



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

August 30, 2018

Senator Alan Olsen
900 Court Street NE S425
Salem OR 97301

Re: EFSC Contested Case Processes

Dear Senator Olsen:

You asked this office to generally compare the contested case process adopted and used by the Energy Facility Siting Council (the Council) under OAR chapter 345, division 15, with the model rules of procedure for contested cases adopted by the Attorney General as OAR chapter 137, division 3. Due to comments presented at the Energy Facility Siting Council Work Group (EFSC Work Group) meetings that began in the fall of 2017, you were particularly interested in two discrete topics related to procedures for contested cases: requirements for the selection and use of hearing officers and requirements for determining party status in a contested case. The discussion in this opinion narrowly focuses on those two discrete topics, while also providing limited background on Oregon's Administrative Procedures Act (APA).

Administrative Procedures Act, General Background

ORS chapter 183—the APA—includes statutory requirements for hearing officers and contested case proceedings by administrative agencies. Those statutory provisions are elaborated on and further defined by model rules of administrative procedure, which the Attorney General is required to prepare such that the model rules are “appropriate for use by as many agencies as possible.”¹

While most agencies are required to use administrative law judges (ALJs) assigned from the Office of Administrative Hearings (OAH) to conduct contested case hearings, ORS 183.635 includes a list of agencies that are statutorily exempt from that requirement. The Attorney General's model rules therefore include one set of procedures for contested case hearings before agencies that *are not* required to use OAH ALJs—OAR 137-003-0001 to 137-003-0092 (the general Model Rules)—and one for hearings before agencies that *are* required to use OAH ALJs—OAR 137-003-0501 to 137-003-0700 (the OAH Model Rules). An agency that is not required to use OAH ALJs may choose to adopt by reference *either* the general Model Rules or the OAH Model Rules.²

¹ ORS 183.341.

² OAR 137-003-0000.

The Council is one of the agencies that is exempt under ORS 183.635 from being required to use OAH ALJs in contested case proceedings, and it has adopted by reference the general Model Rules, as opposed to the OAH Model Rules.³

Selection and Use of Hearing Officers

We limit our discussion regarding hearing officers for contested cases to addressing the procedures for how hearing officers are selected and the type of hearing officers that may be used.⁴ We begin with a short description of the statutory provisions governing the selection and use of OAH ALJs under the APA, and then describe the Council's procedures for selection and use of hearing officers within that context. We conclude with some general comparative observations, including legal standards relevant to some of the issues raised before the EFSC Work Group.

Office of Administrative Hearings Administrative Law Judges

The OAH is part of the Employment Department and is organized and managed by a chief administrative law judge, who is appointed by the Governor.⁵ All persons who serve as OAH ALJs must meet standards and training requirements designed and implemented by the chief administrative law judge and the Attorney General pursuant to ORS 183.680. At a minimum, those standards and training requirements must include an ethical code and training to assist the ALJs in identifying disputes more appropriate for mediation.⁶ Administrative law judges employed by or contracting with the OAH are statutorily required to be impartial and remain fair in all hearings.⁷

Whenever practicable, the chief administrative law judge is required to assign an ALJ that has expertise in the legal issues or general subject matter at issue in a proceeding.⁸ Any agency that is required to use an OAH ALJ to conduct hearings is also required to delegate responsibility for that hearing to the ALJ; the hearing may not be conducted by any person or body charged with administering the agency.⁹ All contested case hearings conducted by OAH ALJs must follow the OAH Model Rules, unless the agency or the category of cases that the contested case falls within have been exempted from the requirement to follow those model rules.¹⁰ The determination of whether an agency or category of cases is exempt is made by the Attorney General by rule, after consultation with the chief administrative law judge.¹¹

Hearing Officers Appointed by the Energy Facility Siting Council

As noted above, the Council is one of several agencies that are statutorily exempt from being required to use OAH ALJs to conduct contested case hearings.¹² The Council's

³ OAR 345-001-0005.

⁴ Under ORS 183.310, "hearing officer" is defined to "include[] an administrative law judge." Thus, the term "hearing officer" is used in this opinion as the general term referring to both an ALJ and any other officer presiding over a hearing, and also as the more specific term referring only to an officer presiding over a hearing before the Council.

⁵ ORS 183.605, 183.610.

⁶ ORS 183.680.

⁷ ORS 183.615.

⁸ ORS 183.625 (1).

⁹ ORS 183.625 (2).

¹⁰ ORS 183.630; OAR 137-003-0000 (2).

¹¹ ORS 183.630 (1), (2).

¹² ORS 183.635.

enabling statutes do not include provisions for the selection and use of hearing officers for contested cases.¹³ However, the Council has adopted rules for the selection and use of hearing officers under its broad authority pursuant to ORS 469.470 to “adopt standards and rules to perform the functions vested by law in the council.”¹⁴ Those rules provide, in part, that:

The Council shall appoint a hearing officer to conduct a contested case proceeding on behalf of the Council or to compile the record and recommend resolution of objections to the record of a local land use proceeding held pursuant to ORS 469.503(2)(a). The Council may appoint a Council member, an employee of the Department of Energy, or some other person or persons as it sees fit.¹⁵

Consistent with the requirements applicable to OAH ALJs, hearing officers appointed by the Council are required by rule to take every action to ensure an impartial and fair hearing.¹⁶

There is no requirement in the Council’s rules that the Council or the State Department of Energy must delegate all responsibility for the hearing to the appointed hearing officer. However, OAR 345-015-0023 (6) does require the hearing officer to enter into the record the substance of any significant contact with department staff starting at the point that notice of a contested case has been issued. Such agency staff contact is not considered ex parte contact under the general Model Rules, and is not necessarily required to be entered into the record by other exempt agencies.¹⁷ Generally, all contested case hearings conducted by hearing officers appointed by the Council must follow the general Model Rules.

Finally, it should be noted that the chief administrative law judge for the OAH has authority to assign an OAH ALJ to conduct contested case proceedings on behalf of the Council, if the Council were to request such an assignment.¹⁸ We did not investigate for purposes of this opinion whether, or how often, the Council does choose to request an OAH ALJ to conduct proceedings. If the Council were to request assignment of an OAH ALJ, that OAH ALJ would generally be required to meet all requirements imposed by law on the ALJ’s station, including all the requirements imposed by ORS 183.605 to 183.690 and OAR 137-003-0501 to 137-003-0700.¹⁹ An OAH ALJ, with limited exceptions, is required to conduct proceedings pursuant to the OAH Model Rules, even if the OAH ALJ is conducting the

¹³ This may not be unusual. For example, the Public Utility Commission is also exempt under ORS 183.635 from the requirement to use OAH ALJs and also does not have statutory provisions related to the selection and use of hearing officers for contested cases. Pursuant to ORS 756.055, the commission has delegated its authority to ALJs within the commission’s own Administrative Hearing Division to preside over and carry out the procedures for hearings before the commission. See OAR 860-001-0090 (delegation of authority to ALJ); OAR 860-001-0010 (defining “staff” to mean “an employee of the Commission except a Commissioner or an ALJ); Public Utility Commission of Oregon, *Administrative Hearings Division* https://www.puc.state.or.us/Pages/admin_hearings/index.aspx (visited August 19, 2018) (explaining that the Administrative Hearing Division’s ALJs “are independent of the Commission Staff”).

¹⁴ See also ORS 469.370 (5) (requiring the Council to conduct contested case proceedings on applications for site certificates), 469.405 (1) (authorizing the Council to establish type of amendment that must be considered in a contested case proceeding).

¹⁵ OAR 345-015-0023.

¹⁶ OAR 345-015-0023 (2)(a).

¹⁷ See OAR 137-003-0055 (1).

¹⁸ ORS 183.640, 183.625.

¹⁹ See OAR 137-003-0000 (2).

proceeding for an agency that has adopted the general Model Rules for its contested case procedures.²⁰

Observations

A few basic comparisons are clear. First, OAH ALJs are selected by the chief administrative law judge to preside over contested cases, while hearing officers for Council contested case proceedings are selected by the Council. However, being exempt from having to use OAH ALJs does not also make the Council exempt from general rules of procedure that mandate impartiality and fairness in the proceedings.²¹ For example, ORS 183.417 requires the officer presiding at a contested case hearing, whether that officer is an OAH ALJ or otherwise, to follow certain procedures for explaining the issues involved at the commencement of the proceeding, taking testimony and developing the record in the proceeding in a manner that shows “a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer in the case and the correct application of the law to those facts.”²² ORS 183.417 also includes requirements for hearing officers’ handling of ex parte communications, although ORS 183.685 provides for additional, more specific procedures that apply to OAH ALJs. The duties of a hearing officer appointed by the Council are specifically outlined in OAR 345-015-0023 and track the requirements imposed by statute and the general Model Rules.

Second, once an OAH ALJ is assigned to preside over a contested case for an agency, the agency must delegate all responsibility for that hearing to the ALJ. That contrasts with the Council’s rules allowing for the hearing officers to be Council members themselves or employees of the State Department of Energy. Allowing agency employees to also be hearing officers is not necessarily uncommon among agencies exempt from the requirement to use OAH ALJs, although agencies take various approaches to assigning hearing officer duties. The Public Utility Commission, for example, has established a separate Administrative Hearings Division within the agency, which employs ALJs to conduct hearings and write orders for cases brought under the commission’s jurisdiction.²³ While the Administrative Hearings Division ALJs are employees of the commission, the commission’s rules also maintain the ALJs’ independence by clearly distinguishing between those ALJs and other commission staff.²⁴ Under the commission’s contested case procedures, commission staff are always original parties to the proceeding.²⁵

Another area in which the two paradigms differ is oversight requirements. The OAH is subject to oversight by an oversight committee, established under ORS 183.690, that includes legislative members, members appointed by the Governor and members appointed by the Attorney General. The oversight committee studies the operations of the OAH and makes recommendations on increasing the effectiveness, fairness and efficiency of the

²⁰ OAR 137-003-0000 (2). The exceptions to the general rule are outlined in OAR 137-003-0000 (2)(a) and (b), which provide that an OAH ALJ is not required to follow the OAH Model Rules if the case is not subject to the procedural requirements for contested cases or if the Attorney General, by order, has exempted the agency or a category of the agency’s cases from the application of the OAH Model Rules.

²¹ ORS 183.615; OAR 345-015-0023 (2)(a).

²² 183.417 (8).

²³ See Public Utility Commission of Oregon, *Administrative Hearings Division* https://www.puc.state.or.us/pages/admin_hearings/index.aspx (visited August 19, 2018).

²⁴ OAR 860-001-0010 (11) (defining “staff” to mean “an employee of the Commission except a Commissioner or an ALJ”).

²⁵ OAR 860-001-0300.

OAH's operations.²⁶ No corresponding committee is required by statute to oversee the Council's operations with relation to the selection and use of hearing officers.

This opinion does not address whether or how contested case parties, the public or the state might be served differently if the Council were required to follow different procedures for the selection and use of hearing officers. However, we understand that this opinion request was made in light of comments made to the EFSC Work Group that the Council's procedures may inherently result in bias or conflicts of interest.²⁷ The following discussion therefore outlines some legal considerations that may be relevant to those concerns.²⁸

All OAH ALJs, non-OAH hearing officers and all other "decision makers" in contested cases are required to comply with the provisions of ORS 244.120 and 244.130, addressing actual or potential conflicts of interest.²⁹ Those statutes rely on a very high bar for determining whether something is an actual or potential conflict of interest: an action or decision must be to the private pecuniary benefit or detriment of a decision-maker to constitute a conflict of interest.³⁰ Regardless, for a contested case that is presided over by an OAH ALJ, statute and rule generally entitle every party and agency in the case to one request to change the ALJ assigned to the case, as a matter of course and without a showing of good cause required.³¹ For a contested case presided over by a hearing officer that is not an OAH ALJ, however, disqualification of the hearing officer may require a showing of actual bias against a party or an actual conflict of interest.³²

Although the case law varies, courts generally recognize that the structure and nature of certain administration proceedings may make elimination of all appearances of bias or

²⁶ ORS 183.690.

²⁷ See, e.g., Energy Facility Siting Council Work Group, *11/16/17 Comments from Irene Gilbert* (November 16, 2017), <https://www.oregonlegislature.gov/olsen/efscdocuments/11-16-17%20Comments%20from%20Irene%20Gilbert.pdf>.

²⁸ The outline in this opinion should be considered general in nature. It largely draws from the practice information available to Oregon State Bar members through the Oregon State Bar publication *Oregon Administrative Law*, Chapter 4: "Contested Cases: Preparation and Strategy" (2010 edition and 2016 Supplement).

²⁹ OAR 137-003-0040 (2) (general Model Rules); OAR 137-003-0600 (2) (OAH Model Rules). A public official who is an appointed member of a board or commission must publicly announce the nature of any potential conflict of interest before taking any action on the matter. ORS 244.120 (2)(a). If the conflict is actual rather than potential, the official must "announce publicly the nature of the actual conflict" and refrain from participating in any discussion of the issue or from voting on the issue, unless the official's vote is necessary to take official action, in which case the official may vote on the issue but may not participate in any discussions of it. ORS 244.120 (2)(b). Notice of the actual or potential conflict must be made part of the official record, but the decision or action of the public official may not be voided by any court solely because the public official failed to disclose an actual or potential conflict of interest. ORS 244.130.

³⁰ ORS 244.020 (1), (13) (defining "actual conflict of interest" and "potential conflict of interest" for purposes of ORS chapter 244).

³¹ ORS 183.645 (1). "Every party and agency in a contested case is entitled to request a change" of ALJ, and the first request will be granted automatically. OAR 471-060-0005 (3). The request will be denied if the party or agency had a "reasonable opportunity" to request the change of ALJ but did not do so. OAR 471-060-0005 (4). Only one request for a change of ALJ will be granted without a showing of good cause. ORS 183.645 (2). Subsequent requests will be granted only on a showing of good cause, as defined in OAR 471-060-0005 (2)(b) ("[g]ood cause" is any reason why an [ALJ's] impartiality might reasonably be questioned," including conflict of interest, personal bias, prejudice or personal knowledge of disputed facts). There is one exception to the rule that the first request for a change of ALJ is automatically granted: in a driver license suspension hearing under ORS 813.410 or 813.440 (under the Motorist Implied Consent Law) a different ALJ will not be assigned "except upon a showing of good cause." ORS 183.645 (3).

³² *Boughan v. Board of Engineering Examiners*, 46 Or. App. 287, 290 (1980); *Teledyne Wah Chang Albany v. Energy Facility Siting Council*, 298 Or. 240, 262 (1984).

conflict of interest impossible.³³ For example, Oregon courts have explained that administrative adjudications like those conducted by the Council may involve “administrative expertise and the avoidance of the cumbersome machinery of a court trial,” both of which “imply a degree of prior knowledge and consequent prejudice” on matters of policy and fact.³⁴ “Due process does not require an absence of these kinds of biases.”³⁵

Oregon courts therefore require a person who claims that a hearing officer is biased to carry the burden of demonstrating *actual* bias.³⁶ A claim that the agency’s investigative functions are combined with its adjudicative or decision-making functions is not enough, nor is it sufficient to merely show that the hearing officer is an employee of the agency or was involved in a prior portion of the proceeding.³⁷ In *Davidson v. Oregon Government Ethics Com.*, the Oregon Supreme Court ruled that a change of hearing officer after the first hearing officer had issued a proposed order contrary to the Oregon Government Ethics Commission’s position was not a basis for reversal when there was no showing of bias or prejudice on the part of the commission.³⁸ Furthermore, prior employment of a hearing officer by a party to the proceeding is also insufficient, without more, to establish actual bias.³⁹ A hearing officer is not considered biased simply because the hearing officer participates in examining witnesses; that participation merely indicates performance of the duty to develop a full record.⁴⁰ Finally, the cases vary considerably regarding when an appearance of impropriety might be enough to require reversal of an agency order based on bias.⁴¹

Regarding allegations that conflicts of interest resulted in violations of due process under the Fourteenth Amendment to the United States Constitution, the Oregon Supreme Court has opined that:

The cases do not easily yield a single, simple rule, but it seems that 14th amendment standards for disqualification tighten with three separate variables: first, the more the officer or agency purports to act as a court; second, the closer the issues and interests at stake resemble those in traditional adjudications; and third, as the disqualifying element moves from appearances through possible temptation and generic

³³ See Oregon State Bar, *Oregon Administrative Law*, section 4.142 (2010 edition and 2016 Supplement) (discussing relevant case law applicable to conflicts of interest and bias in administrative proceedings).

³⁴ *Fritz v. Oregon State Penitentiary Corrections Div.*, 30 Or. App. 1117, 1122 (1977).

³⁵ *Id.* at 1123.

³⁶ *Teledyne Wah Chang Albany*, 298 Or. at 262.

³⁷ *Black v. Corporation Div.*, 54 Or. App. 432, 434-435 (1981); *Boughan*, 46 Or. App. at 291.

³⁸ 300 Or. 415, 427-429 (1985).

³⁹ *Teledyne Wah Chang Albany*, 298 Or. at 262.

⁴⁰ *Black*, 54 Or. App. at 435.

⁴¹ Compare, e.g., *Campbell v. Board of Medical Examiners*, 16 Or. App. 381, 394-396 (1974) (reversing an order because the court could not tell from the record whether the chair of the board, who had disqualified himself, had participated in any manner in the case), with *Gallant v. Board of Medical Examiners*, 159 Or. App. 175, 186-188 (1999) (upholding order because the court could not tell from the record whether a disqualified board member participated in the deliberations in the case). In *Samuel v. Board of Chiropractic Examiners*, a showing of the possibility of personal animosity and the appearance of a substantial basis for bias was sufficient to require a board member’s recusal, where the petitioner had filed a lawsuit against the board member after the petitioner’s administrative hearing, but before the board had issued its order. 77 Or. App. 53, 60-63 (1985). In that same case, however, the court determined that it was proper for another board member not to have recused himself after making comments before the hearing relevant to the legal questions at issue in the hearing. “A preconceived point of view concerning an issue of law,” the court opined, “is not an independent basis for disqualification.” *Id.* at 60.

self-interest to actual personal interest in the outcome of the decision.⁴²

Thus, a board member's actual pecuniary interest in the outcome of a proceeding may be a basis for disqualification,⁴³ but a board member's previous, unrelated and favorable transaction between the board member and the parties to a proceeding may not be a basis for disqualification, where the record does not show that the board member would actually gain something from the outcome of the proceeding.⁴⁴

One may conclude from these examples that the nature of administrative procedures makes removal of all appearances of bias or conflict of interest highly unlikely, and reversal of administrative decisions based on allegations of bias or conflict of interest rare.

Designation of Party Status in Contested Cases

We focus the remainder of our opinion on the statutes and rules addressing party status in contested cases. We compare the procedures for granting party status under the general Model Rules and the OAH Model Rules and, as part of that discussion, address additional procedures that apply specifically to the Council.

Under the APA, a party is defined, as relevant here, as “[a]ny person requesting to participate before the agency as a party or in a limited party status which the agency determines either has an interest in the outcome of the agency’s proceeding or represents a public interest in such result.”⁴⁵ By statute, judicial review of an agency’s decision concerning party status or limited party status in any contested case may be sought only after the agency’s final order is issued.⁴⁶ Jurisdiction of such review is conferred on the Oregon Court of Appeals.⁴⁷

The procedures for participation in contested cases as a party or limited party under the APA are substantively the same under the general Model Rules and the OAH Model Rules.⁴⁸ Generally, “[p]ersons who have an interest in the outcome of the agency’s contested case proceeding or who represent a public interest” in the proceeding’s result may request to participate as a party or limited party.⁴⁹ However, when the Legislative Assembly grants the right to participate to any person, that grant is sufficient to confer standing.⁵⁰

Statutes that govern the Council’s conduct of contested case proceedings for site certificates further limit who may become a party to those proceedings. In the context of a site certificate application, the Council’s enabling statutes require the State Department of Energy to prepare and issue a draft proposed order and issue public notice of a hearing.⁵¹ A public hearing is then held on the order, where in-person and written public comments are

⁴² *1000 Friends of Oregon v. Wasco County Court*, 304 Or. 76, 88 (1987) (internal citations omitted).

⁴³ *Knutson Towboat Co. v. Oregon Bd. of Maritime Pilots*, 131 Or. App. 364, 373-378 (1994).

⁴⁴ *1000 Friends of Oregon*, 304 Or. at 88.

⁴⁵ ORS 183.310 (7)(c).

⁴⁶ ORS 183.310 (7)(c); *see* ORS 183.482 (2).

⁴⁷ ORS 183.482.

⁴⁸ *Compare* OAR 137-003-0005 (general Model Rules), *with* OAR 137-003-0535 (OAH Model Rules). The only substantive difference between the two rules is in OAR 137-003-0535 (1), which specifies that an agency subject to the OAH Model Rules may, by rule or in writing, identify who shall be parties or limited parties.

⁴⁹ OAR 137-003-0005 (1); OAR 137-003-0535 (2).

⁵⁰ *Kellas v. Dep’t of Corr.*, 341 Or. 471, 476-477 (2006).

⁵¹ ORS 469.370 (1), (2).

received.⁵² The department reviews the comments received and, after consulting with other agencies, issues a proposed order and issues public notice of both the proposed order and a contested case hearing on the proposed order.⁵³ The applicant is statutorily granted the right to participate as a party in the contested case.⁵⁴ To otherwise receive party status in the contested case, however, a person must not only have an interest in the outcome or represent a public interest but, under ORS 469.370 and OAR 345-015-0016, must also have appeared in person or commented in writing at the public hearing on the draft proposed order and raised the issue for which the person requests party status “with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond.”⁵⁵ The statutes do not elaborate on what it means to raise an issue with “sufficient specificity,” but the Council, by rule, has determined that “[t]o 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.”⁵⁶

The general Model Rules and the OAH Model Rules both require petitions for party status to be filed with the agency at least 21 calendar days before the date set for the contested case hearing and provide that untimely petitions will not be considered unless good cause is shown.⁵⁷ In the context of a site certificate application before the Council, the timing for when a petition for party status must be filed is dictated by the contested case hearing notice. Under ORS 469.370, and notwithstanding the general Model Rules, the deadline for requesting party status must be included in the contested case hearing notice.⁵⁸ The statutes and rules governing the Council do not include any further detail regarding how long before the contested case hearing that deadline needs to be. The Council rules also do not address whether untimely filed petitions will be considered.⁵⁹ None of the rules discussed here—the general Model Rules, the OAH Model Rules or the Council’s procedural rules—specify a minimum time that must pass between issuance of the notice of the contested case hearing and the deadline for requesting party status.

Under the general Model Rules and the OAH Model Rules, a person seeking to protect a personal interest in the outcome of a proceeding must present a detailed statement that sets forth the person’s interest, economic or otherwise, and how the results of the proceeding may affect that interest.⁶⁰ Generally, a person who seeks to represent a public interest must provide a detailed statement that sets forth that public interest, “the manner in which such public interest will be affected by the results of the proceeding, and the petitioner’s qualifications to represent such public interest.”⁶¹ In addition, the person must include a “statement of the reasons why existing parties to the proceeding cannot adequately represent” the identified interest.⁶² The Council’s rules require all the same statements in a

⁵² ORS 469.370 (2).

⁵³ ORS 469.370 (4).

⁵⁴ ORS 469.370 (5).

⁵⁵ ORS 469.370.

⁵⁶ OAR 345-015-0016 (3); OAR 345-015-0220 (3)(i).

⁵⁷ OAR 137-003-0005 (2); OAR 137-003-0535 (3).

⁵⁸ OAR 345-015-0016 (1).

⁵⁹ OAR 345-015-0016 (1) provides that “[n]otwithstanding OAR 137-003-0005(2),” a person must apply for party status by the deadline set forth in the contested case notice, but is silent as to late-filed petitions. But OAR 137-003-0005 (2) addresses *both* the deadline for filing and the fact that late-filed petitions will only be considered if good cause is shown. OAR 345-015-0016 (1) could therefore be interpreted to indicate that the Council will not consider late-filed petitions, but we did not research for the purposes of this opinion whether that is, in fact, the Council’s practice.

⁶⁰ OAR 137-003-0005 (3)(d); OAR 137-003-0535 (4)(d).

⁶¹ OAR 137-003-0005 (3)(e); OAR 137-003-0535 (4)(e).

⁶² OAR 137-003-0005 (3)(f); OAR 137-003-0535 (4)(f).

petition for party status as the general Model Rules.⁶³ Additionally, because the Council requires a person to have raised an issue with specificity at the public hearing on the draft proposed order, a person must also include in the person's petition for party status both a short and plain statement of the issue or issues the person desires to raise in the proceeding, and a reference to the person's comments at the public hearing showing that the person raised the issue at that time.⁶⁴

The general Model Rules and the OAH Model Rules provide that an agency, in ruling on petitions to participate, must consider the following four factors:

1. Whether the petitioner has demonstrated a personal or public interest that could be affected by the outcome of the proceeding;
2. Whether that interest is within the scope of the agency's jurisdiction and the scope of the notice of a contested case hearing;
3. Whether the petitioner is qualified to represent a public interest; and
4. Whether the petitioner's interest will be represented by existing parties.⁶⁵

The Council's rules do not deviate from the general Model Rules for ruling on petitions for party status. However, the Council's methods for considering the second factor listed above—regarding jurisdiction—warrant some additional discussion. Under ORS 469.501, the Council is directed to adopt standards for the siting, construction, operation and retirement of facilities. The statute outlines an open-ended list of subjects that the standards must cover and, pursuant to that list, the Council has adopted by rule 14 general siting standards.⁶⁶ To issue a site certificate, the Council must consider whether the facility complies with all statutory requirements for facility siting, as well as with the standards adopted by the Council.⁶⁷ Thus, when considering whether an interest raised by a person petitioning for party status is within the scope of the Council's jurisdiction, the Council considers whether the interest is associated with a specific statutory requirement for facility siting or a specific siting standard, and places the burden on the petitioner to prove that specific association. In the *Oregonians' Guide to Siting and Oversight of Energy Facilities*, the Council explains that, in order to present the facts necessary to provide the "sufficient specificity" required by statute to preserve an issue, a person must particularly identify the standard or rule associated with the issue.⁶⁸ "Simply listing the standards," furthermore, "is not typically considered sufficiently specific."⁶⁹

Finally, under the general Model Rules and the OAH Model Rules, the decision of whether to grant party status is made by the agency and not by the hearing officer or ALJ.⁷⁰ Under the rules of the Council, however, requests for participation as a party or limited party are received and ruled on by the hearing officer assigned to the proceeding.⁷¹ The hearing

⁶³ OAR 345-015-0016 (5)(a).

⁶⁴ OAR 345-015-0016 (5)(b), (c).

⁶⁵ OAR 137-003-0005 (7); OAR 137-003-0535 (8).

⁶⁶ See OAR chapter 345, division 22 (setting forth the standards).

⁶⁷ ORS 469.501; OAR 345-022-0000 (1).

⁶⁸ Oregon Department of Energy, *Oregonians' Guide to Siting and Oversight of Energy Facilities*, September 2017, at 15 <https://www.oregonlegislature.gov/olsen/efscdocuments/EFSC-Public-Guide.pdf>.

⁶⁹ *Id.*

⁷⁰ See generally OAR 137-003-0005 (general Model Rules); OAR 137-003-0535 (1) (OAH Model Rules).

⁷¹ OAR 345-015-0016 (1) (requiring person seeking party status to submit petition to the hearing officer by the date specified in the contested case notice).

officer's determination on the request is final, unless the requester submits an appeal, with supporting arguments and documents, to the Council within seven days after the date of service of the hearing officer's determination.⁷² The statutes and rules governing the Council do not address procedures for how the Council handles such appeals.

One concern raised before the EFSC Work Group is that the only opportunity to make a showing sufficient to establish party status is at the hearing on the draft proposed order, and that this does not supply the public with sufficient time to prepare comments adequate to meet the requirements for being granted party status under the statutes and rules.

The deadline relevant to this concern is addressed in statute, and could be amended by the Legislative Assembly if deemed necessary. Under ORS 469.370, the agency's notice of a hearing on a draft proposed order must be mailed at least 20 days before the public hearing and, as noted above, a person must raise an issue with the draft proposed order "with sufficient specificity" in person or in writing prior to the close of the public hearing to preserve the issue for the contested case. Otherwise stated: assuming that most members of the public are not aware of a draft proposed order until notice is mailed, and assuming that the Council does not send a notice until the statutory deadline, a member of the public may have a period of 20 days to prepare to preserve an issue. Based on the statutes and rules applicable to the Council, that preparation would require a member of the public to undertake, at a minimum, the following steps: review the draft proposed order in its entirety; identify any issues they have with the draft proposed order; identify facts that support the person's position on the issue;⁷³ apply an understanding of the Council's statutes and rules—specifically, the Council's 14 siting standards—sufficient to support an argument that the facts identified warrant an alternative application of one or more *specific* statutes or rules and suggest what that alternative application may be;⁷⁴ and prepare detailed written or oral remarks.⁷⁵ The written or oral remarks, furthermore, must be specific enough that when the person applies for party status, the person can include in the person's petition a short and plain statement of the issue or issues the person desires to raise, and a reference to the person's comments at the public hearing showing that the person raised the issue at that time.⁷⁶

We did not readily find an example on the Council's website of a draft proposed order to provide context for the challenges a member of the public may face in meeting a 20-day deadline to conduct the steps outlined above. However, we can assume, based on the Council's procedures, that a draft proposed order may be similar in size and scope to a final order. The final order for the Montague Wind Power Facility site certificate, for example, is a 171-page document, not including attachments detailing wildlife monitoring and mitigation, revegetation and habitat enhancement plans.⁷⁷ The final order for the Perennial Wind Chaser Station site certificate is a 324-page document, including appendices and not including additional attachments.⁷⁸ Note that this context does not include any estimate of how long it

⁷² OAR 345-015-0016 (6); OAR 345-015-0057 (2).

⁷³ See OAR 345-015-0016 (3); OAR 345-015-0220 (3)(i).

⁷⁴ See *Oregonians' Guide to Siting and Oversight of Energy Facilities* at 15 (providing that "simply listing the standards is not typically considered sufficiently specific").

⁷⁵ See ORS 469.370 (2)(e) (issues must be raised in person or in writing prior to the close of the record of the public hearing).

⁷⁶ OAR 345-015-0016 (5)(b), (c).

⁷⁷ Application for a Site Certificate for the Montague Wind Power Facility, Final Order (September 10, 2010) <https://www.oregon.gov/energy/facilities-safety/facilities/Facilities%20library/MWP-final-order-091010.pdf>.

⁷⁸ Application for a Site Certificate for the Perennial Wind Chaser Station, Final Order (September 18, 2015) <https://www.oregon.gov/energy/facilities-safety/facilities/Facilities%20library/2015-09-18-PER-Final-Order-on-Site-Certificate.pdf>.

may take for an interested member of the public to familiarize themselves with the Council's statutes and rules and their application to the draft proposed order. Also, we did not research whether, or how often, the Council provides the public with only the 20-day minimum time period to review and prepare comments of "sufficient specificity" on documents of a comparable size and scope to our examples.

However, if the Legislative Assembly were concerned that a minimum of 20 days presents a barrier to public participation, a statutory amendment would be necessary to address that concern. For examples of time periods set for other, potentially comparable, proceedings, the Legislative Assembly could look to ORS 757.210 and 743.019. ORS 757.210 addresses hearings on utility rate filings before the Public Utility Commission, and provides utilities, utility customers and other "proper" parties with 60 days after the utility's rate filing to file a written complaint on the rate filing before the commission, which triggers the requirement for a hearing to determine whether the rate is fair, just and reasonable. ORS 743.019 addresses the rate review process for insurance premiums. That statute gives any member of the public 30 days from the date the rate proposed by the insurance company is filed to make comments, and 10 days to request reconsideration of the final decision of the Department of Consumer and Business Services to approve or modify the rate filing.

The grant of party status in the context of site certificate amendments has also been raised as a concern before the EFSC Work Group. The only provision in statute addressing procedures for contested case proceedings for a site certificate amendment application is ORS 469.405 (1), which broadly delegates to the Council the authority to "establish by rule the type of amendment that must be considered in a contested case proceeding." Council rules outline three types of review processes for amendment requests, only one of which allows for a contested case proceeding.⁷⁹ While any discussion comparing the review processes is outside the scope of this opinion, it bears repeating that the Council is currently provided very broad statutory authority for designing the site certificate amendment process. If the Legislative Assembly were to determine that the Council's processes do not allow for sufficient public input, legislation that would likely include amendments to ORS 469.405 could place additional limitations on the Council's authority to establish rules for site certificate amendments, including rules related to requirements for contested case proceedings or other opportunities for public participation.

Concluding Remarks

The Council has adopted and applies the general Model Rules for contested case hearings under the APA.⁸⁰ However, as Oregon attorneys are duly warned in an Oregon State Bar publication on practicing Oregon administrative law:

notwithstanding ORS 183.341 and 183.630 (model rules of procedure), procedures may still vary greatly between agencies. Thus, depending on the agency and the complexity of the case, an agency may permit more or less discovery, may limit or prohibit intervention, may or may not schedule a prehearing conference, may be represented by the attorney general's office or by an agency representative, and so forth.⁸¹

⁷⁹ See OAR 345-027-0051 (identifying applicability of type A, type B, and type C amendment review processes); OAR 345-027-0071 (addressing requests for contested case under type A review).

⁸⁰ OAR 345-001-0005.

⁸¹ Oregon State Bar, *Oregon Administrative Law*, section 4.2 (2010 edition and 2016 Supplement).

This opinion does not go to the great lengths necessary to draw complete comparisons between the Council's procedures and those of other agencies that, while also subject to the APA, have used their duly authorized discretion to adopt additional procedural rules. We therefore caution against relying too heavily on this opinion to assess whether the Council's practices are consistent with those of other, similarly situated agencies. That said, we hope that this comparison between the Council's processes and the model processes under the APA for selecting hearing officers and for granting party status is useful to you, and we are happy to advise you further on specific legal questions you have related to this topic.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

A handwritten signature in black ink, appearing to read "Maureen McGee". The signature is fluid and cursive, written in a professional style.

By
Maureen McGee
Deputy Legislative Counsel