



Oregon

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To: Oregon Energy Facility Siting Council

From: Thomas L. Jackman, Rules Coordinator

Date: May 30-31, 2024

Subject: Agenda Item G (Action Item) Contested Case Rules - Consideration of Revised Draft Notice of Proposed Rulemaking for the May 30-31, 2024 EFSC Meeting

Attachments: Attachment 1: Redline of proposed contested case rules
Attachment 2: Revised Draft Notice of Proposed Rulemaking (Forthcoming)
Attachment 3: Redline of proposed contested case rules showing differences between the first and second NOPR versions of the draft proposed rules.
Attachment 4: Public Comments on Notice of Proposed Rulemaking
Attachment 5: Comparison of Contested Case Model Rules

STAFF RECOMMENDATION

Oregon Department of Energy (ODOE or Department) staff request the Energy Facility Siting Council's (EFSC or Council) authorization to issue a revised Notice of Proposed Rulemaking (see Attachment 2) based on proposed amendments to its contested case rules as shown in Attachment 1.

BACKGROUND AND SUMMARY

The 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. 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. Most 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 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. The other RAC members provided no comment on this feedback.

On February 23, 2024, the Council authorized staff to issue a Notice of Proposed Rulemaking (NOPR) to begin the formal rulemaking process for this rulemaking project. A public comment period began which ran through April 19, 2024.

During the public comment period staff received numerous comments, which are included in their entirety as Attachment 4 and discussed below along with staff's recommendations.

This report contains:

1. A summary of staff's draft proposed changes (as shown in draft redline in Attachment 1) to the Council's contested case rules located in Division 15 of OAR 345
2. A revised Notice of Proposed Rulemaking (Attachment 2)
3. A draft redline showing the differences between the draft rules submitted with the February 2024 NOPR and the revised draft NOPR (Attachment 3)
4. A copy of feedback received from RAC members (Attachment 4)
5. A comparison between the Office of Administrative Hearing Contested Case Model Rules and the Department of Justice contested case model rules (Review of Office of Administrative Hearing's Contested Case Model Rules (Attachment 5)

SUMMARY OF PROPOSED AMENDED CONTESTED CASE RULES

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

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

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

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

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

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

STAFF REVIEW OF COMMENTS RECEIVED DURING THE PUBLIC COMMENT PERIOD

Purpose of the Contested Case Process

Before diving into the substance of the feedback received for this rulemaking, it is important to establish the purpose of the process that these rules are meant to regulate: the contested case. Understanding this purpose clarifies the perspective staff used when reviewing public comments.

The contested case process serves a singular purpose: to offer individuals who timely and appropriately raise issues, per statutory requirements, a chance to challenge the Department's recommended findings of fact, conclusions of law, or proposed actions from its Proposed Order on an Application for Site Certificate (ASC) and to do so before a neutral hearing officer. The purpose of the contested case proceedings is to generate a clear record of any disputes, which enables the Supreme Court to review and resolve appeals of the Council's Final Order within the mandatory six-month period stipulated by ORS 469.403(6).

It is equally important to clarify what the contested case process is not. It is not a collaborative learning opportunity for individuals or organizations who oppose a proposed facility but lack a legal basis for their challenge or to discover new issues raised by others in an effort to prevent or delay the Council's granting of site certificates.

The Department and the Council are committed to ensuring the Council's Final Order is as accurate and correct as reasonably possible and welcome the assistance of any organization or individual who can contribute to this goal. However, the appropriate time to raise substantive issues is during the draft proposed order comment period. This allows the applicant to respond while the record is still open and enables the Department to address the issues in the Proposed Order on an ASC. If a commenter still believes their substantive issue has not been adequately addressed in the Proposed Order, that is the purpose of the contested case.

Comments Received During the Public Comment Period

Please note that all the comments timely received and discussed below are included in their entirety as Attachment 4.

Name	Date Received
PUBLIC HEARING	
Irene Gilbert	March 22, 2024
John Luciani	March 22, 2024
Anne March	March 22, 2024
Jim Kreider	March 22, 2024
Fuji Kreider	March 22, 2024
WRITTEN COMMENTS	
Jim Kreider	March 22, 2024
Irene Gilbert	March 22, 2024
Anne March	March 24, 2024
Irene Gilbert	April 11, 2024
Fuji Kreider (On behalf of STOP B2H Coalition)	April 12, 2024
Greg Larkin	April 18, 2024
Irene Gilbert	April 18, 2024
Jim Kreider	April 19, 2024
Sam Myers	April 19, 2024
Wendy King	April 19, 2024
Jack Watson (on behalf of Oregon Solar + Storage Industries Association)	April 19, 2024
Nathan Baker (on behalf of Friends of the Columbia Gorge)	April 19, 2024

Regarding the Sufficiency of the Notice of Proposed Rulemaking

More than one commentor raised a question regarding the sufficiency of the notice provided in the Notice of Proposed Rulemaking (“NOPR”) prepared by staff for this rulemaking effort. Friends of the Columbia Gorge (“Friends”) had the most comprehensive analysis regarding this concern. Friends argues that the NOPR did not explicitly mention that the draft rules would remove the interlocutory appeal to Council when a hearing officer grants a petitioner party status in a contested case but denies consideration of one or more, but not all, issues the person wishes to raise (see OAR 345-015-0460(1)) and so participation in the public comment period on the NOPR could have been reduced.

The argument by Friends and the concerns expressed by others is sufficiently persuasive that staff recommends the Council authorize staff to file a revised NOPR to resolve any concerns about the sufficiency of the notice language. Staff further recommends that, along with updating the descriptions of the proposed changes, the NOPR should be based on the updated draft language that staff is recommending in this staff report.

Filing a revised NOPR would create a new public comment period, and, if the Council chooses to proceed with a second NOPR, staff recommends incorporating and pulling forward all previously submitted public comments to the extent they apply to the newly proposed draft language. Members of the public would still be able to submit updated or new comments if they wish, but they should not feel required to do so.

Please note that some additional comments were made by others about extending this rulemaking and/or the public comment period and this recommendation for a revised NOPR and the restart of the public comment period either addresses these additional concerns directly or renders them moot.

Recommended Changes to Draft Language After Review of Public Comments

What follows is an overview of staff's proposed changes made to the draft rules after careful consideration and review of every one of the comments provided during the public comment period. These changes are reflected in Attachment 1, the latest version of the draft proposed rules; and, Attachment 3, which shows in redline the differences between the latest version of the draft proposed rules and the version of the draft proposed rules submitted with the NOPR submitted in February, 2024.

Staff Recommends:

- 1) Changing the first use of "council" in every rule to "Energy Facility Siting Council" to reduce possible confusion about what is meant by "council" in the contested case rules.
- 2) Modifying OAR 345-015-0403(4) to clarify that lay representation is acceptable when participating in a contested case proceeding. This is in line with ORS 183.457, which states that "No rule adopted by a state agency shall have the effect of precluding lay representation."
- 3) Adding the following language to OAR 345-015-0415(8): "In ruling on petitions to participate as a party or a limited party, the Hearing Officer shall consider the criteria described in OAR 137-003-0535(8)." This language makes it clear that the model rules lay out the general criteria for consideration of party status. That being said, "Whether any such affected interest is within the scope of the agency's jurisdiction. . ." (see OAR 137-003-0535(8)(b)) is something that can only be determined if a petitioner describes their concern in a manner that allows the hearing officer to make that determination and for the other parties to respond to that petition, i.e., with sufficient specificity. See ORS 469.370(3), which requires Council to limit issues in contested cases to those "raised with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond to each issue."
- 4) Adding as OAR 345-0403(1): "A statement that persons requesting a contested case should state whether they are requesting to participate in the contested case proceeding as a party or limited party."
- 5) Modifying the layout of OAR 345-015-0415 to separate out the definition of "sufficient specificity" as its own section: OAR 345-015-0415(4). Several commentors expressed support for the more detailed definition of this term, but they requested that the language describing this term be separated from the surrounding language to call out its importance.
- 6) Modifying OAR 345-015-0415, -0430, -0440, -0445, and -0475 to remove references to a hearing officer "granting standing," but also making it clear in -0415 that full parties may participate on all issues in a contested case and a petitioner is a limited party if the issues they properly raised in their comments on a draft proposed order are not all the issues to be addressed in the contested case. Friends raised concerns that the use of the term "standing" and "granting standing" may not be appropriate for Council rules as Friends believes it suggests legal connotations that are outside the scope of the Council and hearing officer's duties. The removal of the term "standing" from the draft rules does not alter the fact that the hearing officer must confirm a petitioner is eligible to participate in a contested case based on properly raising issues during the draft proposed order public comment period. See ORS 469.370(3).
- 7) Modifying OAR 345-015-0415(6)(b) to indicate that parties and limited parties to a case should have their issue worded the way they wish it to be worded for the contested case proceedings. This is to address concerns brought up by more than one commentor that in a prior contested case the hearing officer had in their opinion mischaracterized or not completely described the issue raised by the petitioner.

- 8) Adding “Subject to the exceptions in ORS 469.370(5)” to OAR 345-015-0415(3), to make it clear that there are circumstances where a hearing officer may consider an issue in a contested case proceeding that was not raised at the public hearing on the draft proposed order. This includes times where the Department fails to follow proper procedures (ORS 469.370(5)(a)) and where the Department’s proposed order differs materially from the draft proposed order (ORS 469.370(5)(b)).
- 9) Updating the definition of indigent in OAR 345-015-420(2) to change the income level to “at or below 125 percent of the United States poverty level” from “at or below 100 percent.” Irene Gilbert pointed out that state or federal agencies typically do not use the 100 percent value when making a determination of indigence, although it varies widely depending on the agency and/or program in question. This value was selected based on the range of values that other agencies use (typically at least 125%).
- 10) Updating OAR 345-015-0405(4)(g) to clarify the circumstances when the hearing officer can limit issues in a contested case. This is to address concerns that the language could be interpreted to give the hearing officer the ability to arbitrarily limit issues.
- 11) Adding “per the schedule and means set forth by the hearing officer” to the end of OAR 345-015-0445(1) to clarify how the schedule is set for the submission of evidence.
- 12) Breaking up OAR 345-015-0475 into two rules (by adding OAR 345-015-0480) due to the material in -0475 exceeding the appropriate scope of the rule title and clarifying in -0480 that the order is the “proposed contested case order.”
- 13) Making it clear in OAR 345-015-0475(3) that exceptions to a hearing officer’s proposed contested case order are filed with the Council.
- 14) Supplementing for clarity OAR 345-015-0405(1) to state the Council shall appoint a hearing officer “to compile the record of the contested case proceeding” and supplementing 345-015-0405(3) to state the hearing officer shall “maintain a complete and current record of the contested case proceeding, including: . . .”
- 15) Modifying the last sentence of OAR 345-015-0405(1) to remove references to appointing a Council member or department employee as a hearing officer. While the Council is free to appoint whomever it wants as the hearing officer, there is no reason to include the language about appointing a Council member or department employee, as it is unlikely the Council will ever do so.

What follows is an overview by rule of the suggested changes staff recommends *not* adopting, along with staff’s reasoning for making this recommendation.

Council’s Ability to Adopt the Proposed Rules – OAR 345 Division 15 Generally

Irene Gilbert proposes throughout her comments that the Council reject many of the changes in the proposed draft rules due to a belief that the changes are beyond Council’s statutory authority. (See, e.g., Ms. Gilbert’s March 22, 2024 comments, pgs. 8-11).

Staff Response

Staff disagrees with Ms. Gilbert’s characterization that this rulemaking represents a material alteration of the Council’s contested case process. What staff has generally attempted to do with this rulemaking is to clarify what was always intended by the Council’s rules. In any event, unlike Ms. Gilbert’s assertions, the Council has broad authority to adopt rules governing its contested cases, insofar as the rules adopted comply with all applicable statutes.

Under ORS 469.470(2), EFSC has authority to “adopt standards and rules to perform the functions vested by law in the council . . .” And as stated in ORS 469.370(5) (emphasis added), “Following receipt of the proposed order from the department, the council shall conduct a contested case hearing on the application for a site certificate in accordance with the applicable provisions of ORS chapter 183 and ***any procedures adopted by the council.***”

Ex Parte Communications - OAR 345-001-0005(2)

Commentors expressed concerns that adoption of OAR 137-003-0660 does not appear to cover ex parte communications between Council and the Department and that by adopting it, ex parte communications between Council and the Department will no longer be made available to all contested case parties. In a related comment, STOP suggests supplementing OAR 345-001-0005(2) by reinserting the reference to 345-001-0055(1), which mentions ex parte communications, and adding OAR 137-003-0625 to the “notwithstanding” reference.

Staff Response

Staff does not agree that adoption of OAR 137-003-0660 poses any concerns. The proposed revision of OAR 345-001-0005(2) establishes that the Department will continue the practice of reporting communications between the Department and the Council, even though such communications are not considered “ex parte” under OAR 137-003-0660(1).

Staff likewise does not recommend adopting STOP’s proposed change, as it would not be accurate to state “notwithstanding OAR 137-003-0055(1)” because -0055(1) will no longer apply, since it is in the Department of Justice’s model contested case rules that staff suggests be replaced by the Office of Administrative Hearings (OAH) contested case rules. Nor would it make sense to state “notwithstanding 137-003-0625,” because that rule does not exempt or carve out any communications from the definition of “ex parte communications.”

Adoption of OAH Model Rules – OAR 345-015-400

Several commentors objected to or expressed confusion as to why Council was adopting the OAH model rules found in OAR 137-003-0501 through 137-003-0700 in lieu of Department of Justice’s contested case model rules (OAR 137-003-0001 through 137-003-0091). This included claims by some that the OAH model rules are simply not suitable for the Council’s contested case process.

Staff Response

Although the Council has the discretion whether to use OAH Administrative Law Judges to conduct contested cases (see ORS 183.635(2)), Council prefers to use OAH ALJs given the breadth of their experience with contested cases relative to that of private attorneys and intends to continue using OAH ALJs for the foreseeable future. Given that OAH ALJs are more familiar with the OAH contested case model rules than the DOJ model rules, it makes sense to adopt the OAH model rules. Further, the model rules, written at the direction of statute (see ORS 183.341) for the benefit of state agencies, explicitly allow the adoption of either set of contested case model rules where said agency (such as EFSC) is not required to use an ALJ from OAH:

“An agency that does not use an administrative law judge assigned from the Office of Administrative Hearings to conduct contested case hearings for the agency **may choose to adopt any or all** of the Model Rules for Contested Cases in OAR 137-003-0000 to 137-003-0092 **or** in 137-003-0501 to 137-003-0700.”

See OAR 137-003-0000(1) (emphasis added).

Second, no commentor expressing dissatisfaction with this change addressed the many reasons presented by staff for adopting the OAH model rules. The chart comparing the two sets of model rules was included in the February 23, 2024, Council meeting as Item B, Attachment 2 and is attached again to this report as Attachment 5. As shown in this detailed comparison, the two sets of model rules are similar in most areas, with the main differences being that the OAH model rules often have more detail and direction, e.g., the OAH model rules discuss motions for summary determination, appointment of a

hearing officer, and contain direction on several discovery related matters where the other set of model rules is silent.

This proposed adoption of OAH's model contested case rules is not intended to alter the Council's contested case process. Rather, this change is intended to make for a more efficient contested case process by using the rules the OAH ALJs are more familiar with and to add clarity regarding certain procedural issues that are more fully addressed in the OAH rules.

Noticing Requirements - OAR 345-15-403 and OAR 345-015-415

Irene Gilbert points out that Department notice requirements in OAR 137-003-505, adopted by OAR 345-015-0403, require "[a] short and plain statement of the matters asserted or charged and a reference to the particular sections of the statute and rules involved." Ms. Gilbert asserts that if this is sufficient to provide notice to the public, then that's all we should request of would-be participants in a contested case in OAR 345-015-0415.

Staff Response

OAR 137-003-0505 establishes the requirements for a state agency's contested case notice, including that the notice include "[a] short and plain statement of the matters asserted." The "matters asserted" in an ODOE contested case notice are that ODOE has issued a Proposed Order recommending Council action regarding an ASC. OAR 345-015-0415 establishes the requirements for a person to request to participate in a contested case regarding the Proposed Order, including "a short and plain statement" of the issue(s) the person desires to raise in the contested case proceeding. While both are "short and plain statements" they address different matters.

Limited Party Status - OAR 345-015-0415

Several commentors opposed restricting participants in a contested case to "limited party" status in the event they are not granted party status with respect to all active issues in a contested case. Commentors made appeals to fairness, due process, equity, and the practical difficulties of the siting process generally. The claim is that the siting process naturally precludes public participation and thus, if someone cares enough to adequately raise an issue of fact or law on one issue, they should be allowed to participate with respect to any issue raised by any party.

A similar issue is raised by Irene Gilbert in her March 22, 2024 comments, who requests that all petitioners be allowed to respond to all requests for party status, not just the Department and the applicant.

Staff Response

Staff does not agree. Participation in a contested case is a result of raising an issue during the public comment period of the draft proposed order that is within Council's jurisdiction and with enough specificity to allow the applicant, the Council, and the Department to respond to the issue.

The scope of a contested case being set at the time of the Council's proposed order is not something that the Council can freely modify, as this framework is set in statute at ORS 469.370(3) ("Any issue that may be the basis for a contested case shall be raised not later than the close of the record at or following the final public hearing prior to issuance of the department's proposed order"). The nature of a contested case is that multiple parties can participate simultaneously, each with their own unique basis for participation, each properly raised at the necessary time. Other parties do not preserve an issue on someone else's behalf.

To the extent a properly preserved issue overlaps another properly preserved issue, nothing prevents one party from reaching out to another party to collaborate or to provide the other party with potentially relevant information regarding that issue. Parties should not automatically be afforded the opportunity to expand their involvement in a contested case when there are other issues granted for consideration that they did not raise.

Several commentors touched on the process of a contested case and how individuals can learn more about a proposed facility through their involvement in it. But this does not really address the main point that the siting process has deadlines that are designed to provide developers and the public with some degree of certainty with regards to the siting process. In a sense, this is the entire function of the Council – to uniformly apply the legislatively mandated standards in a predictable fashion. One of these predictive certainties is that the scope and scale of a contested case is determined by what occurs prior to the proposed order and not after.

Staff likewise recommend rejecting Ms. Gilbert’s suggestion that all petitioners be allowed to respond to requests for party status. This would result in delay and inefficiency.

Incorporation by Reference (No Rule)

Irene Gilbert complains in her March 22, 2024 comments about a ban on incorporation by reference.

Staff Response

There was no ban on incorporation by reference in the first NOPR nor is there one in the current proposed draft rules, see Attachment 1.

Use of Other Party’s Filings - OAR 345-015-0415(7)

Ms. Gilbert suggests in her March 22, 2024 comments that OAR 345-015-0415(7) as written would preclude a limited party from using exhibits or evidence introduced by another party.

Staff Response

This rule bars a limited party from responding to motions, briefs, etc. regarding issues in the contested case that the limited party did not themselves raise / issues another party raised. The rule does not preclude a limited party from using exhibits or evidence introduced by another party.

Opposing Removal of OAR 137-003-0005(9)

Ms. Gilbert and STOP both argue that ending adoption of OAR 137-003-0005(7), which lays out the criteria for considering party status, conflicts with the Supreme Court holding on the appeal of the Boardman to Hemingway (B2H) project, where the Court held that the hearing officer should follow the direction of -0005(7) and that this direction from the Court precludes Council from adopting any other metric for consideration of party status. See *Stop B2H Coalition v. Dept. of Energy*, 370 Or 792 (2023).

Staff Response

This concern overlooks staff’s proposed adoption of OAH model rule OAR 137-003-0535(8), which requires that the hearing officer apply the same factors in determining party status as those found in OAR 137-003-0005(7).

To ensure that the applicable factors for determining party status are made clear, staff has recommended that this metric be explicitly stated in OAR 345-015-0415(8). However, as noted above in the recommended changes section, neither the currently adopted rule nor the recommended rule changes preclude the hearing officer from determining that someone is a limited party, even if the party

requests full party status. See OAR 137-003-0535(9), which states that “[t]he agency may treat a petition to participate as a party as if it were a petition to participate as a limited party.”

Limitation on Proposing New Conditions - OAR 345-015-0415(8)

Commentors expressed concerns about proposed rule language in OAR 345-015-0415(8), which states that parties can only suggest new conditions to the extent they are related to the properly raised issue(s) that enabled their participation in a contested case. Again, commentors raised the idea that there can be overlapping issues and that anyone who has stayed in the siting process all the way through to a contested case should be allowed to suggest whatever conditions they want. STOP discusses how “all participants in the [contested] case have gained new insights and should be afforded the opportunity to recommend conditions.” See STOP’s comments, page 10.

Staff Response

Staff recommend keeping the language limiting involvement in a contested case to the matters on which someone was granted party status. The underlying theme of the arguments made by the various commentors on this issue relate to one concept – would-be contested case participants cannot be expected to understand the project until after the proposed order has been issued.

As discussed above, the contested case process does not exist to educate members of the public on the nature of a siting process, nor to afford them additional opportunities to raise their concerns about a proposed facility beyond that allowed by statute. The determination of whether a proposed facility meets the requirements to be approved by the Council is based on the material provided by the applicant in an ASC and as evaluated by the Department in the Proposed Order. What STOP and others are requesting is essentially an extension of the public comment period for the draft proposed order. Members of the public may request an extension of the public comment period *during the public comment period*, but this opportunity ends after the deadline. Again, nothing precludes a party or organization from passing relevant information or ideas to those who timely preserved a given issue.

Staff notes that proposed OAR 345-015-0445(3) does allow all parties to a contested case to comment on any material changes to site certificate conditions that are proposed during the contested case process, as they may also do if Council’s subsequent review results in material changes. See ORS 469.370(7). But this does not extend to a party being able to *propose* conditions on issues that the party did not raise.

Special Advisory Groups 345-015-0425(1)

Irene Gilbert states that Special Advisory Groups (“SAGs”) should not be required to repeat comments made during the DPO when requesting a contested case. See Ms. Gilbert’s March 22, 2024 written comment at pg. 18.

Staff Response

Staff recommends rejecting any proposal to modify this rule. If a SAG does not submit a request for a contested case containing a description of the issue they are concerned about and identify the comments they made on the record regarding the issue, how are the hearing officer and the parties to the contested case going to know how and to what extent the SAG wishes to participate in the contested case?

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

Several commentors argue that petitioners to a contested case proceeding must be given an opportunity to immediately appeal the hearing officer’s determination that they are a limited party.

They further object to the removal of OAR 345-015-0016(6), which previously granted this right, as well as the language proposed in OAR 345-015-0430(4) and 345-015-0460(1), which explicitly bars participants from filing an interlocutory appeal regarding party status unless the hearing officer's decision results in their not being able to participate in the contested case on any issue. The basis of the arguments (apart from Friends' argument about sufficiently noticing this issue, dealt with above), is that it is not fair and/or inefficient to make people wait to appeal the hearing officer's finding.

Staff Response

This position is inconsistent with statute, which states that judicial review of party status does not happen until after the agency issues its final order. As described in ORS 183.310(7)(c) (emphasis added):

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

Arguments that allowing interlocutory appeal is “more efficient” than forcing parties to delay until after the final order presupposes that the hearing officer will regularly incorrectly assign party status, which Council would then need to correct. But—apart from determining the merits of a given dispute—determining party status is one of the *primary functions of a hearing officer*. It seems unfounded to assert that the person hired to make this determination will get it wrong often enough to make reversing their finding sooner rather than later the more efficient path. The opposite appears to be true, that delaying a contested case to allow interlocutory appeal every time a party is granted party status but denied on the consideration of one or more, but not all, of a given issue is in fact the inefficient path, given the more likely scenario that the hearing officer's finding will ultimately be upheld.

Denial of Contested Case

Irene Gilbert commented on April 11, 2024 that EFSC must issue an order when it denies a request for contested case.

Staff Response

This issuing of orders in the event there is a denial of a contested case is already taking place and staff sees no reason to recommend that Council modify the rules on this point.

Legal Aid

Some commentors lamented the lack of public funding with respect to public participation in a contested case.

Staff Response

The Council lacks the authority to provide any public funding for contested case participants. The appropriate avenue for this concern is for interested parties to reach out to their respective state representatives to raise this concern and for the Oregon legislature to appropriate money and give it to the Council for this purpose.

Timing and Council Review

Several commentors complained that the Council is given insufficient time to review comments during the public comment period on the draft proposed order.

Staff Response

Staff agrees that the Council needs sufficient time to adequately consider public comments. However, staff recommends that this be handled on a case-by-case basis via scheduling of comment time frames and Council meetings, rather than in rule. Recently, Council has reviewed DPOs at its meeting the month following the deadline for comments on the DPO. However, for non-controversial and/or less complex projects, it may be acceptable to keep Council's review of a DPO on the day after the deadline for public comment on the DPO, as Council has done in the past.

Naming Conventions

A few commentors proposed adoption of a naming convention. Alternatively, Jim Kreider wants a naming convention spelled out in the rules.

Staff Response

Staff does not recommend adopting this proposal as the naming/method for identifying documents can be worked out during the pre-hearing conference by the hearing officer and the parties. The Department can explore working out an official naming convention on its website, but regardless, there is no need to address this concern via a new rule.

Records and Docketing

Several parties stated that they want the hearing officer to maintain a complete and current record that is available to all parties throughout the contested case and/or a docketing system to be made available to them, similar to what the Oregon Public Utilities Commission (PUC) uses.

Staff Response

Neither the Department nor the Council have the authority to mandate that OAH establish a docketing system and make it available to the public. The best we can do is to have a discussion with them about improvements to docketing or document filing and distribution. Further, while the B2H contested case was clearly a challenge, it was atypical for a Council contested case given the number of parties and issues raised; most contested case proceedings before Council are not nearly this complex.

The PUC has a docketing system because of the number and scope of the matters they consider and because, to our knowledge, the legislature has given them the money to create one. The Council, however, only has contested case proceedings sporadically and the Department and Council do not have the necessary resources to set up a docket, especially given how little Council would use it.

Fiscal Impacts

During the public comment period, no one commented directly on the topic of fiscal impacts of the rule changes. OSSIA mentioned that they feel this rulemaking will result in general efficiency gains throughout the contested case process, but they did not provide any specific details on the nature of these gains.

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

NEXT STEPS AND PROJECTED RULEMAKING TIMELINE

If the Council is satisfied with the draft proposed rules and the revised NOPR, staff requests authorization to file the revised NOPR on May 31, 2024, with a new 23-day public comment period that ends on June 23, 2024 at 11:59pm.