appeals of a hearing officer's determination on a request to participate as a party or limited party, and clarify these rules to expressly state that a limited party may file an interlocutory appeal of the hearing officer's determination of which issues that party may participate on.

Thank you for the opportunity to comment on this proposed rulemaking. Friends of the Columbia Gorge hopes that our comments and recommendations will be useful to the Council and ODOE in resolving and remedying the questions and concerns we have identified, and in complying with applicable law and the stated goals of this important rulemaking endeavor. If we can be of any further assistance, please do not hesitate to contact us.

Sincerely,

Nathan Baker
Senior Staff Attorney

RAC comments

jkreider@campblackdog.org <jkreider@campblackdog.org>

Fri 4/19/2024 5:05 PM

To:JACKMAN Tom * ODOE <Tom.JACKMAN@energy.oregon.gov>
Cc:fkreider@campblackdog.org <fkreider@campblackdog.org>

2 attachments (176 KB)

Jim Kreider comments from Contested Case RAC phase 2.docx; 2-2024-01-02-Memo on Preliminary Redline-Contested Case - Attachment 1 - Redline-jk.docx;

Council Members,

I have taken my comments sent to you from the RAC that were in red line format. It was and still is very complicated to wade through the comments in the red line document (included). I expected to review these comments with the RAC coordinator and other RAC members. That never happened. And didn't happen in phase 1 either.

For the council I have extracted my comments below and in red have tried to add some context as time has allowed me. My point in the majority of this was not discussed in the RAC. So what is the purpose of a RAC?

Staff take what rack members say and after consultation with DOJ take the comments that fit within the comments and information they want you to see so as to not bother you with unnecessary comments and detail.

Thank you for your consideration.

/s/ Jim Kreider

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

DIVISION 1 - GENERAL PROVISIONS

345-001-0005 - Uniform and Model Rules

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

345-015-0001 - Purpose and Authority
345-015-0014 - Contested Case Notices

Procedures for the Conduct of Contested Cases..

345-015-0401 – Governing Provisions – NEW RULE
345-015-0405 – Appointment and Duties of Hearing Officer
345-015-0410 - Filing and Service
345-015-0415 - Requests for Party or Limited Party Status
345-015-0420 - Petition for Indigent Status
345-015-0425 - Participation by Government Agencies
345-015-0430 - Prehearing Conference and Prehearing Order
345-015-0435 - Suspension of Hearing and Exclusion of a Party
345-015-0440 - Burden of Presenting Evidence (NEW RULE)
345-015-0445 – Submission of Evidence
345-015-0450 – Official Notice of Evidence
345-015-0455 - Motions
345-015-0460 – Interlocutory Appeals to Council
345-015-0465 - Stays
345-015-0470 - Reopening Record Prior to Decision
345-015-0475- Hearing Officer's Proposed Contested Case Order
345-015-0220 - Public Hearing and Notice on the Draft Proposed Order
345-015-0230 - Council Review and the Department of Energy's Proposed Order
345-015-0240 - The Decision-Making Record

DIVISION 21 - APPLICATION FOR SITE CERTIFICATE

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 20~~12~~23): 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 [1]: 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 memo.

Commented [2]: agree with Tom

Commented [3]: The most recent rule that I can find was updated Feb 2016 (137-003-0640), but there is no reason to not just include the current date as we are adopting the rules as they stand today.

Commented [4]: #2 OAH Rule

Commented [5]: Can we do a cross-walk on where these land in the new version?

what is wrong with 137-003-0001 through 137-003-0092? Some seem critical so where are they replaced and how? ie. 137-003-0002 Rights of Parties in Contested Cases, 137-003-0005 Participation as Party or Limited Party, 137-003-0025 Discovery in Contested Cases Hearing

https://secure.sos.state.or.us/oard/displayChapterRules.action?selectedChapter=93

Commented [6]: Updated reference due to move to OAH model rules.

Commented [7]: #2 OAH Rule

Commented [8]: The full set of rules: https://secure.sos.state.or.us/oard/displayChapterRules.action?selectedChapter=93

Commented [9]: Needs discussion as they do different things.
0055 is 137-003-0055 Ex Parte Communications (Applies during the pendency of the proceeding) and 0660 is 137-003-0660 Ex Parte Communications to Agency during Review of Contested Case (review of the contested case). Why not use both as they deal with different parts of the process.

In summary (AI), both rules deal with ex parte communications in the context of contested cases, but **OAR 137-003-0055** applies more broadly to any point during the pendency of the proceeding, while **OAR 137-003-0660** specifically addresses communications during the agency's review of the contested case.

Comparison of the 2 from our AI friends ...
https://docs.google.com/document/d/1Wd8wBIth6tC-B7odl3xmaxO4JQ6AG7g1WrUbxmbafsY/edit?usp=sharing

Commented [10]: Updated reference due to move to OAH model rules.

Commented [11]: #2 OAH Rule

Commented [12]: why have the 2 sets. still need to understand that.

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

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

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~~0505. 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~~ 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) ~~(g) A~~ A statement that ~~active duty~~active-duty service members 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

Commented [13]: Energy Facility Siting Council (EFSC) - full name would be better

Commented [14]: 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 [15]: #3 Consistency

Commented [16]: Agree with Tom and prefer the "proceedings" language too.

Commented [17]: Removed as 345-015-401 now contains the language about the adopted rules governing the contested case proceeding.

Commented [18]: #1 Reorganize

Commented [19]: numbering incorrect. Index 345-015-0401 – Governing Provisions – NEW RULE
and body
345-015-0400 – Governing Provisions – NEW RULE

Commented [20]: this should be discussed as there is no docket system and emailing huge files with files names so long that many machines cannot download them. Plus ISP cut customers off because of large volume mailing.

Commented [21]: 137-003-0001 Contested Case Notice 137-003-0505 Contested Case Notice See ...
https://docs.google.com/document/d/1VHdxsU4sPTp5GQFMwTdGfoyzxr5K6lHAg5XDv3XourA/edit?usp=sharing
137-003-0001 Purpose: This rule outlines the content and format of a contested case notice issued by an agency initiating a contested case proceeding.
137-003-0505 Purpose: This rule specifies the requirements for contested case notices issued by the Office of Administrative Hearings (OAH) when an administrative law judge (ALJ) conducts the hearing.

How will these be addressed?
(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;
(h) If the party is an agency, corporation, partnership, limited liability company, trust, government body or an unincorporated association, a statement that the party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide ...

Commented [22]: where did all these go? cross walk?

Commented [23]: Is this new? I remember that ODOE and IPC responded and tried to "help" the ALJ by organizing the case, the issues, and what & how she should rule on party ...

Commented [24]: but probably not worth objecting too. If it is known in advance that developer and ODOE will do this, then I guess OK? But to me, it gives the upper hand to the ...

Commented [25]: Where are a-f above landing? Where is the deadline for the public to respond? Needs discussion

Commented [26]: not a part of original rule. are there other groups that have the same status to have a stay? Peace Corp, VISTA, state department overseas etc?

Commented [27]: Removed existing list as unnecessary given the proposed adoption of OAR 137-003-0505, which serves the same function.

Commented [28]: #2 OAH Rules

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

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.

(2) The rules in this Division addressing contested cases (OAR 345-015-0401 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

345-015-0023 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 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~~3) The hearing officer shall maintain a complete and current record of all motions, rulings, testimony and exhibits ~~during the course of~~during the ~~hearing~~contested case proceeding. A complete and current record does not include miscellaneous communications or documents that fail to assist in providing a more complete understanding of the related contested case proceedings. The hearing officer shall keep the Council informed regularly on the status of the contested case.

(~~5~~4) The hearing officer is authorized to carry out the responsibilities assigned in this rule, including but not limited to the authority to:

Commented [29]: New rule to clarify governing provisions for the contested case process.

Commented [30]: #4 Clarity

Commented [31]: new rules (effective date). Need to show flow from date in 1 above

Commented [32]: How and when is this decided. Why does ODOE want 2 sets of rules. If ODOE rules are chosen, is the party being punished? Or case to complicated for "normal" legal rules. Why special?

Commented [33]: need to be changed to date approved

Commented [34]: Administrative Law Judge

Commented [35]: shall

Commented [36]: really? never knew this? the council member and staff seems a bit to close, ethically speaking. conflict of interest? Todd would say its not a conflict of interest because unless there was a financial incentive. But, I think peer pressures and professional status' are also things that put people (operating as supposed impartial, independent entity) in conflicted situation.

Delete these.

And get internal language consistent -- this is an ALJ, not a hearing officer!

Commented [37]: need to eliminate. this would be highly suspect of ...

Commented [38]: Needs discussion to justify and specify justifications.

Commented [39]: Removed as duplicative of OAR 137-003-0600(3).

Commented [40]: #2 OAH Rules

Commented [41]: https://secure.sos.state.or.us/oard/viewSingleRule.action;JSESSIONID_OARD=wWtdKP7VJSDvQd-1c1uU2fZX8dVU9KZyUTwNugKaMtbb8VCvLHQQ!1961848273?ruleVrsnRsn=10149

Commented [42]: organized and accessible on line docket system

Commented [43]: Here's a big suggestions to help everyone engaged in the case! !!! This record needs to be accessible to all (whether via One Drive or a docketed system.) It will greatly improve efficiency!

Commented [44]: Clarifying what is and is not part of a complete and current record.

Commented [45]: #4 Clarity

Commented [46]: Who makes this decision? If submitted to the docket, it needs to be included. If a clarifying email from parties to staff or other parties, that's ok. unless email correspondence is used as evidence as an exhibit.

(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~~-0025~~0568, 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-~~0030~~5755, 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, ~~determining~~shall limit th~~ose~~e 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-~~0062~~0470, 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~~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.

Stat. Authority: ORS 469.470

Commented [47]: where do we talk about the rules for naming conventions and standards for submiting documents?

Commented [48]: Making it clear that evidence submitted by parties must be part of the scheduled established by the HO

Commented [49]: #4 Clarity

Commented [50]: I think this should be: "Rule on" not "consider." but its just style. I just say this because all the other items, the hearing officer rules, orders, disposes, administers,... more firm words.

Commented [51]: OAR 137-003-0568 explains how the issuance of subpoenas will work.

Commented [52]: #2 OAH Rules

Commented [53]: Reflecting adoption of OAH rules as proposed.

Commented [54]: #2 OAH Rules

Commented [55]: These need a clear outline of what will be done in the conferences. ALJ's have rephrased parties statements to not reflect what was actually the case the party was raising. How to objection to the ALJ's rephrasing should be indicated. Let's walk through some scenarios for examples.

Commented [56]: clarify what this does that 0575 doesn't and insert that. https://secure.sos.state.or.us/oard/viewSingleRule.action;JSESSIONID_OARD=wWtdKP7VJSDvQd-1c1uU2fZX8dVU9KZyUTwNugKaMtbb8VCvLHQQ!1961848273?ruleVrsnRsn=9974

Commented [57]: Reflecting adoption of OAH rules as proposed.

Commented [58]: #2 OAH Rules

Commented [59]: 0575- https://secure.sos.state.or.us/oard/viewSingleRule.action;JSESSIONID_OARD=wWtdKP7VJSDvQd-1c1uU2fZX8dVU9KZyUTwNugKaMtbb8VCvLHQQ!1961848273?ruleVrsnRsn=10129

Commented [60]: Should read without sufficient specificity or may.
What is mean by limit items that have been raised with sufficient specificity? If issue has been accepted, why limit. And if limited, where is recourse by party? Discussion.

Commented [61]: #4 Clarity

Commented [62]: #3 Consistency

Commented [63]: #1 Reorganize

Commented [64]: true covered under exparte (0625)

Commented [65]: Removing this language, given that OAR 137-003-0625 ("Ex Parte Communications with Administrative Law Judge") covers this topic thoroughly.

Commented [66]: #2 OAH Rules

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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.~~

(2~~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.

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

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~~2) Except as described in section (~~4~~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. 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

Commented [67]: #4 Clarity

Commented [68]: There needs to be a web based docket system. other states agencies have them.

Commented [69]: Good to drop. But this also has me wondering if there should be some requirements about formats, files sizes, naming conventions, bates stamping, etc... Maybe that's something to add to the ALJ's duties: to decide these/make an order, and enforce.

Commented [70]: 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 [71]: #5 Efficiency

Commented [72]: https://docs.google.com/document/d/1NtvdTr2UqH6wqA6iJ0OKQYH9dYzbyQe9Flpbf6J7zHc/edit?usp=sharing

Commented [73]: 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 [74]: 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 [75]: #2 OAH rules

Commented [76]: add: and all other parties that have requested to participate or be on service list

Commented [77]: https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=304074

Commented [78]: https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=266717

Commented [79]: Removing as duplicative of proposed adoption of OAR 137-003-0535(2).

Commented [80]: "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 [81]: #2 OAH Rules

Commented [82]: https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=303985

Commented [83]: earlier this was changed I believe? not just the hearing but "commented on the record by deadline"

Commented [84]: how or why wouldn't they follow this? Isn't an ORS a law and not a rule? Can the department ignore a ...

Commented [85]: This section needs to be broken down. How many different interpretations can we get from this. ...

Commented [86]: Revised to be consistent with ORS 469.370(3), which states that ". . . issues shall be raised wit ...

Commented [87]: #3 Consistency

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.

(3) The requirements in (2) 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.

(45) 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 thefor 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 orderat the public hearing showing that the person raised the issue or issues at the public hearingon the record of the draft proposed order.

(5) 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.

(6) 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. A limited party may participate in the contested

Commented [88]: are we going to use the form as a model?

Commented [89]: wow, this seems like a really high bar!! How would someone know all of this at the beginning of the case-or during the DPO comment period? HOWEVER, as I examine it more, its really not so different? for example:
--"identified" the rec of fact, conclusion of law, or other, that you object to. Well those are spelled out in the end of each section of the DPO.
--specify the standard, laws, etc...
--present facts! this is the tough one for folks --and it needs to be presented IN their DPO comment.

Commented [90]: Clarifying what it means to present an issue at the DPO hearing with sufficient specificity.

Commented [91]: #4 Clarity

Commented [92]: 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 [93]: #1 Reorganize

Commented [94]: Updated to reflect adoption of OAH model rules

Commented [95]: #2 OAH rules

Commented [96]: 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 [97]: #5 Efficiency

Commented [98]: 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 [99]: #5 Efficiency

Commented [100]: this is new in a way. I like that it implies you create your own issue statement. However, I'm not certain of that. I think the ALJ will stiff re-state it in his/her terms (not certain).
It also might be that thru discovery you learn more and therefore, you'll need the issue to be able to cover it all. I can see folks being frustrated with themselves (just like they were with the ALJ) when the issue statement becomes very narrow and limits them greatly. Not sure exactly how to remedy this?

WHAT about the new template will there be prompts for this to be a thorough as needed?

Commented [101]: The comments don't have to occur at the actual hearing, but can be any time during the public comment period.

Commented [102]: #3 Consistency

Commented [103]: this is more clear. good.

Commented [104]: why not place this in the record? This should be part of the record--not just distributed to those ...

Commented [105]: Adding clarity as to how responses to petitioner requests by department and applicant should take ...

Commented [106]: Going to need to edit 15-230 to update reference to this rule.

Commented [107]: #4 Clarity

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~~

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.

(~~2~~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.

(~~3~~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

Commented [108]: This added sub-section (6) is a BIG problem for the public and I do not believe lends itself to good decisions and process in the end. As mentioned in intro letter comments:
This is not helpful and limits good ideas from coming forward.
1) The person that already has standing and participates in the CC is knowledgeable of the development. And while they might be a limited party and focused specifically on one issue in the CC that doesnt' mean that they wouldn't have excellent input for a site "condition." As a matter of fact, they might have the best ideas on conditions because so many issues are interconnected and become apparent throughout the case. By not allowing that limited party to propose another condition(s), is not the way to protect Oregon's resources.
2) By adopting this you will encourage some CC petitioners to get standing on more issues (speggetti), just so that they can propose Conditions on them! Whereas, they might have only taken one issue to the CC, but now they have to get standing on all issues to simply propose conditions.
Does this make sense?

Commented [109]: Defining what it means to be a limited party in order to remove as much confusion as possible regarding this issue.

Commented [110]: #4 Clarity

Commented [111]: See proposed 345-015-0430(4).

Commented [112]: #1 Reorganize / #3 Consistency

Commented [113]: 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 [114]: #2 OAH Rules

Commented [115]: Discussion to move this into an Environmental Justice framework and intervener funding.

Commented [116]: Defining what indigent means.

Commented [117]: #4 Clarity

Commented [118]: This should be linked to state OHA or some state agency. Many of these assets are no longer counted in eligibility.

Commented [119]: that was a while ago. Link to? https://https://www.healthcare.gov/glossary/federal-poverty-level-fpl/

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 345-015-0016. 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.

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

345-015-0083430 - Prehearing Conference and Prehearing Order

(1) The hearing officer may hold a prehearing conference to address petitions for party or limited party status and issues. The hearing officer shall consider whether the person has standing to participate in the contested case as a party or limited party and each issue in which the person may participate by considering the applicable provisions in OAR 345-015-0415 and OAR 137-003-0535(8). The hearing officer shall consolidate one or more issues raised by the same or multiple parties if the hearing officer determines the issues raised are substantially similar to one another and consolidation would expedite the hearing while still ensuring a full, fair, and impartial hearing.

(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 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 and whether they have been granted standing to participate as a party or limited party, 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.

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

Commented [120]: this reminds me of Intervenor funding concept!

Commented [121]: 345-015-0016 Requests for Party or Limited Party Status in Contested Cases on Applications for a Site Certificate https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=266718

Commented [122]: is the rest needed?

Commented [123]: why is this an opportunity? isn't it a right?

Commented [124]: 345-015-0083-sez more https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=266720

Commented [125]: what is the criteria that this will be decided upon?

Commented [126]: this is against the APA - but its also what Karl argued in the supreme ct and lost ;-(

Commented [127]: this is about the agency not the ALJ

(8) In ruling on petitions to participate as a party or a limited party, the agency shall consider:

(a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;

(b) Whether any such affected interest is within the scope of the agency's jurisdiction and within the scope of the notice of contested case hearing;

(c) When a public interest is alleged, the qualifications of the petitioner to represent that interest;

(d) The extent to which the petitioner's interest will be represented by existing parties.

https://secure.sos.state.or.us/oard/viewSingleRule.action;JSESSIONID_OARD=wWtdKP7VJSDvQd-1c1uU2fZX8dVU9KZyUTwNugKaMtbb8VCvLHQQ!1961848273?ruleVrsnRsn=10085

Commented [128]: 1) break this into two. I think addressing the issues should be separated from party status. They are distinctly separate from each other. (less complicated)

2) This idea is so unfair and even more unrealistic in terms of individuals who are not already associated (like in the same organization). MUST OBJECT. Disperse people/parties ...

Commented [129]: Clarifying that that party status is set after the perhearing conference(s).

Commented [130]: #4 Clarity

Commented [131]: 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 ...

Commented [132]: #1 OAH Rules / #4 Clarity

Commented [133]: Discuss McCallister confusion and how to avoid

Commented [134]: at who's request? any party?

Commented [135]: put this subsection, last.

(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.

~~(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~~7) 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

345-015-0435~~024~~ - 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 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.

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

Commented [136]: Making it clear that an amended order is required if party status is granted as the result of an appeal of party status.

Commented [137]: This sub section (6) should go immediately after (4).

Commented [138]: Making it clear how waiver of an issue occurs. Previous language implies parties have to reraise every issue to maintain standing.

Commented [139]: see my comment

Commented [140]: This needs more clarity! Are you certain that the actual language of issues (proposed description of an issue) will be known before the preconference hearing? Meaning, how will a party be able to discuss and raise the issue of if they do not have advanced notice of what exactly the ALJ is proposing! The pre-conference is verbal and often things are not clear. In writing is best--need to know the ALJ's "suggested procedures and issue desripotions" before the prehearing conference in order for the party to be prepared.

Commented [141]: 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).

Commented [142]: #1 Reorganize / #2 OAH Rules

Commented [143]: is this really necessary? Failure to petition for CC would also waive rights. This almost implies that you can raise issues at the prehearing conference. But, in fact, you would have had to already raise the issue in your petition.

Commented [144]: or proceeding?

Commented [145]: Removing as duplicative of OAR 137-003-0525(c), which gives the hearing officer the authority to bifurcate hearings.

Commented [146]: #2 OAH Rules

Commented [147]: 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 [148]: 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 [149]: #3 Consistency

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) 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.

(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 respond to any other party's proposed site certificate conditions related to issues for which the responding party or limited party has been granted standing according to a schedule set by the hearing officer.

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

345-015-0046 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.

Commented [150]: this mainly talks about witnesses and site conditions. What about direct testimony that is in writing? and what about cross exhibits? etc... need to address:
-form of submission (formats, electronic, etc)
-citations & affidavits, declarations
-hearsay (or parameters for that)

-presume that filing and service lists are covered; albeit, I hope this can move to a docket.

Commented [151]: Again, this is so "old school"! Not to mention complete hassles when there are large files and/or many people in the case/on the list! There's got to be a more efficient way!

Commented [152]: This should NOT be limited like this! Any limited party should be able to propose conditions! Remember, this is "to propose." It is not like they will be arguing a full cc case on these conditions. But it sounds like that is what is being expected? It's confusing and might need another detailed look, because there are times when the developer proposes site conditions as part of their application, or the department has proposed a number of them already in the DPO/PO.... In this case, I suppose it would make sense for a full CC, if a party took issue with it. My point is, that MANY site conditions do not emerge until issues are challenges and deal with in the case.

Commented [153]: this is pre-mature!!! Site conditions could be proposed here if the department wants; but it is much better at the end AFTER all the rest of the case is heard because of all the inter-related issues have surfaced and are heard by all. It is not uncommon to "discover" solutions or site conditions after most of the case is heard. If, the department wants these earlier, there should still be a final opportunity for parties to make proposals for conditions at the end!

Commented [154]: Moved from 345-015-0475 as they are a better fit for this rule.

Commented [155]: #1 Reorganize

Commented [156]: see my comments

Commented [157]: why bother with this, seems redundant? But, if you want to keep it, why not add it to the NEW one you created above 0440?

Commented [158]: Moving this language to better suit subject of rule language (submission of evidence).

Commented [159]: This was part of what was 345-015-0083(2), which is now gone.

Commented [160]: #1 Reorganize

(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 hearingproceeding, 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 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.

(c3) 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.

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 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 [161]: is it really facts at this phase? Isn't it about what evidence the ALJ is allowing to be entered into the record? Could be all the facts too--but I think of that as when ALj issues its own final order (or proposed order)?

Where does it say: this is the evidentiary record. Or, here is the list of accepted evidence into the record. Something like this....

Commented [162]: 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 [163]: #2 OAH Rules

Commented [164]: Making clear that newly adopted OAH model rules apply here.

Commented [165]: #2 OAH Rules / #4 Clarity

Commented [166]: Removing as it is not otherwise permitted by the rules.

Commented [167]: #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.

(2) Unless otherwise ordered by the hearing officer, nNeither 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 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.

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

345-015-0085 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,

Commented [168]: all these 7 day things are quick! 14 would be better -- especially something a hefty as an Interloctory appeal to the Council.
Also these 7 days, need some accommodation or clarification for people that are using the USPS and not electronic. What will be there deadlines and dates?

Maybe a solution to that could be: if a party is not capable of electronic filing and use of the docket system (lol) - then the ALJ will determine reasonable accommodations and set customized deadlines and timeframes as necessary.

Commented [169]: Existing language could be more clear as to the power of a hearing officer to stay a proceeding.

Commented [170]: #4 Clarity

Commented [171]: never had this experience, so don't know if this is fair or what???

Commented [172]: Moved (1) and (2) to 345-015-0445 to better fit subject matter of heading (submission of materials to HO).

Commented [173]: #1 Reorganize

Commented [174]: OK, in terms of location. but see comments on 0445 above.

Commented [175]: #3 Consistency

Commented [176]: #3 Consistency

Commented [177]: when and if the department gets a docket system -- all of these references to "serving everyone" will need to edited to something like: must be posted to the service list docket... or whatever.

Commented [178]: #3 Consistency

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) The Council shall evaluate the exceptions described in (3) and then:

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

(b) The Council shall review the Department's proposed order and may adopt, modify, or reject the Department's proposed order.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.

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

(79) 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.

Commented [179]: Updating to match how term is used in OAR 345-015-0240.

Commented [180]: #3 Consistency

Commented [181]: 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 [182]: #4 Clarity

Commented [183]: good.

Commented [184]: #3 Consistency

Commented [185]: #3 Consistency

Commented [186]: #3 Consistency

Commented [187]: I understand the desire to expedite but it seems that the ALJ can decide timeframes based on the complexities of the case and exceptions.

Above too, although many things are 30 days, so might be ok?

Commented [188]: Adding language to describe who is allowed to file responses to exceptions.

Commented [189]: #4 Clarity

Commented [190]: don't have issues with that.

Commented [191]: 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 [192]: #4 Clarity

Commented [193]: Modified phrasing to be more consistent with statute.

However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.

(~~10~~8) 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.

(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-~~0016~~0415;

Commented [194]: this flow is still not completely clear.

missing or helpful for clarity:
--are the parties filing the exception to the Council now? or still to the ALJ? I think it shifted to Council. (3)
--If the Council, why is the ALJ saying the timeframe? I also think its better to leave these times open to the ALJ or Council to set. 15 days is very quick turnaround depending on complexity of case. (4)
--(5) fine
--(6)(b) -- why have the middle sentence? its confusing and seems to counter (a). Isn't the Council NOT reviewing the proposed cc order of the ALJ until after the exceptions have been filed? Aren't they looking at the full package of cc proposed order AND the exceptions! I think this is what (a) says? Then, (b) only has to refer to the Department's PO.
--(6)(b) but also in this one it makes a switch to the hearing officer/ALJ's "proposed order." Where did this come from? In other words, is there a step AFTER "exceptions" that the ALJ files thier own final PO to the Council?

Finally, I would take the date of execution stuff and make it its own subsection (7) and (7) -- ooops catch that.

Commented [195]: #1 Reorganize

(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

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;

(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

Commented [196]: #3 Consistency with the changes made above.

(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.

(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~~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

(b) The Department must send the notice by mail or email to:

(A) All persons on the Council's general mailing list;

Commented [197]: #1 Reorganize

Commented [198]: #4 Clarity

(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

345-015-0240 - The Decision-Making Record

The decision-making record on an application for a site certificate includes the decision record for the Department of Energy's proposed order and the record of the contested case proceeding.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 469.370

DIVISION 21 - APPLICATION FOR SITE CERTIFICATE

~~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.~~

~~(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~~

Commented [199]: Removed, see proposed OAR 345-015-0440, which deals with the burden of proof.

Commented [200]: #1 Reorganize

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

DIVISION 15 - PROCEDURES GOVERNING COUNCIL AND DEPARTMENT OF ENERGY PROCEEDINGS, INCLUDING SITE CERTIFICATE HEARINGS1

Jim Kreider comments from Contested Case RAC phase 2

Council Members,

I have taken my comments sent to you from the RAC that were in red line format. It was and still is very complicated to wade through the comments in the red line document (included). I expected to review these comments with the RAC coordinator and other RAC members. That never happened. And didn't happen in phase 1 either.

For the council I have extracted my comments below and in red have tried to add some context as time has allowed me. My point in the majority of this was not discussed in the RAC. So what is the purpose of a RAC?

Staff take what rack members say and after consultation with DOJ take the comments that fit within the comments and information they want you to see so as to not bother you with unnecessary comments and detail.

Thank you for your consideration.

/s/ Jim Kreider

345-001-0005 - Uniform and Model Rules

Page : 1 Line : 35 Author : Jim Kreider 01/31/2024
Can we do a cross-walk on where these land in the new version?

what is wrong with 137-003-0001 through 137-003-0092? Some seem critical so where are they replaced and how? ie. 137-003-0002 Rights of Parties in Contested Cases, 137-003-0005 Participation as Party or Limited Party, 137-003-0025 Discovery in Contested Cases Hearing Link to Chapter 137

Not discussed

345-015-0012 Filing and Service of Documents in a Contested Case - gone from RAC draft to coucil
345-015-0014 - Contested Case Notices - gone from RAC draft to coucil

Page : 1 Line : 36 Author : Jim Kreider 01/31/2024
Needs discussion as they do different things.
0055 is 137-003-0055 Ex Parte Communications (Applies during the pendency of the proceeding) and 0660 is 137-003-0660 Ex Parte Communications to Agency during Review of Contested Case (review of the contested case). Why not use both as they deal with different parts of the process.

In summary (AI), both rules deal with ex parte communications in the context of contested cases, but **OAR 137-003-0055** applies more broadly to any point during the pendency of the proceeding, while **OAR 137-003-0660** specifically addresses communications during the agency's review of the contested case.

Comparison of the 2 from our AI friends ...

Comparison of OAR 137-003-0055 and OAR 137-003-0660: Ex Parte Communications

Not discussed

Page : 1 Line : 40 Author : Jim Kreider 01/31/2024
why have the 2 sets. still need to understand that.

Not discussed

Context-trying to simplify rules but still have 2 sets of rules that can be used. Why? Examples where rules clashed or rational for developing parallel set of rules. And what is the need to be able to move back and forth between them?

Page : 2 Line : 47 Author : Jim Kreider 01/31/2024
Energy Facility Siting Council (EFSC) - full name would be better

Page : 2 Line : 49 Author : Jim Kreider 02/01/2024
numbering incorrect. Index 345-015-0401 – Governing Provisions – NEW RULE
and body 345-015-0400 – Governing Provisions – NEW RULE

Page : 2 Line : 53 Author : Jim Kreider 01/31/2024
this should be discussed as there is no docket system and emailing huge files with files names so long that many machines cannot download them. Plus ISP cut customers off (pro ses) because of large volume mailing.

These comments were based on a section in the draft given to the RAC which is not in the document given to the council. It was:
345-015-0012 Filing and Service of Documents in a Contested Case

Page : 2 Line : 56 Author : Jim Kreider 01/31/2024
0505 replaces 0001 and need discussion the differences and why?
137-003-0001 Contested Case Notice
137-003-0505 Contested Case Notice
See Comparisons ...
Comparing OAR 137-003-0001 and OAR 137-003-0505

137-003-0001 Purpose: This rule outlines the content and format of a contested case notice issued by an agency initiating a contested case proceeding.

137-003-0505 Purpose: This rule specifies the requirements for contested case notices issued by the Office of Administrative Hearings (OAH) when an administrative law judge (ALJ) conducts the hearing.

How will these be addressed?

(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;
(h) If the party is an agency, corporation, partnership, limited liability company, trust, government body or an unincorporated association, a statement that the party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise;

If this were to be discussed, I would have asked what legal aid resources are shared? Why is there not a specific section identifying who can represent themselves in a contested case. The way it is worded, a person could walk away thinking they could not represent themselves.

Page : 2 Line : 64 Author : Jim Kreider 02/01/2024
where did all these go? cross walk?

Page : 2 Line : 66 Author : STOP B2H Coalition 01/31/2024
Is this new? I remember that ODOE and IPC responded and tried to "help" the ALJ by organizing the case, the issues, and what & how she should rule on party status. I think many of us objected to their advocacy (as we felt it was biased & exparte - like).

If it is known in advance that developer and ODOE will do this, then I guess OK? But to me, it gives the upper hand to the developer and department, in terms of whether the ALJ will grant a contested case or not. Basically, this creates a higher bar upfront! There will be more denials of contested cases doing this -- and then appeals?

Page : 2 Line : 66 Author : STOP B2H Coalition 01/31/2024
but probably not worth objecting too. If it is known in advance that developer and ODOE will do this, then I guess OK? But to me, it gives the upper hand to the developer and department, in terms of whether the ALJ will grant a contested case or not. Basically, this creates a higher bar upfront! There will be more denials of contested cases doing this -- I think?

Page : 2 Line : 66 Author : Jim Kreider 01/31/2024
Where are a-f above landing? Where is the deadline for the public to respond? Needs discussion

Page : 2 Line : 69 Author : Jim Kreider 02/01/2024
not a part of original rule. are there other groups that have the same status to have a stay? Peace Corp, VISTA, state department overseas etc?

345-015-0400 – Governing Provisions – NEW RULE

Page : 3 Line : 79 Author : Jim Kreider 02/01/2024
new rules (effective date). Need to show flow from date in 1 above

Page : 3 Line : 83 Author : Jim Kreider 02/01/2024
How and when is this decided. Why does ODOE want 2 sets of rules. If ODOE rules are chosen, is the party being punished? Or case to complicated for "normal" legal rules. Why special?

Page : 3 Line : 86 Author : Jim Kreider 02/01/2024
need to be changed to date approved

No discussion - why are 2 sets of rules needed?

345-015-0403 - Contested Case Notices - did not exist in RAC version. Don't know where it came from?

345-015-0405 – Appointment and Duties of Hearing Officer

Page : 3 Line : 87 Author : Jim Kreider 02/01/2024
Administrative Law Judge

Page : 3 Line : 91 Author : Jim Kreider 02/01/2024
shall

Page : 3 Line : 92 Author : STOP B2H Coalition 01/31/2024
really? never knew this? the council member and staff seems a bit to close, ethically speaking. conflict of interest? Todd would say its not a conflict of interest because unless there was a financial incentive. But, I think peer pressures and professional status' are also things that put people (operating as supposed impartial, independent entity) in conflicted situation.

And get internal language consistent -- this is an ALJ, not a hearing officer!

Page : 3 Line : 92 Author : Jim Kreider 02/01/2024
need to eliminate. this would be highly suspect of ...

Page : 3 Line : 92 Author : Jim Kreider 02/01/2024
Needs discussion to justify and specify justifications.

States that, 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.

Never discussed

Page : 3 Line : 100 Author : Jim Kreider 02/01/2024
https://secure.sos.state.or.us/oard/viewSingleRule.action;JSESSIONID_OARD=wWtdKP7VJSDvQd1c1uU2fZX8dVU9KZyUTwNugKaMtbb8VCvLHQQ!1961848273?ruleVrsnRsn=10149

Page : 3 Line : 101 Author : Jim Kreider 02/01/2024
organized and accessible on line docket system

Page : 3 Line : 104 Author : STOP B2H Coalition 01/31/2024
Here's a big suggestions to help everyone engaged in the case! !!! This record needs to be accessible to all (whether via One Drive or a docketed system.) It will greatly improve efficiency!

Page : 3 Line : 104 Author : Jim Kreider 02/01/2024
Who makes this decision? If submitted to the docket, it needs to be included. If a clarifying email from parties to staff or other parties, that's ok. unless email correspondence is used as evidence as an exhibit.

Page : 4 Line : 109 Author : Jim Kreider 02/01/2024
where do we talk about the rules for naming conventions and standards for submiting documents?

Page : 4 Line : 111 Author : STOP B2H Coalition 01/31/2024
I think this should be: "Rule on" not "consider." but its just style. I just say this because all the other items, the hearing officer rules, orders, disposes, administers,... more firm words.

Page : 4 Line : 117 Author : Jim Kreider 02/01/2024
These need a clear outline of what will be done in the conferences. ALJ's have rephrased parties statements to not reflect what was actually the case the party was raising. How to objection to the ALJ's rephrasing should be indicated. Let's walk through some scenarios for examples.

Page : 4 Line : 117 Author : Jim Kreider 02/01/2024
clarify what this does that 0575 doesn't and insert that.
https://secure.sos.state.or.us/oard/viewSingleRule.action;JSESSIONID_OARD=wWtdKP7VJSDvQd1c1uU2fZX8dVU9KZyUTwNugKaMtbb8VCvLHQQ!1961848273?ruleVrsnRsn=9974

Page : 4 Line : 118 Author : Jim Kreider 02/01/2024
0575-https://secure.sos.state.or.us/oard/
viewSingleRule.action;JSESSIONID_OARD=wWtdKP7VJSDvQd
1c1uU2fZX8dVU9KZyUTwNugKaMtbb8VCvLHQQ!1961848273?ruleVrsnRsn=10129

Page : 4 Line : 122 Author : Jim Kreider 02/01/2024
Should read without sufficient specificity or may.
What is mean by limit items that have been raised with sufficient specificity? If issue has been accepted, why limit. And if limited, where is recourse by party? Discussion.

Page : 4 Line : 138 Author : STOP B2H Coalition 01/31/2024
true covered under exparte (0625)

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

Page : 5 Line : 148 Author : Jim Kreider 02/01/2024
There needs to be a web based docket system. other states agencies have them.

Page : 5 Line : 151 Author : STOP B2H Coalition 01/31/2024
Good to drop. But this also has me wondering if there should be some requirements about formats, files sizes, naming conventions, bates stamping, etc... Maybe that's something to add to the ALJ's duties: to decide these/make an order, and enforce.

Note: Changes to items 2 and 3 not discussed in RAC.

345-015- ~~0016~~ 0415 - Requests for Party or Limited Party Status in Contested Cases on Application for Site Certificates

Page : 5 Line : 159 Author : Jim Kreider 02/01/2024
compare OAR 137-003-0005(2) and OAR 137-003-0535(2) and (3)

Page : 5 Line : 161 Author : Jim Kreider 02/01/2024
add: and all other parties that have requested to participate or be on service list

Page : 5 Line : 162 Author : Jim Kreider 02/01/2024
https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=304074

Page : 5 Line : 162 Author : Jim Kreider 02/01/2024
https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=266717

Page : 5 Line : 168 Author : Jim Kreider 02/01/2024
https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=303985

Page : 5 Line : 172 Author : STOP B2H Coalition 01/31/2024
earlier this was changed I believe? not just the hearing but "commented on the record by deadline"

Page : 5 Line : 173 Author : Jim Kreider 02/01/2024
how or why wouldn't they follow this? Isn't an ORS a law and not a rule? Can the department ignore a law? https://oregon.public.law/statutes/ors_469.370

Page : 5 Line : 177 Author : Jim Kreider 02/01/2024
This section needs to be broken down. How many different interpretations can we get from this. Lawyer and non lawyer.

Page : 6 Line : 183 Author : Jim Kreider 02/01/2024
are we going to use the form as a model?

Page : 6 Line : 183 Author : STOP B2H Coalition 01/31/2024
wow, this seems like a really high bar!! How would someone know all of this at the beginning of the case-or during the DPO comment period? HOWEVER, as I examine it more, its really not so different? for example:
--"identified" the rec of fact, conclusion of law, or other, that you object to. Well those are spelled out in the end of each section of the DPO.
--specify the standard, laws, etc...
--present facts! this is the tough one for folks --and it needs to be presented IN their DPO comment.

Page : 6 Line : 205 Author : STOP B2H Coalition 01/31/2024
this is new in a way. I like that it implies you create your own issue statement. However, I'm not certain of that. I think the ALJ will stiff re-state it in his/her terms (not certain). It also might be that thru discovery you learn more and therefore, you'll need the issue to be able to cover it all. I can see folks being frustrated with themselves (just like they were with the ALJ) when the issue

statement becomes very narrow and limits them greatly. Not sure exactly how to remedy this?

WHAT about the new template will there be prompts for this to be a thorough as needed?

Page : 6 Line : 208 Author : STOP B2H Coalition 01/31/2024
this is more clear. good.

Page : 6 Line : 212 Author : STOP B2H Coalition 01/31/2024
why not place this in the record? This should be part of the record--not just distributed to those mentioned. And, the record should be docketed!

Page : 6 Line : 218 Author : STOP B2H Coalition 01/31/2024
This added sub-section (6) is a BIG problem for the public and I do not believe lends itself to good decisions and process in the end. As mentioned in intro letter comments:
This is not helpful and limits good ideas from coming forward.
1) The person that already has standing and participates in the CC is knowledgeable of the development. And while they might be a limited party and focused specifically on one issue in the CC that doesnt' mean that they wouldn't have excellent input for a site "condition." As a matter of fact, they might have the best ideas on conditions because so many issues are interconnected and become apparent throughout the case. By not allowing that limited party to propose another condition(s), is not the way to protect Oregon's resources.
2) By adopting this you will encourage some CC petitioners to get standing on more issues (spaghetti), just so that they can propose Conditions on them! Whereas, they might have only taken one issue to the CC, but now they have to get standing on all issues to simply propose conditions. Does this make sense?

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

Page : 7 Line : 231 Author : Jim Kreider 02/01/2024
Discussion to move this into an Environmental Justice framework and intervener funding.

Page : 7 Line : 241 Author : Jim Kreider 02/01/2024
This should be linked to state OHA or some state agency. Many of these assets are no longer counted in eligibility.

Page : 7 Line : 241 Author : Jim Kreider 02/01/2024
that was a while ago. Link to? https://https://www.healthcare.gov/glossary/federal-poverty-level-fpl

Page : 7 Line : 249 Author : STOP B2H Coalition 01/31/2024

this reminds me of Intervenor funding concept!

Page : 7 Line : 255 Author : Jim Kreider 02/01/2024
345-015-0016 Requests for Party or Limited Party Status in Contested Cases on Applications for a Site

Certificate
https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=266718

Page : 8 Line : 259 Author : Jim Kreider 02/01/2024
is the rest needed?

Page : 8 Line : 259 Author : Jim Kreider 02/01/2024
why is this an opportunity? isn't it a right?

Page : 8 Line : 265 Author : Jim Kreider 02/01/2024
345-015-0083-sez more
https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=266720

Page : 8 Line : 268 Author : Jim Kreider 02/01/2024
what is the criteria that this will be decided upon?

Not discussed

345-015-~~083~~ 0430 - Prehearing Conference and Prehearing Order

Page : 8 Line : 268 Author : STOP B2H Coalition 01/31/2024
this is against the APA - but its also what Karl argued in the supreme ct and lost ;-(

Page : 8 Line : 269 Author : Jim Kreider 02/01/2024
this is about the agency not the ALJ

(8) In ruling on petitions to participate as a party or a limited party, the agency shall consider:

(a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;

(b) Whether any such affected interest is within the scope of the agency's jurisdiction and within the scope of the notice of contested case hearing;

(c) When a public interest is alleged, the qualifications of the petitioner to represent that

interest;

(d) The extent to which the petitioner's interest will be represented by existing parties.

https://secure.sos.state.or.us/oard/viewSingleRule.action;JSESSIONID_OARD=wWtdKP7VJSDvQd1c1uU2fZX8dVU9KZyUTwNugKaMtbb8VCvLHQQ!1961848273?ruleVrsnRsn=10085

Page : 8 Line : 272 Author : STOP B2H Coalition 01/31/2024
1) break this into two. I think addressing the issues should be separated from party status. They are distinctly separate from each other. (less complicated)

2) This idea is so unfair and even more unrealistic in terms of individuals who are not already associated (like in the same organization). MUST OBJECT. Disperse people/parties should not be dictated to have to work with others (some they may not even know) in order to present their case. This happened in our case but there was so much push back and that she was only able to do it on a
couple of issues.

Page : 8 Line : 281 Author : Jim Kreider 02/01/2024
Discuss McCallister confusion and how to avoid

Page : 8 Line : 282 Author : Jim Kreider 02/01/2024
at who's request? any party?

Page : 8 Line : 282 Author : STOP B2H Coalition 01/31/2024
put this subsection, last.

Page : 8 Line : 284 Author : STOP B2H Coalition 01/31/2024
This sub section (6) should go immediately after (4).

Page : 8 Line : 287 Author : STOP B2H Coalition 01/31/2024
see my comment

Page : 8 Line : 287 Author : STOP B2H Coalition 01/31/2024
This needs more clarity! Are you certain that the actual language of issues (proposed description of an issue) will be known before the preconference hearing? Meaning, how will a party be able to discuss and raise the issue of if they do not have advanced notice of what exactly the ALJ is proposing! The pre-conference is verbal and often things are not clear. In writing is best--need to know the ALJ's "suggested procedures and issue desripotions" before the prehearing conference in order for the party to be prepared.

Page : 9 Line : 294 Author : STOP B2H Coalition 01/31/2024
is this really necessary? Failure to petition for CC would also waive rights. This almost implies that you can raise issues at the prehearing conference. But, in fact, you would have had to already raise the issue in your petition.

Page : 9 Line : 294 Author : STOP B2H Coalition 01/31/2024
or proceeding?

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

Page : 9 Line : 322 Author : STOP B2H Coalition 01/31/2024
this mainly talks about witnesses and site conditions. What about direct testimony that is in writing? and what about cross exhibits? etc... need to address:
-form of submission (formats, electronic, etc)
-citations & affidavits, declarations
-hearsay (or parameters for that)

-presume that filing and service lists are covered; albeit, I hope this can move to a docket.

Page : 10 Line : 328 Author : STOP B2H Coalition 01/31/2024
Again, this is so "old school"! Not to mention complete hassles when there are large files and/or many people in the case/on the list! There's got to be a more efficient way!

Page : 10 Line : 331 Author : STOP B2H Coalition 01/31/2024
This should NOT be limited like this! Any limited party should be able to propose conditions! Remember, this is "to propose." It is not like they will be arguing a full cc case on these conditions. But it sounds like that is what is being expected? It's confusing and might need another detailed look, because there are times when the developer proposes site conditions as part of their application, or the department has proposed a number of them already in the DPO/PO.... In this case, I suppose it would make sense for a full CC, if a party took issue with it. My point is, that MANY site conditions do not emerge until issues are challenges and deal with in the case.

Page : 10 Line : 333 Author : STOP B2H Coalition 01/31/2024
this is pre-mature!!! Site conditions could be proposed here if the department wants; but it is much better at the end AFTER all the rest of the case is heard because of all the inter-related issues have surfaced and are heard by all. It is not uncommon to "discover" solutions or site conditions after most of the case is heard. If, the department wants these earlier, there should still be a final opportunity for parties to make proposals for conditions at the end!

Page : 10 Line : 337 Author : STOP B2H Coalition 01/31/2024
see my comments

Page : 10 Line : 339 Author : STOP B2H Coalition 01/31/2024
why bother with this, seems redundant? But, if you want to keep it, why not add it to the NEW one you created above 0440?

Page : 10 Line : 351 Author : STOP B2H Coalition 01/31/2024
is it really facts at this phase? Isn't it about what evidence the ALJ is allowing to be entered into the record? Could be all the facts too--but I think of that as when ALj issues its own final order (or proposed order)?

Where does it say: this is the evidentiary record. Or, here is the list of accepted evidence into the record. Something like this....

Page : 11 Line : 388 Author : STOP B2H Coalition 01/31/2024
all these 7 day things are quick! 14 would be better -- especially something a hefty as an Interloctory appeal to the Council.
Also these 7 days, need some accommodation or clarification for people that are using the USPS and not electronic. What will be there deadlines and dates?

Maybe a solution to that could be: if a party is not capable of electronic filing and use of the docket system (lol) - then the ALJ will determine reasonable accommodations and set customized deadlines and timeframes as necessary.

Page : 11 Line : 394 Author : STOP B2H Coalition 01/31/2024
never had this experience, so don't know if this is fair or what???

Page : 12 Line : 415 Author : STOP B2H Coalition 01/31/2024
OK, in terms of location. but see comments on 0445 above.

Page : 12 Line : 420 Author : STOP B2H Coalition 01/31/2024
when and if the department gets a docket system -- all of these references to "serving everyone" will need to edited to something like: must be posted to the service list docket... or whatever.

Page : 12 Line : 423 Author : STOP B2H Coalition 01/31/2024
good.

Page : 13 Line : 436 Author : STOP B2H Coalition 01/31/2024
I understand the desire to expedite but it seems that the ALJ can decide timeframes based on the complexities of the case and exceptions.

Above too, although many things are 30 days, so might be ok?

Page : 13 Line : 439 Author : STOP B2H Coalition 01/31/2024
don't have issues with that.

Page : 13 Line : 458 Author : STOP B2H Coalition 01/31/2024
this flow is still not completely clear.

missing or helpful for clarity:
--are the parties filing the exception to the Council now? or still to the ALJ? I think it shifted to Council. (3)
--If the Council, why is the ALJ saying the timeframe? I also think its better to leave these times open to the ALJ or Council to set. 15 days is very quick turnaround depending on complexity of case. (4) --(5) fine
--(6)(b) -- why have the middle sentence? its confusing and seems to counter (a). Isn't the Council NOT reviewing the proposed cc order of the ALJ until after the exceptions have been filed? Aren't they looking at the full package of cc proposed order AND the exceptions! I think this is what (a) says? Then, (b) only has to refer to the Department's PO.
--(6)(b) but also in this one it makes a switch to the hearing officer/ALJ's "proposed order." Where did this come from? In other words, is there a step AFTER "exceptions" that the ALJ files thier own final PO to the Council?

Finally, I would take the date of execution stuff and make it its own subsection (7) and (7) -- ooops catch that.

April 19, 2024

TO: EFSC Rulemaking Staff

FROM: Oregon Solar + Storage Industries Association

RE: Comments on EFSC Contested Case Rulemaking

The Oregon Solar + Storage Industries Association ("OSSIA") is a trade association founded in 1981 to promote clean, renewable, solar technologies. OSSIA provides a unified voice of the solar industry; OSSIA members include businesses, non-profit groups, and other solar industry stakeholders. OSSIA has been engaged in the ongoing Contested Case (OAR 345-015-400) rulemaking process at the Energy Facility Siting Council and offers the following comments. We appreciate the opportunity to participate in the process and offer support for the changes put forward by the Oregon Department of Energy staff for bringing clarity to clear up ambiguity that has slowed the process previously.

Rule Changes Reflect the Stated Need

The stated purpose of the rulemaking is well matched with the proposed changes to the rules. The proposed changes improve the readability of the rule to demonstrate what is required of each party during a contested case at EFSC. The proposed rules sufficiently improve the consistency between EFSC rules and other Oregon laws and administrative rules. Similarly, the proposed rules improve the clarity through improvements to definitions and will work to improve the efficiency of the EFSC contested case process by removing ambiguity and laying out requirements more clearly in the rules. OSSIA has historically argued to improve the siting process through several rulemakings at EFSC, and these rules reflect a well-balanced approach to contested cases processes for all stakeholders.

Clarification of the "Raise It or Waive It" Requirement

OAR 345-015-0415(3) provides clarity to the previously utilized a "Raise it or Waive it" requirement, by specifying that parties must raise issues with sufficient specificity to allow the Council, the Department of Energy, and the applicant to respond. The rules clarify that sufficient specificity means, "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."

This language provides clarity to applicants and to potential intervenors that issues need to be tied to the Council's standard or some other requirement and that issue must be clearly present in their objection and in a person's petition for party status. A party cannot object because they

oppose an outcome, instead it must have a basis in the Council's standards or other applicable state and local requirements. This change provides additional clarity to the contested case process and will improve the efficiency of the process by avoiding disputes about general issue statements that are not related to EFSC standard. OSSIA is supportive of this proposed change as it accurately reflects the requirements to all stakeholders and should lead to less confusion about what is required.

Limited Party Standing (345-015-0415(7))

The proposed rules include a new section defining limited party standing and the role for limited parties in the contested case process. This new section clarifies that a limited party has standing to participate in one or more issues, but not all issues of a contested case. The addition of this section should improve clarity for all stakeholder about how a limited party can participate in a contested case and should improve the efficiency of the contest case process at EFSC. OSSIA is supportive of this new section as it provides clearly articulated frames for how limited parties are allowed to participate in contested cases on the basis of each limited parties granted standing.

Indigent Definition (345-015-0420(2))

The proposed rules include a definition of what indigent means, the previous rules did not include any definition and have caused issues in the past due to their ambiguity. The new definition should add clarity to the rules and ensure that this special party status is not abused by parties who do not meet the definition. OSSIA is supportive of the inclusion of this section in the proposed rules.

Authorized Representative (previously 345-015-0028)

The proposed rules remove the section relating to authorized representatives, this change does not restrict lay representation, but is duplicative of other rule language and is not necessary in this division of the rules.[1] We are supportive of this removal and recognize that this will not alter the contested case process hereafter.

Burden of Presenting Evidence (345-015-0440)

The proposed rules move this rule from another division into the contested case rules. This move ensures that all rules relevant to contested cases are contained within the same division of rules and should add clarity to applicants and other stakeholders going forward. This change is in line with the stated purpose of the rulemaking to simplify the rules.

Submission of Evidence and Proposed Site Certificate Conditions (345-015-0445)

[1] *See* OAR 137-003-0555; and ORS 183.452(2)

The proposed rules add new sections to this rule that are aimed at clarifying the hearing officer's role in regards to comments on proposed site certificates. It clarifies that standing in a contested case is what allows parties to comment on the site certificate conditions. Parties that do not have standing cannot comment on the site certificate conditions. The proposed rules also add a section that allows for any party or limited party to address material changes to site certificate conditions in applications for site certificates, or proposed site certificate amendments. This addition reflects ORS 469.370(7) that all parties can comment on proposed amendments by other parties if the proposed change is material. Together these additions add clarity and appropriate context to the contested case rules.

Conclusion

All together these proposed rules simplify the rules so that they are more concise and directly comment on many issues that have previously been ambiguous. OSSIA is supportive of the proposed rule put forward put forward by the Department as they are balanced and reasonable. The rules provide a great deal of clarity on the contested case process and should improve contested case efficiency after adoption.

Thank you for your consideration of these comments.

Respectfully submitted,

Oregon Solar + Storage Industries Association

Jack Watson
Director of Policy and Regulatory Affairs
Oregon Solar + Storage Industries Association
jack@oseia.org

April 2024 Contested case rules comment

sam myers (via Google Docs) <sam.myers84@gmail.com>

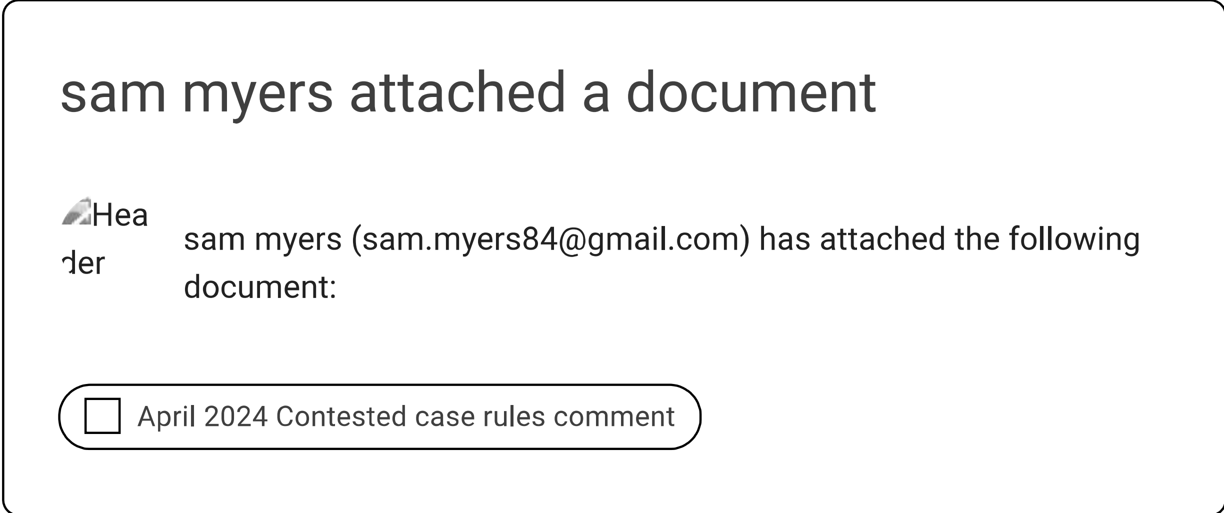
Fri 4/19/2024 4:47 PM

To:EFSC Rulemaking * ODOE <EFSC.RULEMAKING@energy.oregon.gov>
Cc:JACKMAN Tom * ODOE <Tom.JACKMAN@energy.oregon.gov>;stopb2h@gmail.com <stopb2h@gmail.com>; wkingproshop@gmail.com <wkingproshop@gmail.com>

1 attachments (665 KB)

April 2024 Contested case rules comment.pdf;

You don't often get email from sam.myers84@gmail.com. Learn why this is important



sam myers attached a document

Header

sam myers (sam.myers84@gmail.com) has attached the following document:

April 2024 Contested case rules comment

Google LLC, 1600 Amphitheatre Parkway, Mountain View, CA 94043, USA
You have received this email because sam.myers84@gmail.com shared a document with you from Google Docs.

Sam Myers
68453 Little Butter Creek Road
Heppner, OR 97836
(541) 376-8322
Sam.myers84@gmail.com

18th April 2024

EFSC Rules Coordinator
Oregon Department of Energy
550 Capitol St. NE
Salem, OR 97301

I'm writing this letter to express my concern and disappointment with the contested case process. The rules that are currently being reviewed and assessed would benefit from the following information.

Division 15 Specific Rules:
The use of a Naming Convention or numbering system for all documents and evidence needs to be clarified from the start.

Notice:
Full Party vs. Limited Party Status: in the case with B2H, I was denied the ability to bring forward all the risks involved with the B2H project. At one point, I wasn't adequately notified which party status I was granted as seen in the following:

From: sam myers
To: OED_OAH_REFERRAL * OED

Subject: Re: Procedural Information Concerning Hearing Officer's Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case in the matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line
Date: Thursday, November 5, 2020 1:54:34 PM

I am extremely frustrated at the approach this contested case seems to be taking! I am confused, ill informed about specific meanings and time frames of the process!! Idaho has made a motion about adopting a schedule for the contested case, what does that mean and are you giving them special treatment I order to streamline the process in there favor?? The problem here is that I asked for Full a party status and frankly not sure what I have been granted!! I will ask again, please grant me full party status for the issues that I have with Idaho power's proposed project! This is extremely important that all the issues are vetted in a thorough manor and with full disclosure!! Every issue is important to the lives in Oregon!! All of the persons with contested case status deserve to be thoroughly heard and Idaho power must prove that the issues have been resolved!! I'm starting to become suspect that the process is tainted by you Judge Webster, prove me wrong and make this process seem transparent, logical and mostly unbiased!! Please help me understand the process and especially why we do not seem to be able to contest being given only limited party status!!

Sincerely
Sam myers

Sam Myers Appeal of Order on Petition for Party Status Nov. 5, 2020
https://www.oregon.gov/energy/facilities-safety/facilities/Council%20Meetings/2020-11-25-Item-A-Staff-Report-Attachment-1.pdf Page 252 of 345

I was only allowed Limited Party Status, and only on the issues I adequately raised. This prevented me from exposing related landowner issues. Those issues would have provided a more robust and thorough array of concerns to be considered. The following shows my frustration:

> … this rule to cut off the possibility of contested case persons from noticing other important issues and developing information on an issue after the public comment period does not [sit] well with me. I strongly disagree with this rule and believe it does not follow the Oregon statute covering such a hearing. That statute is ORS 183.417(8), which says, "The officer presiding at the hearing <u>shall ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues</u> properly before the presiding officer in the case and the correct application of the law.
>
> PUBLIC HEARING CONDUCTED BY WEBEX BEFORE THE OREGON ENERGY FACILITY SITING COUNCIL NOVEMBER 20, 2020 Page 250 of 462 (emphasis added)
> https://www.oregon.gov/energy/facilities-safety/facilities/Council%20Meetings/2020-11-19-20-EFSC-APPROVED-Meeting-Minutes-with-Nageli-Transcription.pdf

The limited party status narrows the record unjustly. Here is one such example: "In his direct testimony, Mr. Myers states he is concerned that fire protection services 'would be completely overwhelmed responding to a catastrophic fire.' ODOE Closing Brief: Mr. Myers' testimony re: ability of fire protection service providers to address fire is not relevant to his issues. Therefore, this testimony should not be considered because it is not relevant to issue LU-9. Feb. 28, 2022"
36-LU-9 Wildfire Risk and Myers Aerial Spraying - OneDrive (sharepoint.com) pg 67

<u>Appointment and Duties of Hearing Officer</u>:
Rules used in the B2H contested case process were skewed entirely towards the department of energy, the hearing officer, and the overpowering–and ever present–legal team of Idaho power. It was a trifecta against my relevant and well-researched evidence. An example can be found in the Second Order on Case Management Matters and Contested Case Schedule, dated August 30, 2021.

Page 2 of 15 States:

> 1. What do the parties/limited parties need to file on or before close of business (5:00PM) on September 3, 2021? The party/limited party with the burden of proof on an identified contested case issue (i.e., the party/limited party submitting written direct testimony) shall, on or before <u>September 3, 2021</u>, file and serve: (1) a list of identifying the party/limited party's expert and lay witnesses on the identified issue(s) if any; and (2) a list of the party/limited party's exhibits for the identified issue, if any.
>
> 01 Select ALJ Issued Docs and Rulings - OneDrive (sharepoint.com)

What made evidence submission confusing was this statement on page 8 of 15 of the same document:

As set out in the schedule below, the deadline for submitting written direct testimony and **evidence** and any proposed site certificate conditions under OAR 345-015-0085 is September 17, 2021.

There was a hidden agenda behind-the-scenes that I didn't know about. At least that's how it seemed. The public was at an extreme disadvantage with the lack of a publicly available site to access records filed,exhibits, and deadlines.

The contested case rules were unclear, and did not fully inform participants about the accepted (and expected) procedures. Because of confusion as to the correct procedure and timing of evidence, I submitted evidence into the body of my direct testimony dated Sept, 17, 2021; which was convenient for ODOE and IPC to assert as insignificant or improper. Unfortunately, it appears the hearing officer took their advice.

Extreme weather and transmission line fires

Sam Myers Direct Testimony states:

> "Fires starting under high-wind conditions have been shown above to be larger than fires starting in calm conditions, even when including other weather variables such as relative humidity. The tendency of power line fires to become more frequent during extreme events, such as in October 2007 when they were responsible for up to nine of 20 major fires, is due to the fact that the ignition probability rises under high-wind conditions as well. [4]
>
> [4] Power Lines and Catastrophic Wildland Fire in Southern California: Mitchell, Joseph W"
>
> 2 Direct Testimony - OneDrive (sharepoint.com) Page 3 of 10

No objections to the above evidence by Mr. Myers was filed by ODOE or Idaho Power when they filed objections to Limited Parties' Direct Testimony and Exhibits dated October 1, 2021 (01 Select ALJ Issued Docs and Rulings - OneDrive (sharepoint.com)). No objections were made; however, the ODOE Closing Brief suggests that the Hearing Officer give "little weight" to Mr. Myers' testimony about weather contributing to fires and no weight whatsoever to the referenced report (36-LU-9 Wildfire Risk and Myers Aerial Spraying - OneDrive (sharepoint.com) pg 64). In the IPC Closing Response, they state: "Mr. Myers ignores the fact that in this same article, in Table 1, the author reports that there were no instances of power line fires associated with a 500 kV transmission line in San Diego Gas & Electric's service territory during the time period analyzed" (7a Closing Response IPC - OneDrive (sharepoint.com) page 54). The "Table 1" that IPC references lists a short transmission line (only 60.27 miles of 500kV lines) using data collected from only four years (2004-2007). Closing Response IPC - OneDrive (sharepoint.com)

Fire Ignition from Whirlwinds

Sam Myers Direct Testimony states:

> Electric fields in wind-blown sand flows, dust storms and dust evils could be as strong as several kilovolts per meter which may introduce flashover and breakdown of transmission lines, attenuation (or even interruption) of electromagnetic wave propagation, etc … In strong sand storms, E-fields produced by charged sand particles could potentially lead to many failures, such as electric spark, electric corona and point discharge of measuring instruments.[6]
>
> [6]Electrification of Particulate Entrained Fluid Flows – Mechanisms, Applications, and Numerical Methodology. Zhaolin Gu, Wei Wei, Physics Reports; 2015
>
> 2 Direct Testimony - OneDrive (sharepoint.com) (Page 4 of 10)

No objections to the preceding evidence by Mr. Myers was filed by ODOE or Idaho Power when they filed objections to Limited Parties' Direct Testimony and Exhibits dated October 1, 2021 01 Select ALJ Issued Docs and Rulings - OneDrive (sharepoint.com). Conversely, in ODOE's Closing Brief, they write: "However, Mr. Myers did not attach the report he references, state the credentials of the report's author or whether the report has been peer-reviewed and considered reliable. Nor did he provide any evidence showing a similarity between the conditions that might have been assessed in this report and the proposed facility. …the Department suggests the Hearing Officer give Mr. Myers' testimony about whirlwinds little weight and no weight whatsoever to the referenced report" (36-LU-9 Wildfire Risk and Myers Aerial Spraying - OneDrive (sharepoint.com) pg 65). In IPC's Motion to Strike dated March 20, 2022, they contest: "Portions of Mr. Myers's Closing Arguments referring to an article by Wei Wei Zhaolin Gu. Because these statements are not supported by any evidence in the record, and because Idaho Power has not had the opportunity to respond to this evidence, Idaho Power respectfully requests that the Hearing Officer strike the portions of Mr. Myers's brief referring to this article" (7a Closing Response IPC - OneDrive (sharepoint.com) page 5).

Fire damage to soils/crops

In Sam Myers Direct Testimony, he writes:

> "To Whom It May Concern: Below is the account of the effect and subsequent aftermath that fire had on soil used for wheat production on my farm in Morrow County, Oregon and is an example of the long term danger posed by fire risk…we see a crop yield decrease over the next three cropping cycles which encompass an eight-year span of negative soil impacts. …The protection of this residue is of paramount importance to a sustainable farming system. Putting this resource at risk is putting valuable land and resources in jeopardy which will have a chain reaction on the ecosystem as a whole." [7]
>
> [7] Direct Email from Roger Morter, 2021
>
> 2 Direct Testimony - OneDrive (sharepoint.com) (Page 5 of 10)

No objections to the preceding evidence by Mr. Myers was filed by ODOE or Idaho Power when they filed objections to Limited Parties' Direct Testimony and Exhibits dated October 1, 2021 01 Select ALJ Issued Docs and Rulings - OneDrive (sharepoint.com). Once again, in ODOE's Closing Brief, they state: "Mr. Myers quotes an email that he contends is from a local farmer, Roger Morter. However, Mr. Myers did not include a copy of the email from Mr. Morter nor any declaration from Mr. Morter confirming that he sent such an email or experienced the events as described in Mr. Myers' testimony. Given this lack of support, the Department suggests the Hearing Officer give little or no weight whatsoever to the alleged email from Roger Morter" (36-LU-9 Wildfire Risk and Myers Aerial Spraying - OneDrive (sharepoint.com) pg 67-68). In IPC's Closing Brief, they contend the following:

> Mr. Myers further asserts that a mitigation plan is necessary to address the rehabilitation of damaged soils from wildfires. Mr. Myers's concern is misplaced, however, because the chance of the scenario that Mr. Myers's is concerned with is so remote that it would be unreasonable for Idaho Power to plan for such an improbable event—both because (1) a Project-related wildfire is unlikely to occur during operation, and (2) should a fire occur on his property, the damage to soils will not be as extensive as is represented in Mr. Myers's unsubstantiated claims. Mr. Myers provided an unsworn statement from a local farmer, Roger Morter. Mr. Morter's statements have several serious data gaps such as information on the weather before, during, and after the fire event; any indication of what actions were taken after the fire to rehabilitate the soils; if crop reduction was a result of the soil damage or simply because there was no attempt to grow the

same amount of crop as prior years. Because there are many data gaps in Mr. Morter's statement without supporting evidence, this statement should be given little weight. 5a Closing IPC - OneDrive (sharepoint.com) page 46-48

Furthermore, in IPC's Motion to Strike they say: "Mr. Myers relies on a letter from Roger Morter regarding impacts of fire on his agricultural soils, which is an unsworn hearsay statement and should be given little, if any, weight. (Closing Response IPC - OneDrive (sharepoint.com) page 58).

Sunrise Powerlink Transmission Line Project

In my closing brief, I offered another reference by Joseph Mitchell:

> Furthermore, Joseph Mitchell concluded in his research, though limited, that 500 kVtransmission lines can be expected of having a fault rate ranging from .00098 to .0064 faults per mile per year.[9]
>
> [9] Sunrise Powerlink Transmission Line Project Application No. 06-08-010 MGRA Phase 1 Direct Testimony, Appendix A, May 2007 page 19
>
> February 28, 2022 5b Closing Lyons - OneDrive (sharepoint.com) page 6

The ODOE Response Brief states that Mr. Myers "references statements by a Mr. Joseph Mitchell in a report that has not been introduced as evidence in this contested case" and "he does not explain why Mr. Mitchell's testimony regarding another transmission line project should be relied upon when assessing the potential risk of fire for the proposed B2H transmission line" (36-LU-9 Wildfire Risk and Myers Aerial Spraying - OneDrive (sharepoint.com) page 49). This is another instance where lack of procedural information was provided; and therefore relevant testimony was completely disregarded. IPC's lawyers capitalized on this error in their Motion to Strike: "Portions of Mr. Myers's Closing Arguments referring to testimony in Sunrise Powerlink proceeding. Because these statements are not supported by any evidence in the record, and because Idaho Power has not had the opportunity to respond to this evidence…" (March 20, 2022 7a Closing Response IPC - OneDrive (sharepoint.com) page 4).

Weather Events Shorten the Life of the Project

In my Closing Brief, I assert: "Furthermore, it's proven that weather events lessen the lifespan and speed up the erosion of the power line. They are not indestructible. They will get old and they will naturally fault on their own. However, when weather strain is added into the equation, it induces a plethora of weather-related failures." (February 28,2022 5b Closing Lyons - OneDrive (sharepoint.com) page 4).

In their Motion to strike, IPC counters:

> These arguments are outside the scope of Mr. Myers's DPO Comments and thus the Hearing Officer cannot consider these arguments in this contested case. These arguments are also outside the scope of LU-9, are raised for the first time in the closing argument, and are supported by a combination of unsupported assertions and references that are not included in the record in this case. Idaho Power does not have the opportunity to provide evidence in response to these statements, because they are essentially brand new unsworn "testimony" provided after the close of the record. Accordingly, these statements in Mr. Myers's closing arguments should be stricken or, alternatively, given no weight.
>
> March 20, 2022 7a Closing Response IPC - OneDrive (sharepoint.com) page 61

We were ill informed regarding the schedule of the proceeding and the requirements for evidence; IPC capitalized on it. We do not have an army of attorneys on our payroll. The system should be amended to allow the public to participate effectively, otherwise we will continue to be steamrolled by companies with deep pockets.

Red Flag Warnings

In my Closing Brief, I assert:

> IPC is proposing to construct and operate a 500-kV transmission line that has the acknowledged danger of initiating a fire, especially during adverse conditions, right in the middle of a red flag hotspot. In fact, public data from NOAA National Weather Service, Pendleton shows in just the last three years (2019-2021), there were 19 verified Red Flag Warnings documented for Heppner, Oregon where the land I farm is located. Of those warnings, 78% were issued due to a combination of high wind and low humidity. 5b Closing Lyons - OneDrive (sharepoint.com) page 5

In IPC's Closing Response, they counter: "Mr. Myers provides unsupported assertions about the frequency of red flag warnings in Morrow County and farming practices in response to red flag warnings" (7a Closing Response IPC - OneDrive (sharepoint.com) page 55). As the proceeding moved forward and testimony provided, the proceeding did not allow additional information to be added or researched. The nature of this information is fluid; new ideas and studies come to light as a result of the proceeding. Concessions or special rules in the system would allow for deeper research to be made, if needed.

Adequate Wind Loading

In my Closing Brief, I caution that "IPC has failed to communicate with certainty what wind level their design would be able to withstand, especially pertaining to the stretch of 500 kV throughout Morrow County" (5b Closing Lyons - OneDrive (sharepoint.com) page 8). In ODOE's Closing Response, they state:

> At the outset, the Department notes that EFSC site certificates do not govern building code compliance and Mr. Myers has not previously made this allegation, therefore this allegation is not appropriate for consideration as part of Closing Arguments. Mr. Myers has not explained why designing transmission towers in accordance with these standards is not sufficient, given that the state building code expressly does not cover transmission towers.
> 36-LU-9 Wildfire Risk and Myers Aerial Spraying - OneDrive (sharepoint.com) page 50-51

IPC and ODOE were able, throughout the proceeding, to allege that information and evidence provided by the Parties were unverified or incomplete; and yet, in one small sentence, I am unable to assert the same. The relevance of the question is sound; nobody wants a tower failure, and the proceeding is in place to ensure the safety and security of the communities living under the line. In IPC's Closing Response they say:

> Idaho Power has committed to design the Project in conformance with the International Building Code, Oregon Structural Specialty Code, and local building codes. Moreover, compliance with local building codes is outside

> the scope of EFSC's jurisdiction. Therefore, Mr. Myers's arguments are unpersuasive and the preponderance of the evidence in the record demonstrates that Idaho Power will construct the Project to the appropriate design specifications. 7a Closing Response IPC - OneDrive (sharepoint.com) page 62-63

Idaho Power is not the authority here; and yet their closing argument seems to be written as such. Their statement that they will "construct the project to the appropriate design specifications" is still a nonanswer to the question at hand. We still don't have that answer.

Impact to Fire Response Providers

In my Closing Brief, I say:

> Thus, the majority of the transmission line's fire protection and suppression plan is dependent on rural, volunteer fire departments with limited personnel, most of which are local farmers, and outdated, insufficient equipment. Not to mention, the response time in such areas varies widely – this variant alone can mean the difference between a small, manageable fire and catastrophic devastation. 5b Closing Lyons - OneDrive (sharepoint.com) page 9-10

ODOE Closing Brief response was as follows: "Mr. Myers did not raise compliance with the public services standard in his August 24, 2020 request to participate in the contested case and the scope of issue LU-9 does not address the public services standard. Therefore, this testimony should not be considered because it is not relevant to issue LU-9" (36-LU-9 Wildfire Risk and Myers Aerial Spraying - OneDrive (sharepoint.com) Page 67) Imagine reading that. Three years ago, I requested to participate in the contested case to protect my land, family, and community; and yet, here my testimony should not be considered. The "public services standard" is an issue that arose after extensive research into IPC's fire prevention and suppression plan. I am not equipped with a crystal ball. How was I to know on initially entering this proceeding the full scope of the issues? IPC was able to say in their Motion to Strike: "These assertions are outside the scope of LU-9 (and instead address the Public Services Standard), and further, are not supported by evidence in the record. The Hearing Officer should strike the portions of Mr. Myers's brief which offer Mr. Myers's unsupported opinions about local fire response capabilities, or alternatively should give them no weight" (7a Closing Response IPC - OneDrive (sharepoint.com) page 57). This rule worked very well in IPC's favor, because they could disregard multiple testimonies, and prevented having to answer any of the issues raised "outside" the category. This treats the testimony and issues raised as though they have no value. Just strike it (it doesn't matter).

Recommended Site Conditions

In my Closing Brief, I wrote:

> I conclude in order for IPC to comply with the Oregon Administrative Rule 345-022-0030 the following Site Conditions must be included in the Final Order. They are as follows:
>
> • Towers must be constructed to withstand 150+ mph maximum wind load speeds.
>
> • Towers built to the 500 kV standards but only operated at 230 kV voltages.
>
> • The entire transmission line must be powered down (turned off) at a minimum from June 15 – July 15 each year. This allows wheat harvesting (and other dryland cropping) to proceed throughout Morrow County with any possibility of electric discharge events from occurring.
>
> • The entire transmission line must be powered down (turned off) during any Red Flag Warnings issued where B2H traverses.
>
> • IPC must classify the ground covered by the transmission line within Morrow County

as a high-risk zone in its site plan.
• IPC must compensate financially landowners/tenants for any land use restrictions (ie: harvesting, aerial spraying, cropping limitations, etc.) both during construction and operation before final project certification is issued.
• IPC must agree to $1000 per/acre paid to landowners/tenants for soil rehabilitation costs resulting from transmission line fires.
5b Closing Lyons - OneDrive (sharepoint.com) page 15-16

ODOE's Closing Response says: "Mr. Myers also suggests several conditions be proposed in any Final Order granting a Site Certificate. However, he has not provided sufficient evidence to justify imposing these conditions on Idaho Power" (36-LU-9 Wildfire Risk and Myers Aerial Spraying - OneDrive (sharepoint.com) page 51). The proceeding was unclear in the requirement of producing "sufficient" evidence. It also didn't identify "why" the evidence was insufficient. It's convenient that one narrative can wipe out an entire batch of issues. The double-standard allowed by the proceeding truncates the intervenor and empowers the applicant. The IPC Closing Response was similar: "Accordingly, it is unreasonable to include site conditions that are not supported by the preponderance of the evidence in the record, and Idaho Power respectfully requests that Myers LU-9 Proposed Site Certificate Condition 7 be rejected" (7a Closing Response IPC - OneDrive (sharepoint.com) pg 66). Those two responses were remarkably similar, and dismissive.

All of my evidence was swept under the rug. After the proceeding, no changes were made to the plan in consideration for any of the evidence that I brought to the contested cases. It was the same as if I had never spoken at all. That is not how intervenors should be treated. The department of energy saw the issues raised by the evidence, but did not want it to enter into the record. The contested case was a fallacy–a pretense at due diligence. Contested case parties, like myself, were unaware of many of the rules, unaware of our options, and we were never presented with options so that the facts of our evidence would be considered. We had an opportunity to put in motion safeguards and create mitigation standards which would preserve family Farms and the environment for decades to come; but instead the legal team of Idaho Power combined with the ALJ and ODOE found ways to discount, discredit, and dismiss. I cannot describe how utterly disappointed I am. The proceeding was a complete and utter failing of a system designed to protect us.

As noted in B2H Order on Case Management Matters and Contested Case Schedule 01 Select ALJ Issued Docs and Rulings - OneDrive (sharepoint.com) January 14, 2021 page 10 of 24:
IV. Contested Case Process
B. Role and Duties of the ALJ:
1. Pursuant to OAR 345-015-0023 (2), the duties of the ALJ include taking all necessary action to:
a. <u>Ensure a full, fair and impartial hearing;</u>
b. <u>Facilitate presentation of evidence;</u>
c. Comply with statutory time limits on Council decisions;
d. Maintain order; and
e. Assist the Council in making its decisions

New rules need to be put in place that limit the ability for participants in the contested case to bury evidence for their own convenience. These rules need to provide all

parties involved with an equal footing or a level playing field, especially when it comes to preserving their evidence and their point of view.

There were moments in this preceding where the Hearing Officer ignored information provided by intervenors, and deferred to “expert witness” testimony. Below is the Rebuttal Testimony made by Mr. Madison (Idaho Power Expert Witness) on November 12, 2021:

> Should a fire occur in the vicinity of Mr. Myers property, the fuel source will be mostly herbaceous, grass and grain vegetation. The timing of the fire will determine the fire conditions. The most likely time of year for a fire to successfully move through this property is later in the growing season when fuels are quite dry. This may result in a high intensity fire, but it would most likely move through the fields quickly due to the presence of higher winds in that area as Mr. Myers mentions. A quickly moving fire would most likely result in minimal damage to soils. A fast-moving fire may have other benefits to the burned area including reduction of viable weed seed and reduction of disease, insect, and rodent incidence. In addition, burning releases nitrogen (N),potassium (K), phosphorus (P), and other nutrients from undecomposed organic matter to the soil.
> 3 IPC Rebuttal - OneDrive (sharepoint.com) Page 92

The hearing officer was unable to recognize the contradiction made by Mr. Madison in his Sur-Sur Rebuttal testimony dated January 5, 2022:

> First, I believe the impacts will be minimal because of the lower intensity and duration of the fire because of the type of vegetation expected to be present at Mr. Myers’ property, as I previously explained. Second, I believe the damage will be minimal because the fire will have a low severity. The impact of fire on the physical, chemical, and biological properties of the soil is measured based on severity. The severity of a fire at Mr. Myer’s property would be minimal and mostly result in the loss of above ground biomass. A fire will temporarily reduce soil carbon content because of loss of above ground biomass. However, while carbon content may be lost, the amount and type could be replenished through application of organic matter amendments. It is common practice for farmers to intentionally burn off crop residue to control weeds and insects or to reduce surface vegetative matter for rapid planting of a second crop. These <u>farmers understand that amendments may be required after the burn because the residual reservoir of plant nutrients recycled from organic matter that decays each year will be reduced by the fire.</u> Because the loss of soil carbon content can be replenished through the application of organic matter amendments, which is a common and not an unusual farming practice, I believe the impacts will be minimal.
> 4e IPC Sur-sur-Rebuttal - OneDrive (sharepoint.com) Pg 35

Later in Mr. Madison’s testimony, on page 36 he admits:

> I did not review in depth the soil or vegetation conditions specific to Mr. Myers’s parcel. My understanding of the ground coverage in the area of Mr. Myers’ parcel is based on my knowledge of vegetative conditions typically found in that area, which are similar to my family’s farm.

Idaho Power provided a paid Expert Witness, so the hearing officer concluded that his testimony was accurate and ruled that Soil Damage from Wildfire was not an issue on Mr. Myers’ dryland Wheat operation. The viability of the “expert” testimony carries more weight than that of the intervenors, despite their contradiction in testimony. Furthermore, they even admit that the scope of their investigation was limited and based on knowledge that is “typically found in the area.” A generalization such as this does not seem to be “expert” or worthy of much weight. Apparently, this information was detailed enough for the hearing officer. Her decision ultimately passed through the OPUC because she relied on this contradictory conclusion.

Oregon Zone 641

Under "Findings of Fact" Judge Webster says, on page 184, "Although the proposed facility is not yet under construction, Idaho Power analyzed the potential fire risk zones along the proposed route in its 2022 Wildfire Mitigation Plan." I disagree. I asserted:

> According to the 2022 Wildfire Mitigation Plan, Idaho Power has researched Red Flag Warnings in proposed transmission line route. However, they have failed to incorporate the area that poses the highest level of risk – OR 641 – which 25% of B2H would run through. IPC states on page 6, "RFWs for Idaho Power's service territory include Idaho Zones (IDZ) 401, 402, 403, 413, 420 and 422; and Oregon Zones (OR) 636, 637, 642, 634, 644, 645 and 646; and are monitored and are factored into Idaho Power's determination of whether to initiate a PSPS. Myers LU-9 - OneDrive (sharepoint.com) Page 2-3

IPC responded on July 15, 2022:

> As to Mr. Myers' specific criticism that the PSPS Plan does not include Oregon Risk Zone 641, Exception 1 is the first time he has raised a specific concern about the inclusion of "Oregon Zone 641" in the PSPS Plan, and there is no evidence in the record specifically addressing Oregon Zone 641 or its location or characteristics; and for that reason alone, the Council should reject that argument. Myers LU-9 - OneDrive (sharepoint.com) page 36

This is another example where a valid concern was raised, and disregarded because Idaho Power disagreed. No weight is given to the intervenors in these cases; they are admitted as part of the process, but mostly ignored.

High Winds Cause Transmission Line Ignition

Under "Findings of Fact" Judge Webster says, on page 184, "The evidence also demonstrates that the risk of a project-related fire is very low even during Red Flag Warning conditions and/or gusty wind conditions." I argued: "The evidence clearly shows, especially when looking at wildfire data from bordering states, that high winds can directly affect wildfires caused by transmission line ignition. Ignoring the risk, whether high or low, could be detrimental to agriculture in Morrow County" (Myers LU-9 - OneDrive (sharepoint.com) Page 3-4). IPC responded on July 15, 2022:

> In his Direct Testimony, Dr. Lautenberger explained that a 500-kV transmission line like the Project, is not likely to cause wildfires, and therefore the risk of a Project-related fire during operation is extremely low. These stricter requirements make EHV transmission lines like the Project substantially less likely to cause wildfires compared to lower voltage lines that are not subject to these requirements. The fact that the Hearing Officer found Idaho Power's evidence persuasive and cited that evidence to support her factual findings does not support Mr. Myers' assertion that her findings are incorrect. Myers LU-9 - OneDrive (sharepoint.com) page 38-39, 41

Here it appears, again, that the evidence provided by an intervenor is irrelevant. It is also interesting to note that the attorneys at Idaho Power have worded their response to create opposition between the Hearing Officer and intervenor. That is not the nature of this proceeding, period.

Fires Damage Soil

Under "Findings of Facts" Judge Webster ruled, on page 185, "Furthermore, a preponderance of the evidence also demonstrates that, if a fire were to occur at or near Mr. Myers' agricultural operations, the fire would most likely result in minimal damage to soils." I provided not only research, but also the personal testimony of Roger Morter proving the impacts of a quick moving fire on the soils in Morrow County. In Mr. Morter's case, the negative soil effects encompassed an 8-year span. Rehabilitation of local soil, no matter how big, fast, or hot the fire, takes time (Myers LU-9 - OneDrive (sharepoint.com) Page 4-5). IPC said on July 15, 2022:

> Mr. Morter did not provide testimony in this proceeding. There is no sworn statement from Mr. Morter, and he was not made available for cross-examination. Instead, Mr. Myers included an excerpt of what he claims was an email from Mr. Morter in the body of Mr. Myers' Declaration, which he filed as Direct Testimony on September 17, 2021. Thus the "evidence" that Mr. Myers asks the Hearing Officer and Council to consider is unsworn hearsay testimony. …(1) the risk of a

transmission line-related fire impacting Mr. Myers' farm is exceedingly low, and (2) even if a fire were to occur on Mr. Myers' farm, the impacts to the soils would be relatively minor.
…the Council should rely on the testimony of Mr. Madison and should uphold the Hearing Officer's ultimate conclusion that the preponderance of the evidence supports the finding that, if a fire were to occur at or near Mr. Myers' agricultural operations, the fire would most likely result in minimal damage to soils.
Myers LU-9 - OneDrive (sharepoint.com) page 41-44

The advice of IPC was heeded again in this instance. The contradictory testimony provided by the "expert" Mr. Madison was valued higher than that of the first-hand experience of a local farmer. This testimony was very valuable, and simply not accepted. Proceeding rules and timelines need to be made more clear so that valuable evidence and testimony can be included.

Land Use & Aerial Spraying

Under the "Findings of Facts" Judge Webster states, on page 186, "Idaho Power has shown that the project complies with the Land Use standard notwithstanding the impact the project may have on Mr. Myers' farm practices." I believe that the ALJ gave a 'good enough' stamp of approval for the Land Use Standard and completely disregarded that the standard is not met for my farmland (Myers LU-9 - OneDrive (sharepoint.com) Page 4-5).
The IPC responded on July 15, 2022:

Neither ORS 215.275 nor the Land Use Standard require complete elimination or avoidance of impacts. Idaho Power agreed that there would be certain impacts to Mr. Myers' farm, and in particular on his ability to use aerial spraying.
…the Company will attempt to further reduce potential impacts to active agricultural fields through Micrositing. Additionally, Idaho Power must negotiate an easement for any portion of the ROW located on the land in which Mr. Myers conducts his agricultural operations. However, it is important to note that those negotiations will occur outside the Council's site certificate process.
Myers LU-9 - OneDrive (sharepoint.com) page 45-46

Untimely Testimony cannot be used

Under the "Finding of Facts" Judge Webster says, on page 187, "Because Mr. Myers did not timely offer testimony from the Sunrise Powerlink matter or the article my Zhaolin Gu in the hearing record, he may not rely on this evidence in his closing argument."
I introduced and used the article by Zhaolin Gu in my Declaration Testimony on page 4, dated September 17, 2021 (Myers LU-9 - OneDrive (sharepoint.com) Page 6). Here is what the IPC had to say in July, 2022:

First, Mr. Myers is correct that he included an excerpt of the article in his testimony, but the Council should uphold the Hearing Officer's conclusion because Mr. Myers never provided the whole article in the record in this proceeding. Without providing the whole article, Idaho Power was not afforded an opportunity to evaluate the context for the quoted statements or provide a complete response. Thus, even if the Council were to consider the Gu article, the preponderance of the evidence in the record nonetheless demonstrates that, even assuming the whirlwind phenomenon does occur in Morrow County, it has not historically resulted in a powerline ignition. Myers LU-9 - OneDrive (sharepoint.com) page 48-49

Despite already referencing a piece of evidence earlier in the proceeding, it was disregarded with the incorrect assertion that there was "no time" to review it.

EFSC meeting August 31, 2022 PCCO Exceptions Hearing:

Condensed - Hearing - Day 3 (oregon.gov)

Page 689
In person testimony by Sam Myers:
I request that you reverse the ALJ's decision, specifically the ALJ was incorrect in finding that Idaho Power adequately analyzed the risk of project-related wildfire during red flag warning, weather warning conditions, and in operation as well. It's clear in the IPC's 2022 fire mitigation plan that they failed to include the zone that potential -- that poses a highest level of risk. That zone is over our farm. That's a weather service

designated zone over our farm. It's not a zone that you talked about prior to this and that groups weather issues that are similar issued by the weather service itself. The -- the IPC failed to include our zone as a critical fire zone risk or at-risk zone. They failed to include this. This zone includes our cropland, our farm. And this zone also makes up 25 percent of the proposed transmission line link. The IPC misclassifying this zone as a critical fire risk, again, this zone has statistically the same number of red flag warnings issued on average as other zones that were classified as high -- critical -- high critical fire risk zones. In addition, the ALJ was incorrect in finding that high winds pose little risk for wildfires caused by transmission line ignition. In my supporting evidence I presented in multiple filings showing the 500 kV transmission lines have ignited fires in comparable landscapes. Idaho Power has confirmed this fact. Furthermore, the ALJ was incorrect in finding that if a fire were to occur on my farm, it would have minimal soil impact. And there's no need for the IPC to have a soil rehabilitation plan in place. Quite frankly, contrary to Idaho Power's expert witness, Mr. Madison, the facts provided in my direct testimony are a hundred percent accurate and specifically unique to this cropping system. As supporting evidence, I provided a signed, written testimony of a local farmer that experienced the fire in his cropland. That fire impacted his soil negatively for over six year. This is a well-documented testimony that completely contradicts Mr. Madison's findings. It is very clear that a much larger risk exists than what was assessed. In essence, the risk on our section of farm has not been addressed and certainly not as adequately. Judge Webster was incorrect in finding I did not timely offer testimony from the article by Zhaolin Gu into the hearing record. I presented this article within the filing deadline in my declaration testimony, and it is critical evidence -- crucial evidence related to my issue, should not be overlooked.

VICE CHAIR HOWE: Mr. Myers, you need to wrap up.

MR. MYERS: By leaving out this zone over our farm plays out in a number of different ways, but we are at risk of soil damage in a fire. Fires do happen. These lines do light fires. That's -- that's a fact. And our environment, locally, is at risk. Because we don't have a large history of fires in our area is because we got lucky. And because local residents are diligent about not mishandling fire in any way to have a fire take off. Things will change if a transmission line is installed. It's a different environment. You can't say that because we haven't had fires prior to this, that it's not an issue. We just got lucky and we've had people that care about not lighting a fire by accident. And it does happen. And we haven't had a lot of -- we're very rural.

VICE CHAIR HOWE: Okay. Thank you very much. Are there questions from Council? Councillor Beier.

COUNCIL MEMBER BEIER: This is Councillor Beier. We just touched on the fire component -- the wildfire component of your exception. But if you could give us 20 to 30 seconds on the aerial application and your concerns vis-à-vis the power line and how you apply to your property.

MR. MYERS: Absolutely. Absolutely. The IPC has tried to mitigate that with lines going around fields and so on, they mentioned that. Right? In my case, it runs right through a -- a section and a half of ground that had been continuously farmed for 60 to 80 years. I'm stuck with a line going right through my field. What am I going to do? I can't -- it's like -- there's no mitigation here. It goes right through it. Right through the middle of it. I don't even know if I can farm it. I can't -- what am I -- the pilot is not going to want to go anywhere near that. I don't know the regulations there. For my case, it is a disaster. There's no great option. I appreciate that question. Immensely, I really do.

VICE CHAIR HOWE: Thank you, Mr. Myers.

MS. RACKNER: Good morning. Lisa Rackner for the record. Mr. Myers' exceptions raise a number of issues and I'm going to try to briefly address each of them. But before I do that, I just want to provide a little bit of context about the company's wildfire mitigation plan and public safety shutoff plan for de-energizing lines. The company needs to -- Sorry about that. The company filed its most recent -- it's 2022 plan with the Public Utility Commission and that plan was approved. Now, our understanding from Mr. Myers' exceptions was his concern that the public safety power shutoff plan doesn't include risk zone 641. That was an issue he brought up for the first time. Our understanding is that risk zone 641 includes Morrow and Umatilla County. And I do want to ensure the Councilmembers that in the wildfire mitigation plan itself, the company has thoroughly addressed wildfire risk in those counties. With respect to the public safety shutoff plan, again,

that's the plan for de-energizing lines in certain emergency situations, that is a living document. It only covers the transmission lines that have been built. It's because it's dynamic and it has to always change. So B2H has not been added to that -- to that plan yet. But it certainly will before it's energized. And the company will have an appropriate plan for that -- the PSPS. So Mr. Myers also alleges that the hearing officer erred by failing to consider evidence concerning the risk of fire ignition with respect to 500 kV lines. However, there was substantial evidence in this case by our expert addressing this issue. And as Idaho Power's expert witness explained, fires from high -- extra high voltage lines, like a 500 kV line, are extremely rare. They are much less likely to cause fires because they are subject to stricter safety and engineer requirements. They are high above the tree line and they are a much wider right-of-way around -- around it. So the hearing officer correctly found that the risk that a fire would be started from a 500 kV line was extremely -- was extremely low. With respect to -- I know Councilmember Beier wanted to know about the aerial spraying and the issue there. My understanding is that -- is that there is -- B2H is planned right now to be routed through Mr. Myers' farmland; that that was unavoidable. There were a number of other constraints that led that to be the case. My understanding is that micrositing of that line is available, but to the extent there is some impact on the aerial spraying operations planned on his plan (sic), and we acknowledged that there will be -- that will become part of right-of-way negotiations and there will be discussions about -- compensation for the diminution of value of his farmlands for that reason.

VICE CHAIR HOWE: Thank you, Ms. Rackner. Are there questions from Council? Okay. Counsel Rowe.

MR. ROWE: Anything I add will just be in addition to comments that Ms. Rackner made. The hearing officer considered Mr. Myers' arguments. She found that Idaho Power had adequate -- (audio disruption) -- Okay. Sounds like everybody is back on board. This is Patrick Rowe, Department of Justice. Just two brief comments. Again, the hearing officer did find that Idaho Power had adequately analyzed the risk of wildfire. She cited to the wildfire mitigation plan. With regard to the aerial spraying issue, in addition to the measures that Ms. Rackner referenced with regard to potential compensation to Mr. Myers, the Department would also point out the recommended land use condition 14 would require the certificate holder to finalize and implement an agricultural mitigation plan. That plan is described in attachment K-1 of the application for site certificate. It includes measures to avoid, mitigate, repair, and/or provide compensation for impacts that may result from the construction or operation of the project on privately owned agricultural land.

THE COURT: Okay. Council, does anyone feel there are changes needed to the language of land use condition number nine? Councillor Condon.

COUNCILMEMBER CONDON: Cindy Condon. And this is to, I think, Mr. Myers and Ms. Rackner. I'm a little bit confused and I think it has been mentioned. But the substantial disagreement about the zone being adequately -- this specific zone that Mr. Myers -- on Mr. Myers' property. It just sounds diametrically opposed. No -- no review or no analysis and then --
MS. RACKNER: I think that the -- I think it's a disagreement about what it's called. So in the wildfire mitigation plan, Idaho Power did analyze the area that B2H is going to be going through. So -- and we felt that that was adequate and we do feel that that was adequate. In his exceptions for the first time, Mr. Myers' brought up -- he said, well, you didn't look at this whole zone. And that was the first time we had ever heard that. He also was specific that we hadn't brought it up in the power safety shutoff portion, which is kind of -- which is a different document. But to the extent, perhaps, he meant, you didn't consider it at all in the wildfire mitigation plan itself, I think the answer is we didn't say we're looking at the zone. We said we're looking at the route that B2H goes through, which would be the zone of concern for the purposes of our analysis. So -- so I think we may just be crossing each other. To -- so, I guess, that's the answer if Mr. Myers is really referring to the wildfire mitigation plan itself. If Mr. Myers is, as he says in his exceptions, really concerned about, well, what's in your public safety shutoff plan? What is your plan for de-energizing lines in the Morrow County/Umatilla County area? Then the answer is Mr. Myers is correct. We don't have that in our public safety shutoff plan yet, because that's a living document, as is the wildfire mitigation plan. But, particularly, the electrical consequences of shutting off a plan. It's just very technical and it is going to be very specific to the line that you are talking about and what that line is connected to. So B2H would not yet be included. It is a living document. It will be included.

COUNCILMEMBER CONDON: Thank you. And I do understand the difference between the power safety shutoff. But is Mr. Myers still here? I just want to be clear. I -- in his remarks today, at least I don't remember that he mentioned specifically the power safety. I heard it as the wildfire mitigation analysis.

MS. RACKNER: That's what he said today and that's why I answered the way I did.

COUNCILMEMBER CONDON: I just want to be clear that we might be able to get some agreement that, no, it was adequately or not analyzed.

MS. RACKNER: I don't see Mr. Myers in the room.

COUNCILMEMBER CONDON: Thank you.

VICE CHAIR HOWE: Okay. With that, does Council feel there's any changes needed to land use condition nine? Hearing none, I think we're ready for the straw poll.

SECRETARY CORNETT: So it would be to "agree with the findings of fact, conclusions of law, and conditions of approval in the purposed contested case order pertaining to issue LU-9."

VICE CHAIR HOWE: Sounds good.

SECRETARY CORNETT: Kent Howe.

VICE CHAIR HOWE: Yes.

SECRETARY CORNETT: Ann Beier.

COUNCILMEMBER BEIER: Yes.

SECRETARY CORNETT: Hanley Jenkins.

COUNCILMEMBER JENKINS: (No audible 6 response.)

SECRETARY CORNETT: Jordan Truitt.

COUNCILMEMBER TRUITT: Yes.

SECRETARY CORNETT: Perry Chocktoot.

COUNCILMEMBER CHOCKTOOT: Yes.

SECRETARY CORNETT: Cindy Condon.

COUNCILMEMBER CONDON: No.

SECRETARY CORNETT: Thank you, Councilmembers.

The transcript shows that Mr. Myers made no reference to PSPS in his verbal testimony about weather zone 641. It is clear that his intention was to get an accurate characterization of the risk zone over his farm in the 2022 Wildfire Mitigation Plan. If IPC left out the zone in the WMP it seems probable they didn't properly study the area the zone covers. Ms. Rackner changed the context of Mr. Myers' Exception to distract the council from Mr. Myers testimony. She lied to the council by stating, " That's what he said today and that's why I answered the way I did."

How can the Contested Case Rules Protect Pro Se Intervenors and the Council from Legal tactics showcased here? Sadly, the ODOE contested case rules have allowed for a mockery of the evidence that Morrow County deserves. The public needs to know this information and the sitting council needs to be able to review before permitting energy projects.

I would request that a complete review of the contested case proceedings on the B2H case be done by an outside nonpartisan committee. They will find inconsistent rulings and many points which will harm landowners for the next 100 years. They will also identify areas where the system of handling contested cases–like the B2H case–need renovation.

The ODOE would never suggest that east central Morrow county would be a high risk fire zone at the time of the B2H case; but as of March 2024, they have admitted in other renewable cases (in the same region) that fires in this region of Morrow county do "start easily and spread rapidly." This is a complete failure of the ODOE to maintain accurate standards.The ODOE distorted truths and eliminated valuable testimony in the B2H contested case. It was clear to all of the intervenors involved that the ODOE abused their power and used their procedures to suppress the intervenors and hide the facts from the evidentiary record. It is unconscionable that our own government–put in place to protect and support the people of Oregon–deferred to the narrative of a foreign entity. It appears that the matter in which I am referring, the ODOE seems to have intentionally colluded with the legal team from Idaho Power to dismiss fire risk evidence from the record so that Idaho Power would be absolved for any legal responsibility from fires. The system must be repaired in order to prevent the preferential treatment of big money over Oregonians.

Sincerely,

Sam Myers & Wendy King

Public Comment for EFSC contested case rules

Wendy King <wkingproshop@gmail.com>

Fri 4/19/2024 4:55 PM

To:JACKMAN Tom * ODOE <Tom.JACKMAN@energy.oregon.gov>;EFSC Rulemaking * ODOE <EFSC.RULEMAKING@energy.oregon.gov>

1 attachments (665 KB)

April 2024 Contested case rules comment.pdf;

Some people who received this message don't often get email from wkingproshop@gmail.com. Learn why this is important

Hi Tom,
After attempting to leave our letter in the portal, I realized I made an error. So please see attached as another effort to get in our comment on time. I also sent the document by google doc email, but figured I better send another copy by my email just in case.
Counselor Condon and Counselor Beier were wanting to receive some of this information after we spoke at the March meeting.
Thank you,
Wendy King