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To: Oregon Energy Facility Siting Council

From: Thomas L. Jackman, Rules Coordinator

Date: February 9, 2023

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

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

STAFF RECOMMENDATION

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

BACKGROUND AND SUMMARY

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

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

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

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

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

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

This report contains:

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

SUMMARY OF PROPOSED AMENDED CONTESTED CASE RULES

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

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

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

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

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

1) Reorganize

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

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

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

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

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

2) Adopt Oregon Office of Administrative Hearings Model Rules

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

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

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

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

¹ See OAR 345-001-0005(1).

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

³ See ORS 183.625(2)(k).

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

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

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

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

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

3) Consistency

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

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

4) Clarity

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

Examples of these proposed rule changes to improve clarity include:

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

5) Efficiency

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

Examples of proposed changes that fall under this category include:

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

RAC FEEDBACK

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

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

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

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

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

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

3) The timeline for the denial of issues

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

4) The timeline for notice of contested case information

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

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

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

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

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

6) The financial cost of participating in a contested case

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

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

Fiscal Impacts

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

NEXT STEPS AND PROJECTED RULEMAKING TIMELINE

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