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January 4, 2023

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Filing Center
P.O. Box 1088
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Re: Docket No. PCN-5 – In the Matter of Idaho Power Company's Petition for Certificate of Public Convenience and Necessity.

Attention Filing Center:

In accordance with Administrative Law Judge John Mellgren's December 19, 2022 Memorandum issued in the above-referenced docket, requesting that Idaho Power Company ("Idaho Power") file copies of certain documents related to appeals of the Energy Facility Siting Council's site certificate for the Boardman to Hemingway Transmission Line, attached are Answering Briefs filed by Idaho Power, as well as the Oregon Department of Energy and Oregon Energy Facility Siting Council (collectively, "State Respondents") submitted in Oregon Supreme Court dockets S069919 ("STOP B2H"), S09920 ("McAllister"), and S069924 ("Gilbert").

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If you have any questions about these filings, please do not hesitate to contact me.

Respectfully submitted,

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Attachments

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line

STOP B2H COALITION,

Petitioner,

vs.

OREGON DEPARTMENT OF ENERGY, OREGON ENERGY FACILITY SITING COUNCIL, and **IDAHO POWER COMPANY,**

Respondents.

Energy Facility Siting Council

OAH Case No. 2019-ABC-02833

Supreme Court Case No. S069919

Expedited Proceeding under ORS 469.403

CORRECTED ANSWERING BRIEF FOR IDAHO POWER COMPANY

On Petition for Review of a Decision of the Energy Facility Siting Council

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Names and Addresses of Counsel on Next Page

January 2023

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ABBREVIATIONS AND COMMONLY USED TERMS

BLM	Bureau of Land Management
B2H	Boardman to Hemingway Transmission Line Project
CAP	Community Advisory Process
DEQ	Oregon Department of Environmental Quality
DPO	Draft Proposed Order
EFSC	Energy Facility Siting Council
EIS	Environmental Impact Statement
EQC	Oregon Environmental Quality Commission
IRP	Integrated Resource Plan, also known as a "least-cost plan"
kV	kilovolt
NEPA	National Environmental Policy Act
NSR	Noise sensitive receptor
ODOE	Oregon Department of Energy
OPUC	Public Utility Commission of Oregon
ROD	Record of Decision
RPS	Renewable Portfolio Standard
USFS	United States Forest Service

STATEMENT OF THE CASE

I. Nature of the Proceeding and Order Below

This proceeding concerns a final order of the Energy Facility Siting Council ("EFSC") issuing a site certificate to authorize Idaho Power Company to construct and operate a roughly 300-mile-long electric transmission line, plus related facilities, called the Boardman to Hemingway Transmission Line Project ("B2H" or "project"). EFSC's final order is the result of a comprehensive siting review process under ORS 469.330 to ORS 469.370 that started more than a decade ago in 2008. After years of analysis and input from a myriad of state and federal agencies, tribal governments, special advisory groups, and other interested parties, the review process ultimately culminated in a two-year contested-case proceeding under ORS 469.370(5) that began in 2020 and concluded in 2022. In its detailed 730-page final order, EFSC approved the site certificate subject to conditions after finding that B2H complies with each of EFSC's standards adopted under ORS 469.501.

Out of the extensive review process leading to the final order, three parties—petitioner STOP B2H Coalition ("STOP"), a coalition of local opponents to the project, and the two individual petitioners in

S069924 and S069920—now petition for judicial review under ORS 469.403. Based on their various challenges to factual findings and legal interpretations, those petitioners ask this Court to set aside or remand EFSC's final order. Because none of the challenges have merit, Idaho Power asks this Court to affirm.

II. Basis for Jurisdiction and Timeliness of Petition

Idaho Power agrees with STOP's statement on the basis for appellate jurisdiction and the timeliness of the petition for judicial review. EFSC had jurisdiction under ORS 469.320(1).

III. Questions Presented

A. Whether EFSC abused its discretion in granting only limited party status to STOP under ORS 183.310(7) and OAR 137-003-0005.

B. Whether EFSC's comprehensive authority over the siting of energy facilities and issuance of site certificates under ORS 469.300 *et seq*. permitted EFSC to decide that B2H complies with state noise regulations, including by determining proper variances and exceptions.

C. Whether EFSC permissibly interpreted its rules to allow the Oregon Department of Energy ("ODOE") to exercise discretion under OAR 345-021-0010 to specify an "appropriate" analysis area in the site

certificate application.

E. Whether EFSC permissibly interpreted its rules to allow reliance on Idaho Power's proffered visual-impacts analysis, which adapted federal regulatory methodologies and considered the Council's definition of "significant" in OAR 345-001-0010(29).

SUMMARY OF ARGUMENT

Each of STOP's assignments of error should be rejected. To start, EFSC did not abuse its discretion in designating STOP as a limited party in the contested-case proceeding. Under the Model Rules of Procedure for Contested Cases, OAR 137-003-0000-0092 ("model rules"), an agency has express authority to treat a petition for party status as one for limited party status. OAR 137-003-0005(7). The model rules also give express discretion to agencies to "specify areas of participation and procedural limitations as appropriate." OAR 137-003-0005(9). EFSC properly applied the factors under OAR 137-003-0005(7) in exercising its discretion, and STOP offers no credible argument that EFSC misinterpreted the rules. To the extent that this Court construes STOP's assignment as a challenge to the validity of the rules, the rules are authorized under Oregon's Administrative Procedures Act ("APA").

Second, EFSC properly decided whether and how B2H complied with the State's noise program by including an exception and a variance in the site certificate. While STOP contends that those decisions were the sole province of the Environmental Quality Commission ("EQC") and the Department of Environmental Quality ("DEQ"), the legislature created a "one-stop" energy-facility certification process. *See, e.g.*, ORS 469.310. As such, EFSC may make decisions that "bind" other State agencies, even with regard to matters ordinarily within those other agencies' authority. ORS 469.401(3). EFSC acted pursuant to its statutory authority.

Third, when providing specifications for Idaho Power's noise analysis in its site-certificate application, ODOE applied EFSC rules to specify an appropriate analysis area. While STOP contends that OAR 345-021-0010(1) mandated a larger area, that rule expressly authorizes ODOE to "include any appropriate modifications to applicable provisions of this rule." Further, any alleged error in the size of the analysis area was harmless because other rules specify the area for public notice and the area evolved during the certification process.

Fourth, EFSC properly relied upon a visual-impacts study that

showed that, when accounting for mitigation measures, B2H is not likely to result in "significant adverse impacts" to the scenic, recreation, and protected areas resources in the vicinity of the project. EFSC's rules do not specify a study methodology. And, contrary to STOP's claim that Idaho Power must analyze subjective constituent input, the hearing officer and EFSC recognized that Idaho Power's methodology "assumed that all viewers … would be highly sensitive to the resource change" and, thus, "data collection on viewers' subjective evaluations is unnecessary" and, if anything, "could potentially reduce" the affected resource's assessed value. (SER-380.) While STOP argues some different methodology was required under EFSC's rules, it identifies nothing in the rules or record that precluded EFSC from relying on Idaho Power's study. This Court should affirm.

STATEMENT OF FACTS

I. The National and Regional Significance of B2H

Idaho Power is an electric utility serving an area of roughly 24,000-square miles in eastern Oregon and southern Idaho. Idaho Power has established a goal of providing 100-percent clean energy by 2045. (SER-278.) B2H is vital to meeting that goal. As a key component of regional transmission planning, B2H will enable the integration of clean, renewable energy resources into the power grid. B2H also will meet critical resource needs to allow Idaho Power to provide low-cost, reliable power to its customers.

When built, B2H will consist of a 500-kilovolt transmission line capable of delivering bi-directionally approximately 1,000 megawatts of clean, affordable power between eastern Oregon and southwestern Idaho. (SER-1.) B2H will connect the Intermountain West with the power grid serving the Pacific Northwest to alleviate existing transmission constraints during peak use periods to serve the regions' residences, farms, businesses, and other electricity users. (SER-11.) The existing transmission pathway between the Pacific Northwest and Intermountain West currently is at full capacity during peak winter

periods when Northwest utility consumers use electricity to heat their homes and businesses, and during peak summer periods when Intermountain West consumers use electricity for residential and commercial air conditioning and irrigation. (*Id.*) B2H will relieve these transmission constraints by adding critical capacity to meet increasing forecasted demand while also improving system reliability. SER-11-12.) By enhancing the reliable and cost-effective energy exchange between the regions and by connecting remote wind and solar energy resources to the grid, B2H will play an important role in protecting the environment by circumventing the need to build new power plants to meet expected load demands and satisfy mandatory reliability standards and requirements. (*Id.*)

B2H also is critical to the clean energy future of the Pacific Northwest. With the adoption of aggressive greenhouse gas emissions reduction targets in House Bill 2021 (2021)[1] and Renewable Portfolio Standards ("RPSs") mandating electricity to increasingly come from

1 In 2021, the Oregon Legislature passed the Clean Energy Targets Bill (HB 2021), which mandates that large investor-owned utilities must reduce their greenhouse gas emissions 100 percent below baseline emissions level by 2040.

renewable energy resources, such as the RPSs imposed in Senate Bill 1547 (2016),[2] substantial new regional transmission capacity is urgently needed to integrate renewable energy resources and decarbonize the electric grid. (SER_244-245.) Specifically, the increased use of renewable energy resources "can be achieved only if utilities have access to sufficient transmission capacity to connect the most efficient wind and solar resources to the population centers and allow the sharing of demand and renewable resource diversity across a geographic footprint." (SER-245.) As explained in testimony to EFSC on the need for B2H to meet various clean-energy goals:

> "[S]tate RPSs will increase, not decrease, the need for sharing of renewable energy, thus placing even higher demands on transmission capacity. Renewable resources such as wind and solar are variable resources, meaning that the conditions under which they are generated cannot always be predicted and are not under the control of the utility. That means that the generation produced by these renewable resources is not always a match for the utility's needs at any one time. This characteristic of renewables is in contrast to those of more traditional fossil fuels (*i.e.*, gas and coal) that can be dispatched in accordance with a utility's needs. All of this means that, as RPS laws and policies further drive the expansion of renewable resources,

[2] As part of the Oregon Renewable Energy Act of 2007 (SB 838), Oregon established RPSs to require electric utilities to provide a certain amount of electricity from clean energy resources.

> there is a greater chance that a utility will need more energy than they are producing, or will be producing more than they need, at any one point in time. Other utilities will be in the same situation, although presumably at different times, depending on the location of their renewable resources, or load position. As a result, a robust grid that allows utilities to transmit energy to the location where it is required will become even more vital in a world where renewable generation is increasing."

(SER-245, 271-272.)

Due to B2H's ability to increase electric reliability and energy independence by integrating new renewable energy into the nation's aging power grid, the project also has been championed nationally. Among other things, B2H was selected by a multi-agency federal task force—created by the Obama Administration and known as the "Rapid Response Team for Transmission"—as one of seven nationally significant transmission projects prioritized for federal permitting and development. (SER-280-281.) Following an extensive permitting process for the necessary federal approvals, the Bureau of Land Management ("BLM") approved B2H in 2017 (STOP-ER-17, 607, 637-638.), followed by approvals from the United States Forest Service ("USFS") in 2018 (STOP-ER-177, 637.) and the United States

Department of the Navy in 2019.[3] (STOP-ER-177, 600.)

II. Background on Siting Process for the B2H Project

As a regulated utility, Idaho Power is required under Oregon law to plan for and meet its load and transmission requirements to provide reliable electric service to its customers. (STOP-ER-800-802; SER-17.) To comply with that legal duty, among other things, Idaho Power must engage in a planning process with the Public Utility of Commission of Oregon ("OPUC"), in which Idaho Power submits its energy resource action plan for public review and input from OPUC staff and all interested parties through its Integrated Resource Plan ("IRP"). OAR 860-027-0400(3). As described in EFSC's final order, after review, OPUC acknowledged each of Idaho Power's IRPs, including its specific action plans about construction of B2H in its 2017 and 2019 IRPs, as part of Idaho Power's "least-cost, least-risk" portfolio of resources to meet needs. (STOP-ER-802-308.)

After identifying the need for B2H, Idaho Power began the process to obtain a site certificate for B2H in 2008. (STOP-ER-173; SER-15.) A

[3] STOP also challenged the BLM and USFS approvals, but its challenges were rejected, and the approvals were affirmed. *Stop B2H Coalition v. BLM*, 552 F Supp 2d 3d 1101 (D Or 2021).

site certificate is required to construct and operate any large energy facility in Oregon. ORS 469.320; *see also Save Our Rural Oregon v. Energy Fac. Siting Coun.*, 339 Or 353, 356-57, 121 P3d 1141 (2005) (describing same). Although it is required to consult with state and federal agencies and other interested parties, EFSC is vested with exclusive authority over the issuance of site certificates. *Save Our Rural Oregon*, 339 Or at 356; *see also* ORS 469.470. EFSC's decision to issue a site certificate "binds state, county, and city governments in accordance with the council's determination and requires state agencies and local governments to issue any permits specified in the site certificate without further proceedings." *Friends of Parrett Mt. v. Nw. Natural Gas Co.*, 336 Or 93, 96, 79 P3d 869 (2003); ORS 469.401.

To inform EFSC's decisions on applications for site certificates (also called ASCs), the legislature "created an extensive statutory framework governing the site certificate application process." *Friends of Columbia Gorge v. Energy Fac. Siting Coun.*, 365 Or 371, 373, 446 P3d 53 (2019); *see* ORS 469.330-370 (prescribing steps in application process). The legislature also tasked ODOE to "[s]upervise and facilitate the work and research on energy facility siting applications at

the direction of the [EFSC]." ORS 469.040(1); *see* ORS 469.450(6) (mandating same). As described below, the review process to obtain the site certificate for B2H spanned more than a decade, ultimately concluding with a final order approving Idaho Power's application in 2022.

A. Notice of Intent and Initial Corridor Selection Process

The first step in the site certificate application process is the filing of a notice of intent with a detailed description of the proposed project. ORS 469.330(1); OAR 345-020-0011 (prescribing contents of notice of intent). In this case, for a roughly two-year period from 2008 to 2010, Idaho Power undertook extensive studies to identify its initial proposed transmission corridor to include in its notice of intent for the B2H project. (STOP-ER-218-223; SER-15-40.) Idaho Power started by carefully mapping constraints and conditions that limited siting options, such as areas subject to strict regulatory restrictions, environmentally sensitive areas, and areas with challenging landscape features. (STOP-ER-220; SER-17-25.) Idaho Power also mapped areas that offered potential siting opportunities, such as existing utility and energy corridors. (STOP-ER-220; SER-26-27.)

After completing that initial siting assessment, Idaho Power initiated its Community Advisory Process ("CAP") as a way to maximize early input about potential siting options from affected communities and other interested parties. (SER-30-31.) The CAP included 27 project advisory team meetings and numerous other public meetings to gather public input, identify and address community concerns, and ultimately refine the proposed route to minimize impacts on the environment, property owners, historic sites, and other resources. (SER-98.) In all, nearly 1,000 people were involved in the CAP either through Project Advisory Team activities or public meetings. Additionally, numerous meetings with individuals and advocacy groups were held. (SER-36-38, 46.) After identifying 47 possible corridors in the CAP process, Idaho Power then used aerial photography, topographical maps, and data on siting constraints to analyze the feasibility of those routes. (STOP-ER-220; SER-31.) After eliminating certain routes based on that additional review, Idaho Power analyzed each of the possible remaining corridors for permitting difficulty, construction difficulty, and potential mitigation costs. (SER-34.)

In 2010, following the two-year initial assessment process, Idaho

Power filed its notice of intent to file an application for a site certificate, identifying an initial proposed corridor and alternative segments. (SER-40.) Together with BLM—the lead federal agency overseeing the National Environmental Policy Act ("NEPA") review process[4]—ODOE issued public notices about the notice of intent and scheduled public meetings about the project. (STOP-ER-174, SER-40-42.) Pursuant to ORS 469.330 and OAR 345-020-0040, ODOE also requested review and recommendations from tribal governments, state and federal agencies, local governments, and special advisory groups. (*Id.*)

From 2010 to 2013, based on extensive input from community members and interested parties, as well as additional engineering and environmental analyses to further reduce impacts, more refinements were made to the proposed corridor and alternative corridor segments for B2H. (STOP-ER-224; SER-40.) ODOE also issued its project order under ORS 469.330(3), establishing the legal requirements for the site certificate application. (SER-40.)

[4] The NEPA review process, and its relationship to EFSC's review, is described in more detail in Idaho Power's answering brief in S069920.

B. Preliminary Site Certificate Applications

In early 2013, Idaho Power filed its initial preliminary application for site certificate, and ODOE distributed the preliminary application and invited additional comments from reviewing agencies and other interested parties under OAR 345-021-0050. (STOP-ER-175; SER-45-46.) Based on agency comments, including input from BLM, and new changes in other regional transmission development projects, Idaho Power undertook additional analyses of the proposed corridor and alternative route segments. (SER-46-50.) Those additional analyses resulted in more refinements to avoid sensitive resources, meet project objectives, and improve constructability of the project. (*Id.*; SER-54.)

In July 2017, after completing final adjustments, Idaho Power submitted an amended preliminary application for site certificate. (STOP-ER-176, 223.) In response, ODOE solicited comments from reviewing agencies and other interested parties, as well as issued requests for additional information to Idaho Power under OAR 345-021-0050(5). (*Id.*) After reviewing the responses and additional information in consultation with the relevant agencies and parties, ODOE determined that the preliminary application was complete, and Idaho

Power submitted its final application for site certificate in 2018. (*Id.*)

C. Application for Site Certificate

After the application was submitted, ODOE issued public notice and requested comments from reviewing agencies and other interested parties, as required under ORS 469.350. (STOP-ER-176-177.) In response, ODOE received comments from four federal agencies, eight state agencies, two tribal governments, two special advisory groups, and one local planning department. (SER-177.) Under OAR 345-015-0190(9), Idaho Power submitted information based on those comments and requests for additional information from ODOE. (SER-177-178.)

In May 2019, ODOE issued a draft proposed order ("DPO") recommending approval of the site certificate application subject to 105 conditions. (SER-178-180.) As required under ORS 469.370(2), EFSC then appointed a hearing officer to conduct public meetings on the DPO in each county that was crossed by the project. (*Id.*) During the notice-and-comment period, ODOE received oral and written comments from organizations and members of the public, including Stop B2H and the two individual petitioners. (*Id.*) In 2020, after taking the public comments into consideration, and after additional agency consultation,

ODOE issued a proposed order and notice of contested case. (*Id.*)

D. Contested Case Proceeding

After ODOE issued notice of the proposed order and contested case, 55 individuals and five organizations or groups requested party or limited party status. (STOP-ER-180-181.) The hearing officer ultimately granted limited party status to 35 parties. (*Id.*) Twenty-six petitioners, including STOP, timely appealed the order on party status to EFSC under OAR 345-015-0016(6). (STOP-ER-181.) EFSC, however, affirmed the hearing officer's designation of limited party status for STOP and the other parties based on the findings in the order. (SER-170-171; STOP-ER-40; STOP-ER-181-182.)

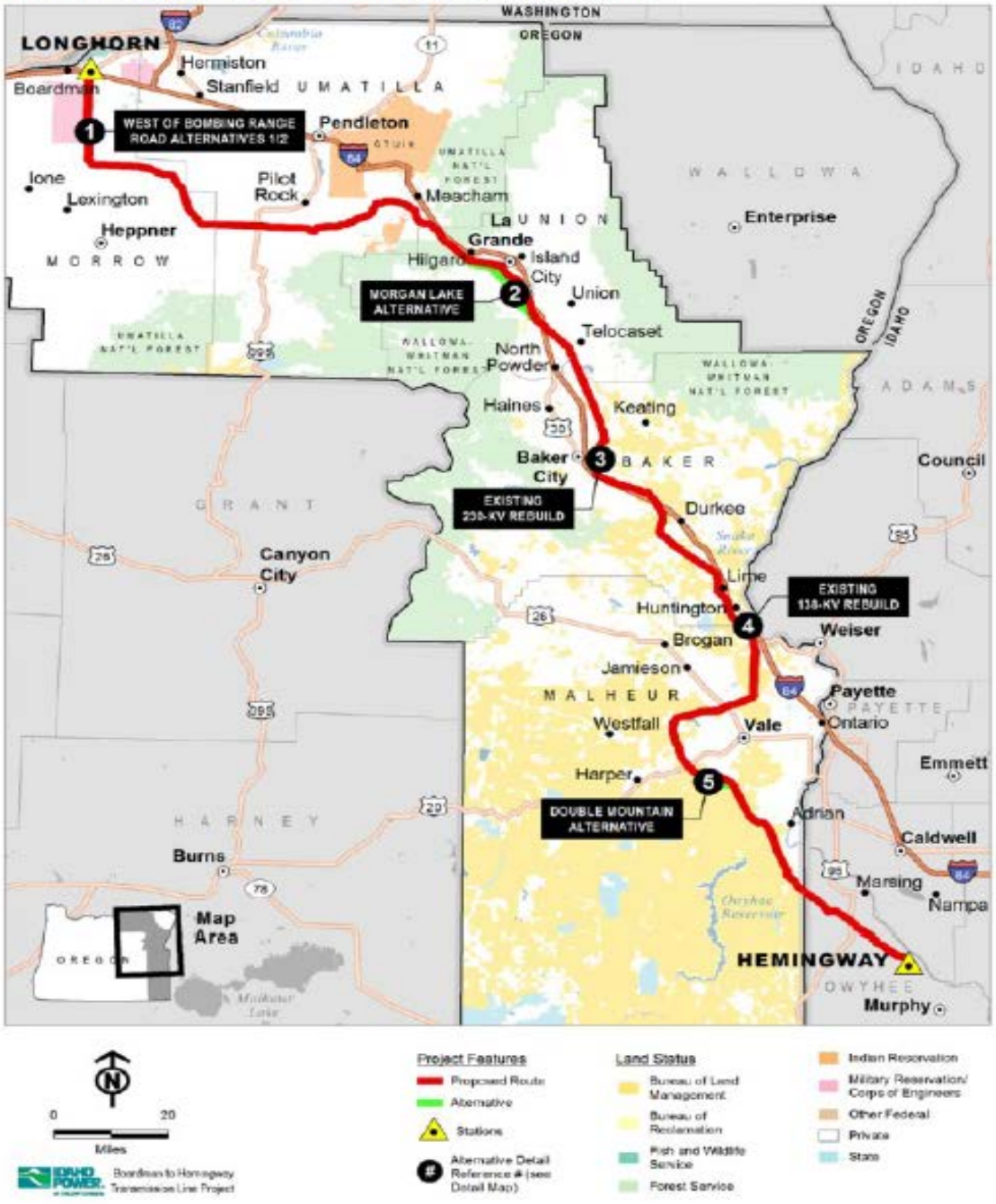
After resolving additional exceptions relating to procedural issues, the hearing officer conducted the contested-case proceeding on whether the application for site certificate complied with the standards adopted under ORS 469.501. In addition to seven miscellaneous issues, the proceeding addressed 78 discrete challenges on the application's compliance with: (1) fish and wildlife habitat mitigation requirements and standards, OAR 345-022-0060; (2) historical, cultural, and archeological resource standards, OAR 345-022-0090; (3) land-use

standards, OAR 345-022-0030; (4) need standards, OAR 345-023-0005; (5) public services standards, OAR 345-022-0110; (6) recreational impact standards, OAR 345-022-0100; (7) retirement and financial assurance standards, OAR 345-022-0050; (8) protected areas and scenic resources standards, OAR 345-022-0040 and 345-022-0080; (9) soil protection standards, OAR 345-022-0022; (10) threatened and endangered species standards, OAR 345-022-0070; (11) structural standards, OAR 345-022-0020; and (12) noise control regulations. (STOP-ER-188-214.)

The contested-case proceeding took place over an approximately 27-month period, ultimately ending in 2022. After considering the challenges and the evidentiary record, and making modifications directed by EFSC to the proposed order, ODOE issued a draft 730-page final order with findings of fact and conclusions of law in September 2022. (STOP-ER-215.) EFSC then conducted a hearing on whether to adopt the final order under ORS 469.370(7), including an opportunity for comments on any material changes to the conditions of approval. After the hearing, EFSC voted unanimously (6-0) to approve the application with the conditions. A map depicting B2H's route is below.

(STOP-ER-230.)

Figure 2: Approved and Alternative Transmission Line Routes



RESPONSE TO FIRST ASSIGNMENT OF ERROR

EFSC acted well within the bounds of its discretion under ORS 183.310(7) and OAR 137-003-0005 in granting only limited party status to STOP in the contested-case proceeding. Even if that were not so, remand would not be required under ORS 183.482(7) because STOP fails to identify any material prejudice from its party designation.

I. Preservation of Error

Idaho Power accepts STOP's statement of preservation to the extent that STOP argues that EFSC abused its discretion under OAR 137-003-0005(7) and OAR 137-003-0005(9) in denying STOP's request for full party status. To the extent that STOP argues that the model rules are invalid and exceed EFSC's statutory authority, that argument is waived because STOP's opening brief fails to raise any challenge to those rules under ORS 469.490 and ORS 183.400. *See* ORAP 5.45(1) (no matter considered "unless the claim … is assigned as error in the opening brief" and each assignment "must identify precisely" the error).

II. Standard of Review

This Court's review of EFSC's final order is governed by ORS 183.482, which generally applies to review of contested-case orders.

ORS 469.403(6). Under ORS 183.482(8), this Court reviews final orders "for errors of law, abuse of agency discretion, and lack of substantial evidence in the record to support challenged findings of fact." *Save Our Rural Oregon*, 339 Or at 356. To the extent that this Court entertains a rule challenge, this Court reviews to determine whether a rule "exceeds the statutory authority of the agency." ORS 183.400(4)(b); ORS 460.490.

STOP's first assignment of error challenges EFSC's decision to grant only limited party status for STOP to participate in the contested-case proceeding on the site certificate application. OAR 137-003-005(8)—a model rule adopted by EFSC—provides discretion for an agency to treat a petition to participate as a "party" instead as a petition to participate as a "limited party." OAR 137-003-005(9)—another model rule—also provides EFSC with discretion to "specify areas of participation and procedural limitations as appropriate." OAR 137-003-005(9); *see Marbet*, 277 Or at 455 (issue of "whether [a petitioner] is qualified to represent a public interest" is an issue of "agency discretion").[5]

[5] *Marbet* concerned *former* ORS 469.380(2) (1977), which

In reviewing EFSC's exercise of discretion, this Court examines whether the decision was outside "the range of discretion delegated to the agency by law," inconsistent with an agency rule or established practice, or "[o]therwise in violation of a constitutional or statutory provision." ORS 183.482(8)(b); *see also Blue Mt. Alliance v. Energy Fac. Siting Council*, 353 Or 465, 492, 300 P3d 1203 (2013). This Court may not "substitute its judgment for that of the agency as to any issue of fact or agency discretion." ORS 183.482(7). For alleged irregularities in procedures, this Court will remand only "if the court finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure[.]" ORS 183.482(7). To the extent that this Court considers a challenge to EFSC's authority to adopt the model rules in OAR 137-003-005(8) and OAR 137-003-005(9), the issue of statutory authority is a question of law. *Pulito v. Or. State Bd. of Nursing*, 366 Or 612, 618, 468 P3d 401 (2020).

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previously governed intervention in contested-case proceedings before EFSC. *See id.* ("The council may, by proper order, permit any person to become a party … by intervention who appears to have an interest in the results of the hearing or who represents a public interest in such results. . . .").

III. Argument

EFSC is required to conduct a contested-case hearing on a site certificate application consistent with the procedures prescribed under the APA, ORS 183.411 to ORS 183.471, and any other procedures adopted by EFSC. ORS 469.370(5). Under Oregon's APA, agencies are expressly authorized to "adopt rules of procedure governing participation in contested case proceedings by persons appearing as limited parties." ORS 183.417(2); *see Friends of Columbia Gorge*, 368 Or at 131-32 (discussing same). Pursuant to that authority, both the model rules and EFSC's own procedural rules recognize a distinction between a "party" and a "limited party." *See* OAR 137-003-0005(8); OAR 345-015-0016. As described below, those rules authorized EFSC to designate STOP as a limited party in this proceeding. To the extent that this Court entertains a challenge to the validity of those rules, such a challenge has no merit because the rules are consistent with the APA.

A. Overview of Governing Standards

Under EFSC's governing statutes, only two parties—the applicant and ODOE—may participate as a matter of right in a contested-case proceeding on a site certificate application. *See* ORS 469.370(5) ("The

applicant shall be a party to the contested case."); OAR 345-015-0080(2) ("The Department must participate in all contested case proceedings conducted by the Council with all the rights of a party."). Other state or local agencies may request to participate as parties, limited parties, or interested agencies. OAR 345-015-0080(1). Others with an interest, or who represent a public interest, also may seek to intervene as parties or limited parties if they provided comments in the public hearings on the DPO. OAR 345-015-0016(2), (3).

To request participation as a party or limited party, an interested petitioner must provide: (1) a detailed statement of the petitioner's interest; (2) a short statement of the issues that the petitioner desires to raise; (3) a description showing that the petitioner preserved the issue; and (4) the reasons why the existing parties cannot adequately represent the interests. OAR 345-015-0016(5); OAR 137-003-0005(3). If a petitioner seeks to represent a public interest, the petitioner also must provide a detailed statement of its qualifications to represent the interest. OAR 137-003-0005(3)(e). A public interest means "an interest shared by a significant part of the public or one to be considered an element in the overall public interest." *Marbet*, 277 Or at 455.

Under the adopted model rules, EFSC has express discretion to treat a petition for party status as a petition to participate as a limited party. OAR 137-003-0005(8). In exercising its discretion, EFSC must consider, among other things, the qualifications of the petitioner and "[t]he extent to which the petitioner's interest will be represented by existing parties." OAR 137-003-0005(7). In granting petitions, the adopted model rules also provide EFSC with express discretion to "specify areas of participation and procedural limitations as appropriate." OAR 137-003-005(9).

Under EFSC's own rules, all parties—including all limited parties—have certain important participation rights that do not depend on party status. To start, all parties are entitled "to propose site certificate conditions that the party believes are necessary or appropriate to implement the policy of ORS 469.310 or to meet the requirements of any other applicable statute, administrative rule or local government ordinance." OAR 345-015-0085(1). In addition, all parties have the right to "present evidence relating to the appropriateness, scope or wording of any other party's proposed site certificate conditions and may present written proposed findings of fact,

briefs and other argument concerning proposed conditions." OAR 345-015-0085(2). Limited parties, however, otherwise may present other arguments and evidence on "only the subjects within the area to which they have been limited." OAR 137-003-0040(3)(b); *see* OAR 345-001-0005(1) (adopting model rules). Limited parties also otherwise "may question only those witnesses whose testimony may relate to the area or areas of participation granted by the agency." OAR 137-003-0040(4).

B. EFSC Acted within Its Discretion to Designate STOP as a Limited Party

In this case, as noted, three organizations and more than 50 individuals petitioned to participate in the contested-case proceeding, with almost all asking to participate as full parties. (SER180-181.) STOP was one of those petitioners. In its petition requesting full party status, STOP explained that it was a nonprofit volunteer member organization formed "to stop the approval and construction of an unneeded 305 million, 500 kv transmission line through Eastern Oregon" and Idaho. (STOP-ER-1.) STOP described its members as mostly residents of the areas near the proposed transmission line corridor, and it included a 16-page list of wide-ranging issues that STOP wished to raise in the proceeding. (STOP-ER-1-18.) STOP did

not describe any special technical or other subject-matter expertise. (*Id.*)

In deciding the petitions for party status, the hearing officer determined to grant only limited party status to STOP. (STOP-ER-1, SER-224.) The order, however, allowed STOP to respond on all procedural matters, as well as to participate in discovery, present evidence, cross-examine witnesses, and submit briefing on all issues properly raised in its petition. (STOP-ER-26; SER-224.) In explaining the decision, the order found that limited party status was appropriate where "as in this case, a petitioner satisfies the eligibility requirements for participation and has established a personal or public interest in the outcome of the proceeding, but is only qualified to respond to some, but not all, issues to be considered in the contested case." (SER-225.) The order also found that limited status was proper based on the need for efficient and orderly presentation of evidence, the large number of petitioners seeking to participate as parties, and the large number of complex issues. (*Id.*) The order specifically found that the designation of limited party status for STOP and others "avoids redundancy, maintains order, and facilitates efficiency while allowing the asserted

issue/public interest to be represented in the contested case." (SER-226.) On STOP's interlocutory appeal of that order under OAR 345-015-0016(6), EFSC affirmed the limited party designation for the reasons stated in the order. (STOP-ER-40.)

In challenging the final order, STOP first argues that "only STOP can choose to limit its participation" and that EFSC exceeded its authority in designating STOP as a limited party over STOP's objections. (STOP-Br. at 11.) Alternatively, STOP argues that EFSC abused its discretion in designating STOP as a limited party because, according to STOP, EFSC's findings were insufficient and not supported by substantial evidence. (*Id*. at 12-14.) As discussed below, none of the arguments has merit, and STOP has not established any material prejudice in any event.

1. EFSC Had Authority to Designate STOP as a Limited Party, Even if STOP Requested Full Party Status

In its first argument, STOP claims that the APA does not permit EFSC to designate a party as a limited party if the party has requested to participate as a full party. (STOP-Br-9-10.) STOP's argument appears to rely on ORS 183.310(7)(c), which defines a "party," in part, as "[a]ny person requesting to participate before the agency as a party

or in a limited party status[.]" According to STOP, that statute and related rules are intended to address only "the ability of a party to limit their own status, should they choose to do so." (STOP-Br-10.) As explained below, STOP's argument is meritless and disregards controlling law.

a. The model rules provide discretion for agencies to designate intervenors as "limited parties."

As this Court recognized in *Friends of Columbia Gorge*, 368 Or at 131-32, the APA long has recognized the concept of limited parties. A key reason for granting only limited party status rather than full party status—particularly in complex matters—is to prevent contested-case proceedings from becoming unduly burdensome and inefficient as a result of intervening parties. *See, e.g., id.* at 130 (explaining limited party status was adopted in response to agency concerns that "affording intervenors the same participation rights as other parties could overburden contested case proceedings"); *see also, e.g., Marbet*, 277 Or at 478-79 (Bryson, J., dissenting) (noting "[t]he public also has an interest in efficient and speedy administrative proceedings" and causing delay is "the name of the game" in some anti-development litigation). Indeed, far from granting a right of full participation to any interested

party, the legislature introduced the concept of limited parties in the APA for the very purpose of giving "agency control over the scope of participation for persons intervening in contested case proceedings." *Friends of Columbia Gorge*, 368 Or at 130.

ORS 183.417(2) is the key statute providing agencies with this control. Under ORS 183.417(2), agencies are expressly authorized to "adopt rules of procedure governing participation in contested case proceedings by persons appearing as limited parties." And, pursuant to that delegated authority, the model rules prescribe a process to enable agencies like EFSC to act as gatekeepers and to control the scope of participation of intervenors. As a first step in "governing participation" of limited parties, the model rules provide that agencies may treat any petition for party status instead as a petition for limited party status, with various factors prescribed to guide an agency's exercise of that discretion. OAR 137-003-0005(7). The model rules also give express discretion to agencies to "specify areas of participation and procedural limitations as appropriate." OAR 137-003-005(9).

Those model rules are controlling, and STOP offers no explanation why those rules do not authorize EFSC to exercise its

discretion to designate STOP as a limited party even if STOP requested to intervene as a full party. Although EFSC may not limit the full participation of those entitled as of right to a hearing—such as an applicant—the model rules clearly allow EFSC to limit the participation of other interested parties as a way to maintain order and control over contested-case proceedings. Although STOP insists that the model rules address only "the ability of a party to limit *their* own status" (STOP-Br-10, italics in original), STOP's reading has no support in the text or context of the rules. Indeed, if the rules did not authorize agencies to determine the appropriate party status, then agencies would face an all-or-nothing choice in considering a petition for party status—that is, deny it entirely or allow it fully. That is clearly not the intent of the rules, which expressly allow an agency to land on the middle ground and convert a petition for party status to one for limited party status. EFSC did not err in interpreting the adopted model rules as providing discretion for EFSC to designate STOP as a limited party based on EFSC's evaluation of the factors under OAR 137-003-0005(7). *See Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994) (court gives deference to agency's interpretation of rules and

affirms if it is "plausible" and "not inconsistent with the wording of the rule itself or with the rule's context").

b. To the extent that STOP argues that the model rules are invalid, that argument is waived and lacks merit in any event.

Although STOP's opening brief does not challenge the model rules as invalid, STOP argues that the APA favors "broad public participation" and appears to suggest that any rule limiting an interested person's right to participate as a full party would be contrary to the APA. (STOP-Br-10-13.) To the extent that this Court would entertain such arguments as a rule challenge despite the framing of STOP's assignment of error, it is beyond dispute that the delegated authority under ORS 183.417(2) to adopt rules "governing participation" for limited parties is expansive. That statutory delegation clearly allows for the adoption of rules to determine whether, and to what extent, an interested person should be permitted to participate as a limited party if the person is not entitled to participate as a party as a matter of right.

Statutory terms of delegation are "non-completed legislation which the agency is given delegated authority to complete." *Springfield*

Educ. Asso. v. Springfield School Dist., 290 Or 217, 224-26, 621 P2d 547 (1980). With such delegation, "[t]he discretionary function of the agency is to make the choice, and the review function of the court is to see that the agency's decision is within the range of discretion allowed by the more general policy of the statute." *Id*. at 229; *see Pulito*, 366 Or at 618 (court's inquiry considers whether rule "departs from the statutory directive"). The Court determines the general policy of a statute by applying ordinary rules of statutory construction. *Bergerson v. Salem-Keizer Sch. Dist*., 341 Or 401, 413, 144 P3d 918 (2006).

The statute at issue here—ORS 183.417(2)—authorizes agencies to "adopt rules of procedure governing participation in contested case proceedings by persons appearing as limited parties." The key term "governing participation … by persons appearing as limited parties" is both highly general and broad, authorizing agencies to adopt rules on every aspect of participation without any stated limitations. *See State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009) (court looks to text and context as first step in statutory interpretation). That interpretation of the text is confirmed when viewed in context. As this Court described in *Friends of Columbia Gorge*, 368 Or at 130, ORS 183.417(2) was part

of a broader set of statutory amendments returning the concept of limited parties to the APA, with a goal of returning agency control over the participation of interested parties in contested-case proceeding. In addition to ORS 183.417(2), other adopted provisions also give broad discretion to agencies to define the extent of limited party participation. *See, e.g.*, ORS 183.450(3) ("Persons appearing in a limited party status shall participate in the manner and to the extent prescribed by rule of the agency."). STOP offers no argument showing that it is implausible to interpret those statutes as authorizing agencies to make rules on the initial determination of whether a party should appear as a full party or as a limited party. Indeed, as EFSC recognized in its order on party status (Order at 4), if any person could avoid the constraints on limited parties by simply making the choice to appear as a full party, it would defeat the very reason for the adoption of the limited party designation—that is, to "reintroduce agency control" and to prevent intervening persons from overburdening contested-case proceedings. *Friends of Columbia Gorge*, 368 Or at 129.

The legislative history also confirms that the general policy of the statute was to give agency control over participation by intervenors,

including authority to adopt rules under ORS 183.417(2) to determine the appropriate party status for intervenors. As described in *Friends of Columbia Gorge*, 368 Or at 131, the 1979 amendments to the APA "inserted the concept of limited parties into the definition of 'party' that exists today." The legislative record included discussion about the fact that agencies must be given discretion to make the initial determination about whether an intervening person should be permitted to participate as a full party or a limited party. In one discussion explaining the need for the amendments to allow agency discretion to designate party status, it was noted: "Experience will show that there are very few individuals who are going to come before an agency and say that they have a limited interest. Everyone is going to want to be a full party." HB 2497 (1979), House Judiciary Committee, Minutes for April 26, 1970, Tape 53, Side 2 at 335 (Wood Testimony) App-99. In other discussions, it was specifically asked how the limited party status would be determined, and the answer was that the agency would make that initial determination. *See* HB 2497 (1979) (Committee of Judiciary, Minutes at p. 8, line 200 (May 7, 1979) App-97 ("Rep. Mason asked who determines the limited party status. Ms. Stockdale

responded that the agency does."). The legislative history shows no intent to allow intervening persons to determine for themselves whether to appear as parties or limited parties. To the extent that this Court entertains a rule challenge, OAR 137-003-0005(7) and OAR 137-003-005(9) are well "within the range of discretion allowed by the more general policy of the statute." *Springfield*, 290 Or at 229.

2. EFSC's Order Was Supported by Substantial Evidence

In challenging the order on party status, STOP next quibbles with EFSC's application of the factors under OAR 137-003-0005(7) for deciding whether a party should be designated as a party or limited party. (STOP-Br. at 12-13, 18.) According to STOP, EFSC failed to evaluate the factors under OAR 137-003-0005(7) in exercising its discretion to determine STOP's party status. STOP also appears to argue that the order was not supported by substantial evidence, asserting that it was "uniquely qualified to participate in this proceeding" as a full party because its "members and leadership are subject-matter experts" and its interests are "broad and far-reaching." (*Id*. at 13.) Those arguments fail because this Court cannot "substitute its judgment for that of the agency as to any issue of fact or agency

discretion," ORS 183.482(7), and the order included sufficient findings.

Contrary to STOP's arguments, the hearing officer applied the factors under OAR 137-003-0005(7) and specifically found that STOP and the other interested petitioners were not qualified to address all subjects and that limited party status was appropriate. (SER-225.) Although STOP complains that the findings were not sufficiently specific, the order found that none of the intervening parties, including STOP were qualified to address all subjects. The order also was supported by substantial evidence, as nothing in STOP's petition indicated any special subject-matter or technical expertise. STOP's interests—representing primarily the interests of residents of the affected areas—also largely overlapped with the interests of the other petitioners, who primarily were residents of the affected areas.

In addition, the order correctly recognized the large number of interested parties and the large number of complex issues as supporting the designation of limited party status for STOP and others. Under OAR 345-015-0023(2), a hearing officer is obligated to "take all necessary action" to ensure a full and fair hearing, to facilitate the presentation of evidence, comply with statutory time limits, maintain

order, and assist EFSC in reaching its decision." Here, given the large number of interested parties, the designation of limited party status was appropriate and adequately protected STOP's interests—especially when the order allowed STOP to address any issue properly raised in its petition. EFSC acted well within its discretion under ORS 183.310(7) and OAR 137-003-0005 in designating STOP as a limited party.

3. STOP Fails to Identify Prejudice in Any Event

Finally, STOP fails to satisfy the standard for remand in any event. For irregularities in procedures, this Court will remand only "if the court finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure[.]" ORS 183.482(7). Here, STOP was given full participation rights on the many issues that it raised in its petition for party status, as well as on all procedural issues. In complaining about its designation as limited party, STOP fails to point to any issues that would have resulted in different outcomes if STOP had been given full participation rights. Because EFSC acted within its discretion and STOP fails to show any prejudice in any event, this Court should reject STOP's first assignment of error.

RESPONSE TO SECOND ASSIGNMENT OF ERROR

Because the legislature granted EFSC comprehensive authority to decide issues of State and local law relating to energy-facility siting, EFSC had authority to decide that B2H complies with State law, including by granting a variance and an exception.

I. Preservation of Error

Idaho Power agrees that STOP preserved this issue for review.

II. Standard of Review

The applicable standards of review are as stated in response to STOP's first assignment of error.

III. Argument

STOP disputes that EFSC can issue a variance and an exception under Oregon's noise program—and its arguments have sweeping implications. Per STOP, the legislature failed in its stated intention to create a "comprehensive system" for deciding siting-related issues, such that EFSC cannot decide a siting-related legal issue if the legislature empowered another entity to decide such issues generally. (Br. at 24-25 (quoting ORS 469.310).) By STOP's logic, EFSC's role would be narrow, and an entity building an energy facility may be required to obtain

approvals, variances, and exceptions from many governmental entities, risking inconsistent siting-related decisions. But STOP's argument is meritless.

First, the legislature created EFSC as a "one-stop" entity for deciding issues of state and local law relating to the siting of energy facilities. That means, for example, that EFSC may make decisions that "bind" other State agencies, even with regard to matters ordinarily within those other agencies' authority. ORS 469.401(3). Second, while the legislature authorized EQC and DEQ to administer the State's noise program, later funding constraints mean those agencies no longer implement or administer *any* of that program, such as "processing requests for exceptions and variances." OAR 340-035-0110. Thus, STOP is trying to impose a blood-from-a-stone impossibility on any party whose compliance with the State's noise program depends on an exception or a variance.

As shown below, EFSC did not "usurp" another agency's authority, as STOP contends. (Br. at 27.) Instead, EFSC merely exercised its own expansive siting-related authority.

A. Overview of History on Noise-Compliance Issues

When ODOE issues a project order, it sets forth "the statutes, administrative rules, council standards, local ordinances, application requirements and study requirements for the site certificate application." ORS 469.330(3). Here, ODOE identified that Idaho Power should assess noise in relation to various regulations, including OAR 340-035-0035, which addresses noise emissions from industrial facilities that raise ambient noise levels. (SER-106, 109-10.)

To comply with the project order, Idaho Power submitted an extensive noise analysis. (ER-830-70.) That analysis determined that, in certain areas along the line and for a small percentage of hours in a year—1.3 percent on average across the project—it would be impracticable to strictly comply with the general noise-emission standards. (ER-852-53.) That is because transmission of electricity over a high voltage line generates what is called "corona noise," which can be heard nearby as a "low hum, hissing, frying, or crackling sound." (ER-831.) It occurs because of "small local pressure changes" from energy dissipation near the surface of conductors and is more audible in certain foul weather conditions. (ER-831-32.) As such, Idaho Power

asked that, in relation to Oregon's noise program, the site certificate include a variance and an exception to strict compliance, together with conditions protective of the public. (*See* ER-851-70.)

STOP objected, arguing that a variance and an exception could only be issued by EQC or DEQ. (*See, e.g.*, SER-372.) In response, ODOE and Idaho Power argued that the legislature granted EFSC authority to resolve *all* regulatory compliance issues involving state or local code, including issues with variances and exceptions. (*Id.*)

The hearing officer agreed with that "common sense" application of Oregon's energy-siting statutes, which are intended to provide a "*comprehensive system*" for siting and operating such facilities. (SER-372-74 (quoting ORS 469.310; emphasis in original).) By statute, EFSC alone determines "whether the proposed facility complies with '[its standards] and *any additional statutes, rules or local ordinances determined to be applicable to the facility by the project order, as amended*.'" (*Id.* (quoting ORS 469.370(7); emphasis in original).) In short, these statutes create a "one-stop" certification process for the applicant. (*Id.*) And here, EFSC's authority is critical because EQC and DEQ no longer administer Oregon's noise program. (SER-373.)

EFSC agreed with the hearing officer. (ER-202.) In relation to 41 properties normally used for sleeping or as schools, churches, hospitals, or public libraries (collectively, "noise sensitive receptors," or "NSRs") where there may be infrequent exceedance of the ambient noise antidegradation standard, EFSC granted an exception with four conditions and a variance with a further condition. (ER-831, 850-870.) EFSC did so after utilizing a third-party technical expert and finding regulatory criteria were met, including that "exceedances along the transmission line would be an infrequent event" and that "strict compliance with the ambient antidegradation standard in [the] DEQ rule is inappropriate, unreasonable, or impractical." (ER-852-853, 869.)

B. By Statute, EFSC Has Comprehensive Authority to Decide Siting-Related Issues.

As shown below, the text and context of energy-facility-siting statutes establish EFSC's authority to issue a variance and an exception here. In contrast, STOP's arguments are inconsistent with those statutes. Moreover, the legislative history supports EFSC's exercise of authority here.

1. Oregon's statutes establish EFSC's authority to decide state-law compliance issues, including by issuing a variance and an exception.

"When the question is one of an agency's authority to act in a certain way, the first resort is to the legislation and rules governing that agency." *1000 Friends of Or. v. LCDC (Clatsop Co.)*, 301 Or 622, 628, 724 P2d 805 (1986). Here, EFSC has statutory authority to decide that a proposed energy facility complies with state law.

As the hearing officer understood, the legislature intended to create "a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state." ORS 469.310. At the heart of that system is EFSC. It directs ODOE's "work and research on energy facility siting applications," ORS 469.040(1)(b), and obtains input from other state and local government entities, *see* ORS 469.330(3); ORS 469.350(2); ORS 469.370(4); ORS 469.360. The legislature actively prevented any of these entities' input from amounting to a veto of EFSC's siting-related decisions—as shown in at least three provisions.

First, the legislature provided a method for resolving potentially conflicting siting-related considerations, as might impede progress if

EFSC had to defer to other entities' siting-relating decisions. While EFSC cannot outright waive an applicable statute, the legislature authorized EFSC to resolve stalemates that might arise under Oregon law—specifically, "[i]f compliance with applicable Oregon statutes and administrative rules, other than those involving federally delegated programs, would result in conflicting conditions in the site certificate, [EFSC] may resolve the conflict consistent with the public interest." ORS 469.503(3); *see also* ORS 469.505(2) (similar).

Second, when EFSC ultimately issues a site certificate, it "bind[s] the state and all counties and cities and political subdivisions in this state as to the approval of the site and the construction and operation of the facility." ORS 469.401(3). Relatedly, in any later permitting-related proceeding for which governing law was decided in the site certificate, "the only issue … shall be whether the permit is consistent with the terms of the site certificate." *Id.* In other words, "the council's determinations" in the site certificate "bind[]" state and local government. *Friends of Parrett Mt.,* 336 Or at 96.

Third, there is what happens *after* EFSC issues a site certificate. A certificate holder need not comply with the new law absent a "clear

showing of a significant threat to the public health, safety or the environment." ORS 469.401(2). And even then, such later enacted law is imposed on the certificate holder, not by the entity ordinarily charged with administering the new provision, but instead *on a discretionary basis by EFSC*. *See id.* (even on a sufficient showing, "the council may require compliance with such later-adopted laws or rules").

Here, EFSC's authority to decide noise-related issues regarding B2H is, as the hearing officer observed, "common sense." (SER-373-74.) Oregon law generally prohibits noise emissions in excess of the levels fixed by EQC, which is empowered to enforce its regulations and grant exceptions and variances, or, as to variances, to delegate its authority to DEQ. ORS 467.010 *et seq.*; OAR 340-035-0005 *et seq.* Exceptions and variances are authorized because DEQ, through its director, persuaded legislators that the State's noise program requires "flexibility" not "sharp restriction." (App-75-76.) That is, a suitable noise source can *both* exceed the State's general noise standards *and* comply with Oregon law. *See, e.g.*, ORS 467.060 (a variance can be appropriate when "[s]pecial circumstances render strict compliance unreasonable,

unduly burdensome or impractical due to special physical conditions or cause"). And that is what EFSC decided here.

As this Court has observed, "there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *Gaines*, 346 Or at 171. Here, the energy-facility-siting statutes clearly express the legislature's desire for EFSC to administer a "comprehensive system." ORS 469.310. That comprehensive system includes the issuance of variances and exceptions because EFSC, through a contested case process, alone decides whether and how an energy facility complies with applicable "statutes, rules or local ordinances." ORS 469.370(7).

2. STOP's narrow view of EFSC's authority conflicts with the siting statutes.

Rather than accept the full scope of EFSC's statutory authority, STOP argues that "[a]ssessing *compliance with* a statute or rule is different than authority to grant *exceptions to or variances from* statutes and rules." (Br. at 21 (emphasis in original).) But STOP offers no supporting authority. And there should be no serious dispute that a compliance issue can be decided by issuing a variance or an exception. *See, e.g.*, ORS 469.504(2) (for land-use issues, EFSC "may find goal

compliance for a facility that does not otherwise comply with one or more statewide planning goals by taking an exception to the applicable goal").[6] That is particularly true here, given the legislature intended sound-related variances and exceptions to be available for suitable noise-sources to comply with State law. ORS 467.060.

STOP also presumes that EFSC's authority is negated when the legislature directs another agency to adopt and administer a program, as the legislature did for noise emissions. (Br. at 24.) But STOP identifies nothing exceptional about the legislature's delegation in relation to the State's noise-program. Similar delegations are common.[7] So, treating such delegations as an *exclusive* grant of authority would frustrate the legislature's grant of authority to EFSC alone to issue site certificates, deciding compliance issues.

At root, both of STOP's arguments would allow another agency

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[6] This statue, which was enacted separately from the principal energy-facility siting statutes, provides an energy-facility applicant multiple paths to establish compliance with land-use-planning goals. *See* Or Laws 1997 ch 428 § 5.

[7] *See, e.g.*, ORS 527.670 (mandating that State Board of Forestry adopt rules relating to operations near streams and resource sites); ORS 537.783 (mandating that Water Resources Commission adopt rules governing the disposal of certain geothermal fluids).

veto power over EFSC's siting decisions. As such, both are inconsistent with the legislature's intention to have EFSC preside over "a comprehensive system" for energy-facility siting. ORS 469.310.

3. The legislative history shows EFSC was meant as a "one-stop" agency for siting-related decisions.

The legislative history also shows that the energy-facility-siting statutes create a "one-stop" certification process for the applicant. In 1971, the legislature passed House Bill 1065, which established EFSC's predecessor, the Nuclear and Thermal Energy Council. *See* Or Laws 1971, ch 609. That bill was intended to grant comprehensive siting authority to the nuclear council. For example, Senator Wingard, one of the bill's sponsors, commented that, because of "controversy where power sites should be," the council would "decide where all nuclear power sites should be in the State." (IPC-App-80.) An EQC member advocated for the new council to "have comprehensive regulatory authority." (IPC-App-87.) Oregon's Nuclear Coordinator understood that, while agencies "only will 'comment' on the proposed sites," the council and governor "would then also have some binding power to obligate acceptance by all the state agencies." (IPC-App-92.) And, in what appears to be a draft of a floor speech by a member of one of the

committees to consider the bill, the author explains that the bill establishes "a signle [*sic*] state agency to consider and approve … sites for [nuclear] plants and to centralize consideration of theenvironmental [*sic*] impact of such installations." (IPC-App-95.)

Ultimately, the legislature granted authority to the Nuclear and Thermal Energy Council that closely resembles that of its successor entity, EFSC. So, it too was established as part of a "comprehensive system for the siting, monitoring and regulating of the location, construction, and operation of [energy facilities within its jurisdiction]." Or Laws 1971, ch 609 § 1. And, following a process similar to that which was later adopted for EFSC, *see* Or Laws 1971, ch 609 § 7a–10, a site certificate would issue, "bind[ing] the state and all counties and cities and political subdivisions of this state as to the approval of the site and the construction and operation of the proposed [facility]" with affected state agencies compelled to "issue the appropriate permits, licenses and certificates necessary to construction and operation of the plant or installation, subject only to condition of the site certificate." Or Laws 1971, ch 609 § 12(5).

The overarching legislative intent was clear. In 1974, the Oregon Attorney General recognized that the legislature "clearly intended that [the Nuclear and Thermal Energy Council] would serve as a 'one-stop' agency for the review of applications for site certificates." 37 Op Atty Gen 103, 105 (1974). Notably, "[t]he legislature recognized that, for the 'one-stop' concept to operate effectively, a high degree of cooperation and coordination between [that council] and other state and local governmental agencies would be required." *Id.* at 108 (quoting *former* ORS 453.455(6) (1971)). Despite advising that the council defer to other agencies' "recommendations and suggested conditions," the Attorney General observed that the legislature "lodged final decision-making responsibility on site certificate applications with [that council] and the Governor[.]" *Id.* at 114.

In 1975, the legislature revisited the Nuclear and Thermal Energy Council's existence as well as the jurisdiction and authority to be afforded a siting-agency. *See generally* Or Laws 1975 ch 606 (creating EFSC as successor; extending jurisdiction to all energy facilities; and eliminating the governor's previous veto authority). But the legislature retained in EFSC the "one-stop" concept. Indeed, the Attorney General

said as much when opining that the amended siting statutes and 1974 opinion "clearly indicate that county agencies would be foreclosed from interfering with construction and operation of [an electrical transmission] line." 38 Op Atty Gen 2185, 2189 (1978).

The legislative history and these Attorney General opinions are further persuasive evidence that the legislature intended to create a "one-stop" entity capable of deciding all siting-related issues arising under State and local law. *Accord Blue Mt. Alliance*, 353 Or at 469 (summarizing procedural history, including that EFSC had "determined that the facility complied with [DEQ] noise regulations" promulgated by DEQ specific to wind turbines).

In sum, "[t]he legislature has entrusted [EFSC] with the authority to decide whether to issue a site certificate." *See Save Our Rural Or.*, 339 Or at 356 (citing ORS 469.470(1)); *Friends of Parrett Mt.*, 336 Or at 97 ("ORS 469.470(1) places the responsibility for studying each aspect of site selection with the council[.]").[8] As such, this Court should reject STOP's argument that, when compliance with the State's noise-

[8] Both these cases address energy-facility siting in relation to land-use issues under ORS 469.504.

program turns on the issuance of a variance or an exception, other governmental entities may possess veto power over siting decisions.

C. EFSC Must Decide Compliance Issues Relating to the State's Noise Program Because DEQ and EQC Stopped Administering It.

STOP's arguments, if accepted, impose an impossible task on Idaho Power. "In 1991, the Legislative Assembly withdrew all funding for implementing and administering ORS Chapter 467 and [DEQ's] noise program." OAR 340-035-0110. As a result, DEQ and EQC have "suspended administration of the noise program, including but not limited to processing requests for exceptions and variances, reviewing plans, issuing certifications, forming advisory committees, and responding to complaints." *Id.*

EQC and DEQ intended other governmental entities to address compliance issues. By internal directive, DEQ expressly recognized that, because EFSC "is authorized to approve the siting of large energy facilities in the State[,]" its "staff review applications to ensure that proposed facilities meet the State noise regulations." (ER-79; *see also* ER-824 (EFSC relying on guidance).)

Thus, STOP is asking this Court to impose a roadblock even though DEQ itself understands that EFSC is empowered to decide compliance issues related to energy facilities.

D. STOP's Arguments about EFSC's Factual Findings and Exercise of Discretion Are Meritless.

Beyond disputing EFSC's authority to issue a variance and an exception, STOP raises other arguments in passing. (Br. at 28-29.) In one, STOP argues that EFSC abused its discretion when it found that noise exceedances were "infrequent" or "unusual" for purposes of granting an exception under OAR 340-035-0035(6)(a). (Br. at 28.) But STOP points to a witness who estimated frequency by counting *days* when an exceedance of *any duration* was predicted—in effect, always rounding up to 24 hours of exceedance. (SER-375-76.) The hearing officer rejected that opinion as "not persuasive" for various reasons, including that it was "misguided," given that potential exceedances would only occur "for a small portion of the day" and the proportional hours of predicted exceedance in a year across the project area amounted to "only 1.3 percent of the time." (*Id.*) STOP fails to establish any abuse of discretion. *See* ORS 183.482(8)(b); *Friends of*

Parrett Mt., 336 Or at 106 (declining to "weigh the evidence in the record, reexamine the credibility of the experts, or both" on appeal).

STOP also disputes EFSC's fact findings as they relate to three of four alternative criteria for issuing a variance under ORS 467.060(1). (Br. at 28-29.) STOP's arguments, however, are conclusory. For example, STOP claims there is "no evidence" supporting findings while ignoring the extensive record discussion and analysis in the final order. (ER-867-870.) Moreover, STOP's factual arguments supply no basis for setting aside the variance because STOP does not challenge any finding supporting the conclusion that "[c]onditions exist that are beyond the control of the persons applying for the variance[,]" under ORS 467.060(1)(a)—namely, weather and routing considerations. (ER-868-69.)

In sum, when the legislature created a "one-stop" entity to address energy-facility siting in Oregon, it imbued EFSC with the authority to issue the site certificate here, including as it addresses compliance with Oregon's noise program by a variance, an exception, and conditions. Any other result would risk inconsistent siting-related decisions from state agencies and local governments, undermining the longstanding

"goal of Oregon to promote the efficient use of energy resources and to develop permanently sustainable energy resources." ORS 469.010(2). As such, this Court should affirm.

RESPONSE TO THIRD ASSIGNMENT OF ERROR

ODOE permissibly applied its discretion under EFSC's rules to specify an "appropriate" analysis area for a site certificate application that differed from a default analysis area in OAR 345-021-0010.

I. Preservation of Error

Idaho Power agrees that STOP preserved this issue.

II. Standard of Review

The applicable standards of review are as stated in response to STOP's first assignment of error. Further, STOP's arguments implicate EFSC's interpretation of its own rules, to which courts defers unless it is inconsistent with the rule's wording or context, or with some other source of law. *Don't Waste Or. Comm. v. Energy Facility Siting Council*, 320 Or 132, 142, 881 P2d 119 (1994). Absent those limited circumstances—that is, the agency's interpretation is simply not "plausible"—"there is no basis" on which to find an error of law. *Id.*

Even in the event of an error of law, however, this Court still must affirm unless the "correct interpretation compels a particular action." ORS 183.482(8)(a). That is, harmless error is not reversible error.

III. Argument

Although STOP couches this assignment of error in terms of an alleged impermissible rule change, no such amendment or modification to any rule occurred. Instead, ODOE merely applied EFSC's rules as written, which supply ODOE with discretion when issuing project orders. Here, when providing specifications for Idaho Power's noise analysis, ODOE's project order required that Idaho Power include all NSRs within a half mile of B2H. (*See, e.g.*, SER-110.)

The dispute is whether, as STOP contends, EFSC's rules mandated a one-mile distance or, as expressly authorized in those rules, ODOE could issue a project order that "include[s] any appropriate modifications to applicable provisions of this rule." OAR 345-021-0010(1). Not only is STOP's assignment of error meritless, but any alleged error is harmless on this record, as shown below.

A. Procedural History

As noted above, applying for an energy-facility site certificate involves an iterative process. A would-be applicant submits a notice of intent, which may lead to a project order, which in turn identifies the appropriate information for an application. Under OAR 345-021-0010(1), "[t]he project order … identifies the provisions of this rule applicable to the application for the proposed facility, *including any appropriate modifications to applicable provisions of this rule*." (Emphasis added.)

Subject to any modifications, one of the default categories of information in OAR 345-021-0010 relates to noise, including analysis of compliance with noise regulations and "[a] list of the names and addresses of all [NSRs] … within one mile of the proposed site boundary." OAR 345-021-0010(1)(y)(E);[9] *see also* ER-831 n 728 ("noise sensitive receptor" and "NSR" are synonyms for the rule term, "noise sensitive properties").

[9] EFSC has amended OAR 345-021-0010(1), causing subsection (**x**)(E) to become (**y**)(E). Idaho Power references the rule by its current identification.

Here, ODOE set the noise analysis area at a half mile from the site boundary, explaining that the default one-mile distance in OAR 345-021-0010 was modified "because of the linear nature of the proposed facility"—that is, the default one-mile area would be unduly burdensome and unnecessary. (SER-110.) "[A]nalysis areas," ODOE explained, "are to be used for the assessment of impacts to the associated resource." (SER-112 n 8.)

Although Idaho Power carefully considered proximity to NSRs, other "siting constraints and obligations … directed the placement of the proposed and alternatives [*sic*] routes in proximity to [some] NSRs," where potential exceedances of Oregon's noise standards were projected. (ER-861-62.) Moreover, Idaho Power—in response to public input—extended its noise analysis area to one mile from the site boundary "[o]n a case-by-case basis … where the late-night baseline sound level was unusually low" and identified "one potential additional exceedance at an NSR that was not previously addressed," which it then included with other NSRs in the analysis. (ER-844-46 & n 745.) Idaho Power proposed that the site certificate contain as a condition that, "[p]rior to construction within 1 mile of [referenced NSRs], the

certificate holder shall submit to [ODOE] for its approval a site-specific noise mitigation plan for avoiding, minimizing, or mitigating the ambient antidegradation standard noise exceedances at the relevant NSRs." (B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28 at 61.)

Throughout, STOP disputed that ODOE could modify the analysis area stated in a project order from its default and disputed that Idaho Power's analysis of a larger area cured any alleged defect because, it claimed, OAR 345-021-0010(1)(y)(E) identified parties entitled to notice. (*See, e.g.*, ER-141-144.)

The hearing officer concluded that STOP's positions were meritless. (SER-369-71.) ODOE has such authority, and, in any event, STOP misunderstood the analysis area to be related to public notice, which it is not. (SER-370-71.)

EFSC adopted the hearing officer's decision. (ER-201.) The final order provides for noise-mitigation plans, including in relation to NSRs within one mile of the site boundary at which exceedances are projected or are shown to occur. (*See* ER-855-60 (Noise Control Conditions 1 and 2, which are applicable to the 41 NSRs).)

B. EFSC's Rules Authorize ODOE to Specify the Analysis Areas Appropriate to B2H.

There is clear benefit to ODOE possessing discretion to select the analysis area on a facility-by-facility basis. For example, a proposed site or facility could make it appropriate to *expand* the one-mile distance based on the noise-emission characteristics of a site or facility. And that discretion can be found in two rules. First, under OAR 345-021-0000(4), "[ODOE] may waive or modify [OAR 345-021-0010's] requirements that [ODOE] determines are not applicable to the proposed facility." Second, under OAR 345-021-0010(1)—that is, the same rule that establishes the default one-mile boundary—ODOE is charged with identifying in the project order "the provisions of this rule applicable to the application for the proposed facility, including *any appropriate modifications* to applicable provisions of this rule." (Emphasis added.)

According to STOP, however, OAR 345-021-0010(1) supplies a fixed set of application requirements that ODOE lacks discretion to modify. (Br. at 31-34.) The references to waiver and modification, STOP says, contemplate further rulemaking by EFSC as the only way to waive or modify application requirements during the pendency of a

siting proceeding. As support, STOP first points to ORS 183.335, arguing that its provisions about rulemaking are not followed in a project order and thus EFSC's rules must contemplate further rulemaking. (Br. at 31-32.) But that argument merely assumes its conclusion—namely, that specifying a project-appropriate analysis area somehow amounts to rulemaking. And STOP's only other argument is that ODOE's selection of "appropriate" analysis areas renders the default areas "meaningless." (Br. at 31.) But STOP misunderstands the rules.

First, rather than reference EFSC as the agency taking action, as STOP imagines, both rules reference ODOE—a fact that demonstrates that a rulemaking was not contemplated. In OAR 345-021-0000(4), ODOE is expressly referenced: "*the Department* may waive or modify those requirements that *the Department* determines are not applicable to the proposed facility." (Emphasis added.) For OAR 345-021-0010, ODOE is again the agency waiving or modifying the application requirements because, contextually, those actions occur in the project order, where ODOE identifies the applicable provisions and their appropriate modifications. *See* OAR 345-021-0010(1) ("[t]he project

order … includ[es] any appropriate modifications to applicable provisions of this rule"; for applicants seeking expedited review, the "analysis areas" are "subject to later modification in the project order"). Because both rules reference ODOE, they do not reference EFSC modifying the rules themselves, as STOP contends.

Second, OAR 345-001-0010(1)'s default provisions are meaningful. In that rule, EFSC identifies dozens of application requirements suitable for evaluating most energy facilities. *See generally* OAR 345-001-0010(1)(a)-(dd). Those default specifications are meaningful because they identify the application requirements, absent a reason to modify them for a specific facility. (*See, e.g.*, SER-110 (default analysis area modified "because of the linear nature of the proposed facility").) Moreover, OAR 345-001-0010's default provisions are meaningful for expedited applications—that is, certain classes of energy facilities for which an applicant may submit a preliminary application *before* the project order is issued. *See* OAR 345-015-0300; OAR 345-015-0310. For such facilities, OAR 345-021-0010(1) requires that "the applicant must include information that addresses all provisions of this rule."

In sum, STOP fails to offer any colorable argument that EFSC's misconstrued its rule. Because STOP has not established EFSC's interpretation is somehow implausible, "there is no basis" on which to find an error of law. *Don't Waste Or. Comm.*, 320 Or at 142.

C. In Any Event, Any Alleged Misinterpretation of EFSC's Rules Was Harmless, Based on Idaho Power's Actual Noise Analysis.

Unrelated to whether ODOE had discretion to specify an appropriate analysis area in the project order, STOP's appeal still fails because any alleged error was harmless. *See* ORS 183.482(8)(a) (reversal or remand requires petitioner to show that "correct interpretation compels a particular action"). While STOP suggests that prejudice exists because its interpretation of OAR 345-021-0010(1)(y)(E) would have required broader notice (Br. at 34), STOP misunderstands the purpose of that provision's analysis area and disregards EFSC's interpretation of its rules.

As ODOE explained, the analysis areas in the project order "are to be used for the assessment of impacts to the associated resource." (SER-112.) The hearing officer and EFSC agreed. Although STOP argued that the project order, by specifying a smaller analysis area than

OAR 345-021-0010(1)(y)(E), improperly "reduced the project's NSR notification … area to one-half mile from the project site boundary[,]" that rule "does not establish notification requirements." (SER-371.) Instead, "[t]he requirements for public notice of a proposed project are set out elsewhere in [EFSC's] rules, including OAR 345-015-0110(1), OAR 345-015-0220 and OAR 345-021-0010(1)(f)." (*Id.*) In contrast, OAR 345-021-0010(1)(y)(E) "does not address notice" and "does not require that [ODOE] or Idaho Power provide notice of potential noise impacts to owners of [NSRs] within a mile of the proposed site boundary." (*Id.*) By adopting the hearing officer's decision on this issue, EFSC also rejected STOP's public-notice argument. (ER-201.)

EFSC was right to do so. That is because OAR 345-015-0110(1) sets forth notice requirements in relation to the notice of intent and *does not* reference OAR 345-021-0010(1)(y)(E). The same is true of OAR 345-015-0220, which relates to the public hearing on the draft proposed order. Both those rules reference "Exhibit F," a different list of persons from a far smaller area than the default analysis areas in OAR 345-021-0010(1)(y)(E). For information accompanying the application, Exhibit F contains "[a] list of the names and mailing addresses of property

owners" that would not be greater than "500 feet [from] the property which is the subject of the application[.]" OAR 345-021-0010(1)(f)(A).

As such, the error alleged by STOP was harmless. Even if OAR 345-021-0010(1)(y)(E) fixed every project's noise-emissions analysis area, that would not change Exhibit F, the list of persons entitled to particularized notice under OAR 345-015-0110(1) and OAR 345-015-0220. It follows that STOP cannot establish a prerequisite for reversal or remand—namely, that STOP's interpretation of OAR 345-021-0010(1)(y)(E) would "compel[] a particular action" in relation to notice that was not already taken. ORS 183.482(8)(a).

The same is true of the actual purpose of the analysis area, which STOP effectively concedes when stating that the "Final Order … ultimately does require a larger list of NSRs, based on the 1-mile proximity, for purposes of actions taken under the Site Certificate." (Br. at 34. *See also* ER-855-60 (mitigation-related Noise Control Conditions 1 and 2).) So, STOP's arguments on appeal also do not show its interpretation of OAR 345-021-0010(1)(y)(E) would "compel[] a particular action" in relation to the final order that was not already taken. ORS 183.482(8)(a).

In sum, STOP cannot establish any error relating to OAR 345-021-0010(1)(y)(E)—let alone reversible error. EFSC's rules provide ODOE discretion to specify "appropriate" analysis areas in a project order. OAR 345-021-0010(1). Because STOP failed to establish that the grant of such discretion is implausible under the rule, "there is no basis" on which to find an error of law. *See Don't Waste Or. Comm.*, 320 Or at 142. Moreover, STOP fails to show that, by construing OAR 345-021-0010(1)(y)(E) to fix an analysis area for all energy facilities, this Court would "compel[] a particular action" that was not already taken. ORS 183.482(8)(a). As such, this Court should affirm.

RESPONSE TO FOURTH ASSIGNMENT OF ERROR

Because EFSC's rules specify no methodology for assessing an energy facility's visual impacts, EFSC permissibly interpreted its rules to allow those impacts to be assessed by Idaho Power's analysis, which adapted federal regulatory methodologies.

I. Preservation of Error

Idaho Power agrees that STOP preserved this issue.

II. Standard of Review

The applicable standards of review are as stated in response to STOP's first and third assignments of error.

III. Argument

According to STOP, EFSC misconstrued its own rules. STOP opines that a single term, "significant," imposes a highly particular visual-impact analysis—specifically, studies must incorporate "constituent[s'] subjective feelings about changes." (Br. at 37-38.) Stated differently, STOP contends that *every plausible* meaning of the term "significant" in EFSC's rules requires the collection of data on "subjective feelings." But STOP makes no such showing.

A. Procedural History

ODOE's project order for B2H specified that, "while no specific methodology is required by EFSC rule, the applicant must demonstrate why the proposed facility is [in] compliance with" OAR 345-022-0080 (scenic resources), OAR 345-022-0040 (protected areas), and OAR 345-022-0100 (recreation opportunities). (SER-106-07, 109.) Subsection (1) of each rule requires a showing that B2H would not likely result in a "significant adverse impact" to the resource.

To reduce such impacts, Idaho Power identified avoidance and mitigation measures. So, for example, Idaho Power avoided any direct impacts to the National Historic Oregon Trail Interpretive Center by siting B2H so it does not overlap the parcel the center is located on. (SER-325-26.) Furthermore, to mitigate indirect impacts to the center, Idaho Power will swap the steel-lattice structures to be used in most locations for shorter, H-frame structures with a weathered steel surface treatment (or equivalent coating), which will "reduce visual clutter." (SER-329-35.) As a result, "[t]he Baker Valley and mountainous landscape beyond will provide a backdrop for [B2H] and will appear co-dominant [i.e., have comparable visual influence] with the Proposed Route and other past human developments, including the existing 230-kV H-frame transmission structures" and visual impacts, taking into account mitigation, will be less than significant. (SER-313-14, 329, 334, 336.)

Near Morgan Lake Park—the other location STOP references—Idaho Power plans similar mitigation measures for a three-mile segment, reducing visual impacts of B2H for park users. (SER-342-46,

350-51, 364 (explaining further that B2H will not be visible at all from approximately 84 percent of the park).)

Relatedly, Idaho Power engaged Louise Kling, who has more than two decades of experience in environmental research and planning, to develop a visual-impact assessment methodology and prepare a visual-impacts study. (SER-287-88.) That 570-page study shows that—when accounting for mitigation measures—the "[B2H Project] … is not likely to result in significant adverse impacts" to the resources identified by ODOE. (B2HAPPDoc3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28 at 5.) The term "significant" is defined in the rules to mean:

> "having an important consequence … based upon the magnitude and likelihood of the impact on the affected human population or natural resources, or on the importance of the natural resource affected, considering the context of the action or impact, its intensity and the degree to which possible impacts are caused by the proposed action."

OAR 345-001-0010(29). Because EFSC's rules did not specify a study methodology, Idaho Power and its consultants developed one in coordination with ODOE and two federal agencies, USFS and BLM. (B2HAPPDoc3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28 at 7.) That development process was necessary because BLM's and

USFS's methodologies do not "consider [EFSC's] definition of 'significant,'" which ODOE required Idaho Power tp address. (SER-293-94.) So, "Idaho Power maintained applicable elements from the BLM and the USFS methodologies where appropriate because these methodologies are … acceptable and defensible assessment tools." (*Id.*) In particular, Idaho Power "incorporated the BLM visual 'sensitivity level' criterion and the [USFS's] visual 'concern' criterion into its methodology, both of which measure the degree to which viewers subjectively value a visual resource." (SER-380.)

STOP objected that the resulting visual-impacts assessment was impermissible under EFSC's rules because it lacked data on subjective opinions about the impact and also was unpersuasive. (SER-379-80.)

The hearing officer rejected that argument, reasoning that, rather than specify any particular methodology, EFSC's rules "simply require that the applicant demonstrate that the proposed facility is not likely to result in significant adverse impacts to identified resources[,]" which may be accomplished without "collect[ing] constituent information." (*Id.*) Because Idaho Power's methodology "assumed that all viewers … would be highly sensitive to the resource change[,]" "data collection on

viewers' subjective evaluations is unnecessary[,]" and, if anything, "could potentially reduce" the affected resource's assessed value. (SER-380.) As such, "Idaho Power's methodology adequately addressed the impacts 'on the affected human population.'" (*Id.* (quoting definition of "significant").) At bottom, "although the limited parties may have preferred that Idaho Power adopt a different methodology to assess visual impacts of the proposed facility, [EFSC's] standards do not require that the Company do so." (SER-381.)

EFSC affirmed the hearing officer's decision. (*See* ER-210-11.) The final order imposes various conditions to mitigate the visual impact of B2H. (ER-622-23, 628.)

B. EFSC Was Not Required to Construe Its Rules to Require Subjective Feelings Be Included in a Visual-Impacts Assessment.

STOP argues that EFSC's rules mandated that an applicant's visual-impact assessment elicit "subjective feelings." (Br. at 37-38; *see also id.* at 38, 41, 42, 45, 47 (similar).) But STOP is wrong for two reasons.

First, as even STOP concedes, nothing in EFSC's rules specify any particular methodology or assessment of subjective feelings. (Br. at 45.)

Indeed, when the ODOE rejected Idaho Power's direct reliance on BLM and USFS methodologies, Idaho Power's expert expended considerable effort incorporating EFSC's definition of "significant." Idaho Power's study incorporated that term's component parts:

Table R-1-1. The Definition of Significance (per Council's Rule OAR 345-001-0005(53)) and Interpretation in Exhibit R)

Excerpt	Interpretation for Exhibit R
"having an important consequence,"	An important consequence is considered a significant impact.
"either alone or in combination with other factors,"	Qualifying language suggests that an "important consequence" may be caused by the proposed development either alone or in combination with other past or present actions.
"based upon the magnitude and likelihood of the impact"	Magnitude represents the size and scale of the impact, and is measured in terms of visual contrast and scale dominance. Likelihood represents the probability of occurrence of an impact; for the purposes of Exhibit R, impacts analyzed were assumed to be likely to occur.
"on the affected human population"	The impact on the human population is measured in terms of the viewer's perception of impacts to valued scenic attributes of the landscape.
"or [on the] natural resources"	The impact to the natural resource is measured in terms of the potential change in scenic quality and/or landscape character of the scenic resource,
"or on the importance of the natural resource affected"	The disjunction of the magnitude of the impact from the importance of the natural resource suggests that an impact to scenic values may not result in an "important consequence" if the scenic value affected is not considered important.
"Considering the context of the action or impact,"	The Council shall also consider the other "mitigating" (or "aggravating") contextual factors, such as the extent to which impacts affect scenic values for which the resource was considered significant or important per OAR 345-022-0080; or, for those resources (protected areas and recreation sites) not identified as significant or important per OAR 345-022-0080, the extent to which impacts to visual values are consistent with the standards and guidelines of relevant land management objectives.
"[the impact's] intensity…"	The intensity of the impact considers how impacts would manifest on the landscape by assessing the combined effect of resource change and viewer perception.
"…and the degree to which the possible impacts are caused by the proposed action."	Consider the extent to which adverse impacts are caused by the proposed facility, as opposed to other past or present actions. The contribution of this action to potential cumulative (additive) impacts should be disclosed.

(B2HAPPDoc3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28 at 144.)[10] Because none of the component parts of the term "significant" obligated Idaho Power to elicit constituents' "subjective feeling," as urged by STOP, STOP cannot show that *every plausible* meaning of EFSC's rules includes such a requirement. It follows that STOP cannot force such a requirement upon Idaho Power.

Second, this Court should reject STOP's argument because Idaho Power's methodology in fact "assumed that all viewers … would be highly sensitive to the resource change." (SER-380.) As Idaho Power's consultant Louise Kling explained, "Idaho Power accounted for viewers' subjective experiences by assuming that all groups viewing [a referenced] resource would be highly sensitive to potential changes to that resource." (SER-308.) That is, Idaho Power already assumes the negative subjective feelings STOP envisions. Indeed, as the hearing

[10] Given ODOE's demand for a methodology that applies EFSC's definition of "significant," STOP's continued efforts to engineer these methods' application here is perplexing. (Br. at 39.) Indeed, while STOP pressed below for application of the USFS's methodology, SMS (*see* ER-122-23, 158-59), that tool is an inventorying tool; it does not include metrics to assess the significance of potential impacts to resources. (B2HAPPDoc1056 Transcript for Cross-Examination Hearing Day 6_Till_2022-01-20 at Tr 50-52.)

officer found, "additional constituent information would not add to, but could potentially reduce, the value that Idaho Power attributed to the affected resources." (SER-380.)

STOP also complains that Idaho Power's methodology was not itself peer reviewed (Br. at 38), even though it was adapted from peer reviewed methodologies "in close coordination with ODOE." (SER-297.) Critically, however, no statute conditions EFSC's decisions on peer-reviewed evidence—unlike some areas of law. *See, e.g.*, ORS 414.332 (OHP's drug formulary to be based on peer-reviewed studies). That is, when STOP argues about peer review or, for that matter, about bias or lawyer involvement (Br. at 40), STOP makes unavailing arguments about the weight to be afforded the evidence. *Cf. Jennings v. Baxter Healthcare Corp.*, 331 Or 285, 308, 14 P3d 596 (2000) ("neither peer review nor publication is a sine qua non for the admissibility of scientific evidence").

Because STOP assigns error to EFSC's interpretation of its rules and yet makes no showing that EFSC's interpretation is implausible, this Court should affirm. *See Don't Waste Or. Comm.*, 320 Or at 142. Nothing in any EFSC rule required it to reject a visual-impacts analysis

that, rather than eliciting subjective feelings, assumed such reactions would exist.

C. This Court Should Reject STOP's Arguments That Are Unrelated to Its Assignment of Error.

Separate from STOP's rule-interpretation issue, STOP also advances unrelated arguments, which also lack merit. By stressing simulated visuals, STOP seems to invite this Court to substitute its judgment about the visual impact of B2H for EFSC's view of the evidence, including its reliance on STOP's visual-impacts analysis. (Br. at 36, 41, 43.) Not only are the visuals STOP supplies this Court misleading,[11] but a court cannot "substitute its judgment for that of the agency as to any issue of fact or agency discretion." ORS 183.482(7); *see*

[11] For the image of a tower framed by a window, inaccuracies include the tower type (falsely using a lattice tower), viewer position ("the towers near [National Historic Oregon Trail Interpretive Center] will generally be seen from above"), and context (through a window even though B2H "will be located close to one mile from the main [interpretive center] building"). (SER-354-55.) For the image of H-frame structures, STOP omits key caveats about cropping, scale, and viewing. (*See* B2HAPPDoc917 SR-2,SR-3,SR-7,R-1,R-2,R-3,R-4 Rebuttal Testimony of Kling (Email 2 of 5)_Till_2021-11-12 at 4.) And, for the image STOP associates with Morgan Lake Park, the tower type is again wrong and it appears to be *outside* the park—and thus unrelated to the resource rules. (*See* SER-360-63 (park entrance road is located outside of Morgan Lake Park).)

Friends of Parrett Mt., 336 Or at 106 (declining to "weigh the evidence in the record, reexamine the credibility of the experts, or both" on appeal).

As to STOP's contention that Idaho Power should be required to "underground" the power line in some areas (Br. at 42, 46, 47 n 43), EFSC rejected that argument for two related reasons. First, Idaho Power's proposed mitigation is adequate, as EFSC concluded. (SER-390-91.) That is, "the facility, *as proposed by Idaho Power*, complies with applicable standards, laws and rules." (SER-385 (emphasis added).) Second, EFSC thus "lacks jurisdiction to require Idaho Power to underground the transmission line." (SER-391.) Because Idaho Power did not itself propose undergrounding, "the question of whether undergrounding is a better mitigation option is outside [EFSC's] jurisdiction." (SER-385.) That conclusion follows from ORS 469.370(7), under which EFSC "shall issue a final order, either approving or rejecting *the application*." (Emphasis added.) STOP identifies no contrary authority.

In sum, in areas where there was risk that B2H would cause significant visual impacts for purposes of OAR 345-022-0040(1), OAR

345-022-0080(1), and OAR 345-022-0100(1), Idaho Power proposed mitigation measures, including changing tower type, height, and coating. With those measures taken, Idaho Power's analysis shows B2H complies with the visual-impact aspects of those rules. While STOP wishes it were otherwise, nothing in EFSC's rules requires Idaho Power to rely on a different study methodology or different mitigation measures. This Court should affirm the final order.

CONCLUSION

EFSC's final order was lawful and was supported by substantial evidence. This Court should affirm.

DATED this 4th day of January, 2023.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05; and (2) the word-count of this brief, as described in ORAP 5.05(2)(a), is 13,992 words. I also certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 4th day of January, 2023.

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 4, 2023, I filed the **CORRECTED ANSWERING BRIEF OF IDAHO POWER COMPANY** with the State Court Administrator via the eFiling system. I further certify that on January 4, 2023, I caused copies of the **CORRECTED ANSWERING BRIEF OF IDAHO POWER COMPANY** to be served on the following parties via the eFiling System, with courtesy copies by email, except as noted.

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IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line STOP B2H COALITION, Petitioner, v. OREGON DEPARTMENT OF ENERGY, OREGON ENERGY FACILITY SITING COUNCIL, and IDAHO POWER COMPANY, Respondents.	Energy Facility Siting Council No. 2019ABC02833 SC S069919 **EXPEDITED JUDICIAL REVIEW UNDER ORS 469.403**

STATE RESPONDENTS' ANSWERING BRIEF

On Direct Expedited Judicial Review

Continued…

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STATE RESPONDENTS' ANSWERING BRIEF

STATEMENT OF THE CASE

Respondents Oregon Department of Energy (ODOE) and Energy Facility Siting Council (EFSC) accept petitioner's statement of the case except to the extent that the facts are supplemented or clarified in the argument below.

Summary of Argument

This judicial review arises out of EFSC's final order approving Idaho Power Company's (IPC) application for a site certificate for a 300-mile, 500 kilovolt electrical transmission line running from Boardman through five Oregon counties to Owyhee County, Idaho. On judicial review, petitioner challenges EFSC's decision to grant petitioner only "limited party" status, and petitioner also renews three substantive objections it raised to the project—two noise-control issues and one regarding visual impacts to scenic resources.

As to all issues, EFSC acted within its legislatively delegated authority and based its conclusions on factual findings supported by substantial evidence in the record. This court should reject petitioner's arguments and affirm EFSC's final order.

1. First, EFSC correctly granted petitioner limited party status. The Administrative Procedures Act (APA), the Attorney General's Model Rules, and ESFC's own statutes and rules all show that EFSC had discretion to grant petitioner only limited party status, despite its request for "full" party status.

The legislature intended for agencies to have authority to control and limit participation in their proceedings. A conclusion requiring EFSC to grant full party status to everyone who requests it would undermine that authority. Exercising that authority here, EFSC acted within its discretion in concluding that granting petitioner limited party status was appropriate under the circumstances.

2. Next, EFSC acted squarely within its legislatively delegated authority when it applied Oregon Department of Environmental Quality (DEQ) noise-control regulations to IPC's application, including when it determined that the proposed facility should receive exceptions authorized by DEQ's rules. The legislature's purpose in creating EFSC was to centralize the regulatory review procedure for new energy facilities. To effectuate that purpose, the legislature expressly granted EFSC authority to bind and compel action by other state agencies, including issuing permits. Here, EFSC acted within that authority when it assessed the proposed facility's compliance with DEQ noise-control regulations and permissibly concluded, based on unchallenged findings supported by substantial evidence, that the facility should receive exceptions authorized by DEQ rules.

3. Third, ODOE acted within its authority when it modified an application requirement to require IPC to compile a list of all noise sensitive property owners within only one half-mile of the facility, rather than one mile.

EFSC's rule setting out the information that ordinarily must be included in a site certificate application expressly recognizes that ODOE's project order determines whether and how those requirements apply to any individual application and expressly contemplates "appropriate modifications" of those requirements. ODOE acted squarely within that authority when it modified the requirement about the list of noise sensitive property owners.

4. Finally, EFSC permissibly relied on IPC's evidence in concluding that, with mitigation, the proposed facility would not cause substantial adverse visual impacts near important scenic resources like the National Historic Oregon Trail Interpretive Center and Morgan Lake Park. EFSC's rules require the applicant to present evidence regarding potential visual impacts, including impacts on the "affected human population," but they do not prescribe any particular form or methodology for that evidence. Here, IPC's evidence included metrics accounting for the proposed facility's impact on human viewers, and it assumed that all viewers would be highly sensitive to the visual changes near the Oregon Trail Interpretive Center and similar points. Based on the evidence, EFSC concluded that, with mitigation, the visual impacts at those points would be less than significant, and the proposed facility would accordingly comply with pertinent siting standards. EFSC acted within its authority in reaching that conclusion and its findings are supported by substantial evidence in the record.

ANSWER TO FIRST ASSIGNMENT OF ERROR

EFSC correctly affirmed the hearing officer's discretionary decision to grant petitioner limited party status.

A. Preservation of Error

Respondents agree that petitioner preserved this claim of error.

B. Standard of Review

This court reviews EFSC final orders to ensure that EFSC followed the law, acted within its discretion, and based its factual findings on substantial evidence in the record. ORS 469.403(6) (review is as provided in ORS 183.482); *Save Our Rural Oregon v. Energy Facility Siting*, 339 Or 353, 356, 121 P3d 1141 (2005). "Review of a contested case shall be confined to the record, and the court shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion." ORS 183.482(7).

This claim poses a question of law: whether EFSC has authority to grant limited party status to a person who has requested "full" party status. As explained below, EFSC has that legal authority. Within that authority, the decision whether to grant limited party status is a discretionary one, which this court should review for whether it is outside the range of the agency's discretion; inconsistent with an agency rule, stated agency position, or prior agency practice; or otherwise in violation of a constitutional or statutory provision. ORS 183.482(8)(b)(A)-(C).

ARGUMENT

A. Background

The legislature created EFSC to centralize the regulatory review process for new energy facilities. ORS 469.310; *Marbet v. Portland Gen. Elec. Co.*, 277 Or 447, 450, 561 P2d 154 (1977). After an applicant submits a notice of intent to apply for a site certificate, ODOE issues a project order that identifies all statutes, administrative regulations, and other requirements the applicant must satisfy to obtain the site certificate. ORS 469.330(3). The applicant submits their evidence of compliance with all project order requirements in the Application for Site Certificate. ORS 469.350.

Once ODOE determines that an application is complete, it issues a draft proposed order on the application, and the public has an opportunity to comment on the draft proposed order. ORS 469.350(4); ORS 469.370. After that, EFSC conducts a contested case on the application. ORS 469.370(5). Only issues raised with sufficient specificity in the public comments may be raised in the contested case. ORS 469.370(3), (4).

In the contested case proceeding, the applicant is a party by right, and ODOE is a party by designation. *See* ORS 469.370(5); OAR 345-015-0080(2). Other persons who commented on the draft proposed order may seek to intervene in the contested case by submitting a petition for party or limited

party status.[1] *See* ORS 469.370(5) ("The council may permit any other person to become a party to the contested case in support of or in opposition to the application[.]"); ORS 183.310(7) (stating that "party" includes persons who have an interest in the proceeding and request to participate).

This case arises out of EFSC's final order approving Idaho Power Company's Application for a Site Certificate to build a new 300-mile, 500-kilovolt transmission line. (ER 987, 990).[2] Petitioner commented on the draft proposed order and subsequently petitioned for "full" party status. (*See* ER 24-27 (hearing officer decision)). The hearing officer ultimately granted petitioner limited party status, which generally meant that petitioner could participate only as to the issues that it had raised when commenting on the draft proposed order. (*Id.*). EFSC later considered petitioner's appeal of that issue and affirmed the hearing officer's determination. (ER 36-37, 40). In its final order, EFSC again reaffirmed petitioner's limited party status. (ER 182-83).

At issue here is whether EFSC had legal authority to limit the scope of petitioner's participation in the contested case and, if so, whether EFSC

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[1] Under the APA, "person" refers to "any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character other than an agency." ORS 183.310(8).

[2] EFSC's final order and attachments, including the site certificate (Attachment 1) and the contested case order as adopted by EFSC (Attachment 6), are available at https://www.oregon.gov/energy/facilities-safety/facilities/Pages/B2H.aspx (accessed January 3, 2023).

properly exercised that authority in this case. As explained below, EFSC can limit a party's participation, and, in this case, properly did so.

B. EFSC had authority to grant petitioner limited party status despite petitioner's request for "full" party status.

Petitioner argues, as it did below, that an agency has no authority to grant a person limited party status where the person has requested "full" party status. Or put another way, petitioner claims that only the person requesting party status can limit the scope of its own status. (*See* Pet Br 12 ("The statutory language should be enough, on its own, to make it plain that only STOP can choose to limit its participation.")). Petitioner is mistaken.

1. The APA and the Model Rules give agencies discretion to allow a person to participate in a contested case only in a limited capacity.

Petitioner's contention that a person who requests party status can only be granted "unqualified" or "full" party status is based largely on the APA and the Attorney General's Model Rules (Model Rules) implementing the APA.[3] Whether an agency is precluded from limiting a party's participation under the APA presents an issue of statutory construction, which this court resolves by examining the text of the relevant statutes in context, along with any useful legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

[3] ORS 183.341(1) requires that the Attorney General "prepare model rules of procedure appropriate for use by as many agencies as possible."

That same analytical method applies to construction of the Model Rules. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993) (method for statutory construction applies to regulations).

a. The APA provides that the agency determines the scope of an intervening party's participation.

Under the APA, the term "party" encompasses persons that are entitled by right to a hearing before the agency, as well as persons "named by the agency to be a party." ORS 183.310(7)(a)-(b). That term also encompasses "[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." ORS 183.310(7)(c).

The distinction between parties and limited parties determines the scope of a person's participation in a contested case. For instance, "parties" can "respond and present evidence and argument on *all issues* properly before the presiding officer in the proceeding." ORS 183.417(1) (emphasis added). But agencies "may adopt rules of procedure governing participation in contested case proceedings by persons appearing as limited parties." ORS 183.417(2). Similarly, ORS 183.450(3) provides that "[p]ersons appearing in a limited party status shall participate in the manner and to the extent prescribed by rule of the agency."

Thus, although the APA does not separately define "limited party," the text and context of the relevant provisions establish that a limited party refers to a person that is permitted to intervene in a proceeding but whose participation is limited by the agency. For those persons, it is the agency that decides the scope of the limited party's participation. *See* ORS 183.417(1); ORS 183.450(3); *see also Friends of the Columbia Gorge v. Energy Facility Siting Council*, 368 Or 123, 129, 486 P3d 787 (2021) ("[T]he APA authorizes *agencies* to restrict the participation for limited parties in ways that agencies cannot for other parties entitled to the full participatory rights otherwise set out in the APA." (emphasis added)).

Consistently, the text and context of the APA also demonstrate that it is the agency, not the person requesting party status, that determines, in the first instance, whether a person participates as a "full" party or a limited party.[4] ORS 183.310(7) contemplates that a person can *request* to participate either as a full party or a limited party, but it is the agency that determines whether the person "either has an interest in the outcome of the agency's proceeding or represents a public interest in such result."

[4] For ease of reference, respondents use the term "full party" to distinguish a "party" from a "limited party."

Given those textual indications that *the agency* decides a person's party status, ORS 183.310(7)(c)'s text cannot support the conclusion that an agency is powerless to deny full party status to any and every person who requests it. Nor does the text demonstrate that a person is entitled to participate as a full party based solely on the type of interest they have in the outcome of the proceeding or the public interest they represent, given that those requirements apply to both types of parties.

Context supports that it is the agency that decides whether to grant a person full or limited party status. ORS 18.417(2) and ORS 183.450(3) expressly grant agencies authority to determine the extent of a limited party's participation. That authority would be significantly undermined if persons could compel agencies to grant them full party status on request. Thus, the text and context of the relevant APA provisions show that the agency, not the person requesting party status, determines whether a person can participate as a full party or a limited party. ORS 183.310(7)(c).

The legislative history also supports that conclusion. This court previously had occasion to consider the APA's legislative history on limited parties in *Friends of the Columbia Gorge*, 368 Or at 129-31. As the court noted in that case, the legislature "added the concept of a 'limited party' in 1979 to reintroduce agency control over the scope of participation for persons intervening in contested case proceedings." *Id.* at 129 (citing Or Laws 1979, ch

593, § 6(5)(c)). The legislature had "eliminated the distinction between parties and intervening participants in 1977 by expanding the definition of 'party' to include persons who previously would have been treated as intervening participants." *Id.* at 130. Through those changes, intervening persons had "gained the same participation rights as parties entitled to participate as a matter of right or otherwise named by the agency to be a party." *Id.* The legislature sought to change that in 1979.

Indeed, state agencies had "raised concerns that affording intervenors the same participation rights as other parties could overburden contested case proceedings." *Id.* As a result, the Subcommittee on Administrative Procedure Act, chaired by then-Representative David B. Frohnmayer, recommended an amendment to the APA that would create "'some form of limited party status, so that interested persons may participate in agency hearings to address specific issues or policy matters without becoming full parties[.]'" *Id.* (quoting Legislative Counsel Committee, *Final Report of the Subcommittee on Administrative Procedure Act*, 12 (1978) (App 4)). The subcommittee also suggested that the version of ORS 183.415 in existence at the time be "amended to provide for agency authority to adopt rules for contested case participation by persons admitted in a limited or intervenor status," noting that such recommendation was "complementary to the suggested change in the definition of 'party.'" Legislative Counsel Committee, *Final Report of the Subcommittee*

on Administrative Procedure Act, 15 (1978) (App 5). Changes to ORS 183.450 were also recommended to "complete the coverage of the rights and responsibilities of [limited] parties." *Id.* at 16 (App 6).[5]

At a public hearing concerning the proposed amendments to the APA, Frohnmayer explained that the committee conceded that "a mistake was made in 1977 when legislators abolished the category of 'intervenor' in the wake of the *Marbet* decision." Tape Recording, House Committee on Judiciary, HB 2497, Apr 5, 1979, Tape 38, Side 2 (statement of Rep. David B. Frohnmayer), *available at* http://records.sos.state.or.us/ORSOSWebDrawer/Record/7688847 (accessed Jan 3, 2023).[6] He added that, in discussions with judges and administrative practitioners, there was "an enormous amount of worry as to whether or not you could have more than 100 parties to a case all of whom

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[5] In subcommittee meetings, Frohnmayer had "strongly urged the committee to redefine the word 'party' and consider reestablishing the class of intervenors," noting that "[u]nder current law, an agency may not have the option of narrowing the focus of testimony or limiting presentations by parties not directly involved in a proceeding." Minutes, Subcommittee on Administrative Procedure Act, Jan 13, 1978, 6 (App 9). Frohnmayer had also moved for ORS 183.415 and 183.450 to be amended to authorize agencies to limit participation by parties to the issues for which they were granted status and to allow hearing officers to reasonably limit the presentation of evidence, which would "make clear that the hearing officer has control over the proceedings in order to make the hearing manageable." *See* Minutes, Subcommittee on Administrative Procedures Act, July 7, 1978, 5 (App 13).

[6] *See also* Minutes, House Committee on Judiciary, April 5, 1979, 8 (App 1-2).

demand a right to present evidence, prosecute so forth, and make a proceeding totally unwieldy." *Id.*

In that same discussion, Representative Tom Mason asked, "Who determines the limited party status?" *Id.* (statement of Rep. Tom Mason) (App 2). Legislative counsel responded, "the agency does." *Id.* (statement of legislative counsel Elizabeth Stockdale) (App 2).

Ultimately, the legislature adopted the recommended changes to the APA in 1979, creating the concept of a "limited party" as it currently appears in ORS 183.210(7)(c) and granting agencies the authority to limit the scope of participation by those parties. *See* Or Laws 1979, ch 593, § 6(5)(c); *see also* Or Laws 1979, ch 593, § 21 (adopting changes to ORS 183.450(3)); Or Laws 1979, ch 593, § 18 (adopting changes now codified in ORS 182.417(2)).

It is evident from the legislative history that, in creating a "limited party" category of participants, the legislature's primary goal was to give agencies and hearing officers the ability to control the proceedings before them by limiting the extent to which intervening persons—that is, persons not entitled by right or designation by the agency—could participate. That goal would be frustrated if agencies were legally required to grant full party status on request. If that were the rule, an agency's ability to control the proceedings would be entirely contingent on persons electing limited-party status. Yet, as this case illustrates,

most intervening parties are unlikely to make such an election. (*See* ER 24 (noting that "most of the petitioners for party status * * *, including [petitioner], specifically requested 'full' as opposed to 'limited' party status")).

In sum, contrary to petitioner's contention, the text, context, and legislative history establish that the APA gives agencies discretion to determine whether a person requesting to participate may do so as a party or a limited party. In doing so, the APA strikes an important balance between the need to safeguard the public's participation in matters of public concern and agencies' ability to ensure the orderly and prompt resolution of their proceedings.

b. The Model Rules, consistent with the APA, allow an agency to treat a petition for full party status as a petition for limited party status.

Under the Model Rules, a "petition to participate as a party may be treated as a petition to participate as a limited party." OAR 137-003-0005(8).[7] When an agency grants such a petition, the agency is required to "specify areas of participation and procedural limitations as it deems appropriate." OAR 137-003-0005(9).[8] Thus, consistent with the APA, the Model Rules plainly provide

[7] OAR 137-003-0535(9), a rule of the Office of Administrative Hearings (OAH), similarly provides: "The agency may treat a petition to participate as a party as if it were a petition to participate as a limited party."

[8] OAH's counterpart rule, OAR 137-003-0535(10), likewise provides: "If the agency grants a petition, the agency shall specify areas of participation and procedural limitations as it deems appropriate."

that an agency is permitted to consider an application for full party status as a petition for limited party status and to impose appropriate limitations if it grants such petition.

Petitioner nonetheless contends that OAR 137-003-0005(8) does not mean what it says, claiming that the Model Rules merely reflect "the ability of a party to limit *their own status*, should they choose to do so." (*See* Pet Br 10-11 (emphasis in original)). Petitioner further suggests that the rules, at most, allow an agency to treat a mislabeled petition for full party status as a petition for limited party status if it is discovered that the petition in reality seeks only limited participation. (*See* Pet Br 15). But petitioner's contentions cannot be reconciled with the plain and unambiguous language of the Model Rules. As noted, under OAR 137-003-0005(8)-(9), a petition for full party status can be treated (and granted) as a petition for limited party status, irrespective of whether a person requests full party status.

2. EFSC's statutes and rules also allow it to treat a petition for full party status as a request for limited party participation.

Under ORS 469.370(5), EFSC must conduct contested case hearings on site certificate applications in accordance with the APA and any procedures it has adopted through rulemaking. That provision also limits who, other than the applicant, EFSC may permit to be a party in the contested case. It provides that EFSC may permit a person party status but "only if the person appeared in

person or in writing at the public hearing on the site certificate application." ORS 469.370(5).

OAR 345-015-0016, in turn, sets out the requirements for persons to request party status in those proceedings, as well the specific requirements for raising contested case issues in public comments on the draft public order. Nothing in that rule establishes a right to full-party status on request or prohibits EFSC from limiting an intervening person's participation in a contested case. To the contrary, its focus on limiting contested-case issues to those raised with sufficient specificity in the public comments reflects an underlying policy of narrowing and focusing the issues for the contested case proceeding. OAR 345-015-0016(3). Agency discretion to limit an intervening party's participation in the contested case to the issues they raised is consistent with that policy.

To be sure, EFSC also has discretion to grant an intervening person full party status, allowing them to comment on all issues in the contested case proceeding, just as the applicant and ODOE are permitted to do. But the question here is not whether EFSC has discretion to grant full party status. The question is whether EFSC is *legally required* to grant full party status to every intervening person simply because they request it. The answer is no. As set out above, the APA, the Model Rules, and EFSC's own statutes and rules all recognize that the agency, not the intervening person, decides that person's party status and can grant a petitioner only limited party status. Indeed, that

discretion is especially important for an agency like EFSC whose contested case proceedings—like this one—often involve dozens of parties and issues.

For all those reasons, EFSC was not legally required to grant petitioner full party status simply because petitioner requested it. To the contrary, EFSC had discretion to limit petitioner's participation in the contested case to the issues petitioner actually preserved in the public comment phase.

C. EFSC acted within its discretion in granting petitioner only limited party status.

In this case, EFSC acted within its discretion in granting petitioner limited party status. An agency's exercise of discretion to grant or deny a person's petition for party status is guided by the factors set out in OAR 137-003-0005(7). Those factors include:

> (a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;
>
> (b) Whether any such affected interest is within the scope of the agency's jurisdiction and within the scope of the notice of contested case hearing;
>
> (c) When a public interest is alleged, the qualifications of the petitioner to represent that interest;
>
> (d) The extent to which the petitioner's interest will be represented by existing parties.

OAR 137-003-0005(7).

Here, EFSC determined that petitioner and the other intervening persons who requested full party status should be granted limited party status in light of

"the strict eligibility requirements for participation set out in ORS 469.370, OAR 345-015-0016(3), and OAR 137-003-0005"; "the number of petitioners with an interest in the outcome of this contested case requesting to participate as a party"; "the number and nature of properly raised contested case issues in this matter"; and the need to "facilitate the presentation of evidence, maintain order, [and] comply with time limits." (ER 26; *see also* ER 40, 182-83 (EFSC orders affirming hearing officer's determination)).

On judicial review, petitioner contends that the record does not establish that its petition for party status was evaluated under the factors set out in OAR 137-003-0005(7), asserting that no analysis of those factors was provided. (Pet Br 12, 18). Petitioner also implies that the ruling on its petition for party status was improperly guided by ODOE's and IPC's arguments against affording intervening persons full party rights. (Pet Br 10). Those assertions present no basis for reversal. *See* 183.482(8)(b) (setting standards for review of discretionary determinations).

First, it is evident from the hearing officer's order, which EFSC adopted by reference, that the hearing officer, in fact, considered the factors set out in OAR 137-003-0005(7). (ER 24-37, 40, 182-83). The hearing officer addressed the public interest represented by petitioner, the specific issues it had raised, and the appearance of other limited parties in the case. (*See* ER 24-34).

Petitioner, however, appears to read into the rule a written findings requirement that it does not contain. OAR 137-003-0005(7). To be sure, OAR 137-003-0005(10) requires that a ruling on a petition for party status be issued through a written order, but there is no requirement that the order contain written findings on each subsection (7) factor. Ultimately, the decision to grant a petitioner limited or full party status is a discretionary one, not a legal one. Here, the hearing officer's reasoning, which EFSC adopted, adequately explained the basis on which it exercised its discretion to grant petitioner only limited party status.

Second, to the extent that petitioner suggests that EFSC ceded that party-status decision to ODOE or IPC, that argument is meritless. As parties by right and designation by the agency, ODOE and IPC were full parties and therefore permitted to take a position on whether intervening persons should be allowed full or limited party status. *See* ORS 183.413(2)(e) (a "party has the right to respond to all issues properly before the presiding officer"). Thus, it is neither surprising nor suspect that they did so in this case, particularly in light of their concerns about ensuring an orderly proceeding due the number of potential intervening parties. (*See* SER 13-19, 22-23, 37-42). Indeed, 36 parties were ultimately granted limited party status to participate in the contested case. (B2HAPPDoc298 OAH Amended Order on Party Status and Issues_OAH Hearing Officer_2020-12-04 at 76-77).

In short, petitioner, as well as IPC and ODOE, expressed their position on petitioner's request for party status, and EFSC made its ruling. This court should discard petitioner's suggestion that petitioner's participation was limited merely because IPC and ODOE requested it. Nor, for all the reasons explained, has petitioner identified any other basis for disturbing EFSC's decision to grant petitioner only limited party status. This court should reject petitioner's first assignment of error.

ANSWER TO SECOND ASSIGNMENT OF ERROR

EFSC acted within its legislatively delegated authority when it assessed the proposed facility's compliance with DEQ noise-control regulations and determined that the facility should receive exceptions authorized by DEQ rules.

A. Preservation of Error

Respondents do not contest preservation.

B. Standard of Review

This court reviews EFSC final orders for legal error, abuse of agency discretion, and lack of substantial evidence supporting any challenged factual findings. ORS 469.403(6) (review is as provided in ORS 183.482); *Save Our Rural Oregon*, 339 Or at 356. This claim poses a question of law: Whether EFSC acted outside of its legislatively delegated authority when it assessed the proposed facility's compliance with DEQ noise-control regulations and concluded that the facility should receive exceptions authorized by DEQ rules.

ARGUMENT

Petitioner's second assignment of error contends that EFSC acted outside its legislatively delegated authority when it assessed the proposed facility's compliance with DEQ noise-control regulations and concluded that the proposed facility should receive exceptions authorized by DEQ rules.[9] To the contrary, EFSC resolved those issues exactly as the legislature intended it to.

A. The legislature's purpose in creating EFSC was to centralize the regulatory review process for new energy facilities.

When the legislature created EFSC, its express purpose was "to establish * * * a comprehensive system for the siting, monitoring, and regulating of the location, construction, and operation of all energy facilities in this state." ORS 469.310 ("Policy"). As this court has already recognized, EFSC's statutory scheme "reflects a legislative policy to centralize [those] responsibilities in the council." *Marbet*, 277 Or at 450.

To that end, the legislature granted EFSC "wide discretion over many facets of the construction of energy facilities." *Id.* at 462-63. The legislature directed EFSC to "set its own standards" for the siting, construction, operation,

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[9] As discussed below, EFSC concluded that the evidence warranted granting the proposed facility either an "exception" per OAR 340-035-0035(6) or a "variance" per OAR 340-035-0100. (ER 852-53, 867-70). The evidentiary record is legally sufficient to support both conclusions, and petitioner makes no cogent argument to the contrary. For ease of reference, respondents refer to both legal bases as "exceptions."

and retirement of facilities, authorizing EFSC "to exercise its own judgment" in setting those standards in accordance with legislatively identified policy objectives. ORS 469.501; *Marbet*, 277 Or at 458, 459.

As noted above, after an applicant files a notice of intent to apply for a site certificate, ODOE issues a project order that identifies all the EFSC siting standards, statutes, administrative rules, and other application requirements that that the applicant must satisfy to obtain the site certificate. ORS 469.330(3). The applicant submits their evidence of compliance with all project order requirements in the Application for Site Certificate, ORS 469.350, and EFSC decides whether a preponderance of evidence shows compliance with all project-order requirements and warrants granting the site certificate, ORS 469.503(1), (3).

If EFSC grants the site certificate, the certificate "shall bind the state" and "any affected state agency" must issue any permits contemplated by the site certificate "without hearings or other proceedings." ORS 469.401(3); *see Marbet*, 277 Or at 450 (so noting). Indeed, after EFSC issues the site certificate, "the only issue to be decided in an administrative or judicial review" of an agency's permitting decision "shall be whether the permit is consistent with the terms of the site certificate[.]" ORS 469.401(3); *Marbet*, 277 Or at 450.

That does not mean other agencies are excluded from the process. To the contrary, EFSC's statutory regime provides for EFSC consultation with affected state agencies throughout EFSC's review. *See* ORS 469.330(3) (preapplication conference with state agencies following notice of intent); ORS 469.350(2) (copies of notice of intent and ASC to all affected state agencies); ORS 469.505 (consultation throughout process); *see also Marbet*, 277 Or at 450 (noting that, under the EFSC statutory scheme, the "concerns previously pursued" through separate agency action now "find expression" through EFSC consultation). But it is EFSC that decides whether a preponderance of evidence supports granting the site certificate, and that decision binds and may compel action by other state agencies. ORS 469.503(1), (3); *Marbet*, 277 Or at 450.[10]

In sum, the legislature's express purpose for EFSC was to centralize the regulatory review process for energy facilities. ORS 469.310; *Marbet*, 277 Or at 450. And EFSC's legislatively delegated authority expressly contemplates EFSC making binding compliance decisions about regulations ordinarily administered by other state agencies. ORS 469.401(3).

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[10] Different rules apply to local land use regulations and "statutes and rules for which the decision on compliance has been delegated by the federal government to a state agency other than the council." ORS 469.501(3); *see also* ORS 469.505(1) (discussing how federal delegation impacts permitting decisions). This judicial review does not involve those issues.

B. EFSC acted squarely within its legislatively delegated authority in applying DEQ noise-control regulations and concluding that the facility should receive an exception authorized by DEQ rules.

Despite that statutory framework, petitioner contends that EFSC exceeded its authority when it applied DEQ noise-control regulations to the proposed facility and determined that the facility should receive an exception authorized by DEQ rules. To the contrary, EFSC acted squarely within its legislatively delegated authority.

EFSC generally requires proposed energy facilities to demonstrate compliance with DEQ noise-control regulations. OAR 345-021-0010(y). ODOE's Second Amended Project Order required IPC to make that showing here. (B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26 at 23).

As pertinent to the proposed facility, DEQ's noise-control regulations set a 50 dBA maximum allowable noise level and prohibit increases in "ambient statistical noise levels" of "more than 10dBA in any one hour[.]" OAR 340-035-0035(1)(b)(B)(i). But those rules also authorize exceptions to those limits for "[u]nusual and/or infrequent events." OAR 340-035-0035(6); *see also* OAR 340-035-0010 (also authorizing exceptions). And another rule authorizes the Environmental Quality Commission (EQC) to grant a separate exception, termed a "variance," in light of "conditions beyond the control" of the noise source. OAR 340-035-0100.

Here, IPC's evidence addressed the potential for "corona noise," which is the low humming and crackling that a high-voltage transmission line can produce, particularly at higher voltages and damp weather conditions. (ER 831-32; SER 83-84). That evidence showed that, even when operating at maximum capacity, the proposed facility would not exceed maximum allowable noise levels, and it would not exceed the 10dBA limit on increases in ambient noise during typical, fair weather conditions. (SER 77, 86-87, 89).

The facility might exceed the ambient noise limit late at night during foul weather conditions. (SER 89). But, based on meteorological data, the circumstances necessary to cause those exceedances would occur only in 1.3 percent of the total hours in a year. (SER 77, 92-98).[11]

Based on that evidence, EFSC concluded that the proposed facility should receive both exceptions authorized by DEQ rules—an OAR 340-035-

[11] Petitioner references a meritless argument made below regarding that evidence, suggesting that exceedances would occur 48 days out of every year, which petitioner asserts is not infrequent. (Pet Br 27-28). But that argument ignores the pertinent DEQ standard, which limits exceedances in ambient noise "*in any one hour*." OAR 340-035-0035(1)(b)(B)(i) (emphasis added). IPC's evidence showed that, based on meteorological data, the weather conditions necessary to cause ambient-noise exceedances would occur in only 1.3 percent of the total hours in a given year. (SER 92-98). Petitioner's argument about 48 days of exceedances incorrectly treats even a single exceedance in a single hour of one day as having the same frequency as an entire day's worth of exceedances. (*See* B2HAPPDoc1339 ODOE Response to Closing Arguments_2022-03-30 at 84-85 (explaining issue)).

0035(6) exception because the evidence showed that any exceedances of the ambient-noise standard would be infrequent, and an OAR 340-035-0100 variance because the foul weather conditions that would cause them were beyond the facility's control. (ER 852-53, 867-70; SER 55-57). EFSC further concluded that, with those exceptions, the proposed facility would comply with DEQ noise-control regulations. (ER 870). And consistently, EFSC's site certificate ultimately imposed a noise-control condition granting the facility those exceptions but limiting them to the foul weather conditions identified by IPC's evidence as causing the exceedances. (ER 870).[12]

For all the foregoing reasons, EFSC acted within its legislatively delegated authority when it assessed the proposed facility's compliance with DEQ noise-control regulations. And it permissibly concluded, based on unchallenged factual findings supported by substantial evidence, that the proposed facility should receive both exceptions authorized by DEQ rules.

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[12] In reaching that conclusion, EFSC complied with its statutory obligations to consult with DEQ. (*See* B2HAPPDoc1275 ODE Resp to Exception Issues NC-1,NC-2,NC-3,NC-4_Gulevkin_2022-07-15 at 43-48 (DEQ comments on IPC's preliminary application)). DEQ advised that it stopped administering its noise-control regulations in 1991, after the legislature withdrew funding for it. (*Id.* at 46); *see also* OAR 340-035-0110 (noting that EQC and DEQ have suspended administration of the noise program, including processing requests for exceptions and variances). Thus, while DEQ noise-control regulations are still in effect, neither DEQ nor EQC process requests for variances or otherwise enforce noise-control regulations. (*Id.*).

Petitioner nonetheless contends that EFSC acted outside of its legislatively granted authority and usurped DEQ's authority when it assessed the proposed facility's compliance with Oregon noise-control regulations. (Pet Br 3, 20-27). But petitioner fails to persuasively reconcile his argument with the legislature's purpose of centralizing in EFSC the regulatory approval process for new energy facilities—which this court already recognized in *Marbet*, 277 Or at 450—and the express authority to bind and compel action by other state agencies that the legislature gave EFSC to effectuate that purpose. ORS 469.310 (legislative policy for EFSC is to provide "comprehensive" energy facility siting process); ORS 469.401(3) (authority to bind other state agencies). Petitioner's bare denial of EFSC's express legislatively delegated authority is powerless to obscure it.

C. The asserted error cannot have been prejudicial because DEQ does not administer its noise-control regulations.

As explained above, once EFSC issued the site certification concluding that the proposed facility should receive exceptions authorized by DEQ rules, that decision bound DEQ and EQC to take any action necessary to effectuate those exceptions. ORS 469.401(3). But regardless, neither DEQ nor EQC administer noise-control regulations after the 1991 legislature withdrew funding to do so. OAR 340-035-0110; (B2HAPPDoc1275 ODE Resp to Exception Issues NC-1,NC-2,NC-3,NC-4_Gulevkin_2022-07-15 at 46). Neither DEQ nor

EQC process requests for exceptions nor otherwise enforce violations of noise-control regulations. *Id.*

As a result, petitioner's asserted error—that DEQ or EQC, not EFSC, should have assessed the proposed facility's compliance with noise-control regulations—cannot have caused prejudice warranting reversal on appeal. DEQ and EQC would not have taken any action to enforce their noise-control regulations in relation to the proposed facility, so EFSC's application of that law to the proposed facility is more than petitioner could have obtained from DEQ or EQC. This court should decline to reverse in those circumstances.

In short, EFSC acted squarely within its legislatively delegated authority when it concluded that, with exceptions authorized by DEQ rules, the proposed facility would comply with DEQ noise-control regulations. But regardless, the asserted error cannot have prejudiced petitioner in any event. This court should reject petitioner's second assignment of error.

ANSWER TO THIRD ASSIGNMENT OF ERROR

EFSC properly affirmed ODOE's decision to require IPC to compile a list of noise sensitive property owners within only one half-mile of the proposed facility, instead of one mile.

A. Preservation of Error

Respondents do not contest preservation.

B. Standard of Review

This court reviews EFSC final orders for legal error, abuse of agency discretion, and lack of substantial evidence supporting any challenged factual finding. ORS 469.403(6) (review is as provided in ORS 183.482); *Save Our Rural Oregon*, 339 Or at 356. This claim poses an issue of law: Whether ODOE exceeded its authority when it modified an application requirement to require a list of noise sensitive property owners within only one-half mile of the facility, rather than one mile.

ARGUMENT

A. ODOE acted within its authority when it required IPC to compile a list of noise sensitive properties within only one-half mile of the proposed facility, rather than one mile.

Petitioner next argues that ODOE committed legal error by modifying an application for site certificate requirement to require a list of noise sensitive property owners within only one-half mile of the project site, rather than one mile. But, again, EFSC acted squarely within its authority.

As noted above, EFSC has provided by administrative rule that site certificate applications ordinarily must include information regarding the noise impacts of a proposed facility and evidence establishing compliance with DEQ noise-control regulations. OAR 345-021-0010(1)(x) (July 25, 2022).[13] That

[13] At the time of the agency proceedings in this case, OAR 345-021-0010(1)(x) described the noise-control information that should be included in

Footnote continued…

rule ordinarily also requires the applicant to provide "[a] list of the names and addresses of all owners of noise sensitive property * * * within one mile of the proposed site boundary." OAR 345-021-0010(1)(x)(E).

But the same rule that sets out those application requirements also expressly recognizes that not all of them will invariably apply to every application. Instead, the rule expressly states that "*[t]he project order* * * * identifies" which of those requirements applies to a particular site certificate application, "*including any appropriate modifications*[.]" OAR 345-021-0010 (emphases added).

Here, ODOE's Second Amended Project Order made such a modification: It modified the application requirement for a list of noise sensitive property owners within one mile of the facility, shortening that distance to one-half mile:

> [B]ecause of the linear nature of the proposed facility, the requirements of [OAR 345-021-0010(1)(x)(E)] are modified. Instead of one mile, to comply with paragraph E the applicant must develop a list of all owners of noise sensitive property * * * within one-half mile of the proposed facility.

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an application for site certificate Exhibit X. OAR 345-021-0010(1)(x) (July 25, 2022). Subsequent EFSC amendments to that rule shifted those provisions to OAR 345-021-0010(1)(y), and noise-control information is now submitted in Exhibit Y. OAR 345-021-0010(1)(y) (July 29, 2022). For consistency with citations in the agency record, EFSC refers to the former version of the rule in this section.

(B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26 at 23; *see also* SER 51-52 (EFSC affirming ODOE's modification)). ODOE acted within its authority in making that modification. OAR 345-021-0010(1) (recognizing ODOE's authority to make "appropriate modifications" to general ASC information requirements in deciding which of those requirements to include in a specific project order).

B. Contrary to petitioner's arguments, ODOE's modification of an ASC requirement does not create a new rule nor modify any existing one.

Petitioner recognizes that OAR 345-021-0010(1) allows ODOE to modify ASC requirements as appropriate to specific ASCs. (Pet Br 32). But petitioner argues that that makes the rule invalid because, in petitioner's view, it allows ODOE to amend EFSC rules without engaging in proper rulemaking procedures. (Pet Br 30-32, 32-33).

Petitioner is wrong for two separate but related reasons. First, ODOE's modification of an application requirement as applied to an individual application is not a "rule" because it necessarily is not "of general applicability"—it applies only to the specific application for which it was made. *See* ORS 183.310(9) (defining rule as agency directive "of general applicability"); *Pen-Nor, Inc. v. Oregon Dept. of Higher Education*, 84 Or App 502, 507-08, 734 P2d 395 (1987) (agency action was not a rule because it was "directed to a specific person or entity" rather than generally applicable);

United Parcel Service, Inc. v. Oregon Transportation Commission, 27 Or App 147, 150, 555 P2d 778 (1976) ("Not every administrative action with public consequences is a rule and calling something one does not make it one.").

Second, ODOE's modification of an application requirement in an individual project order does not *amend* the existing rule because that rule expressly authorizes such modifications. Indeed, OAR 345-021-0010(1)'s application requirements apply *only* to the extent that ODOE includes them in a project order, and the rule expressly allows ODOE to make "appropriate modifications" in doing so. ODOE's decision to modify an application requirement in a project order thus does not amend the existing rule, it effectuates its express terms.

This court should also reject petitioner's arguments that EFSC's modification was "arbitrary" or violated any rights created by the rule. (Pet Br 32, 33). The modification was not arbitrary, but rather a rational accommodation of the long, linear nature of the proposed facility. And the requirement that IPC create a "list" of noise sensitive property owners requires only that—the creation of a list. It does not set out any notice requirements or otherwise create any right for the owners of the property on the list, nor does it define the geographic scope of the applicant's noise analysis. *See* OAR 345-015-0220(2) (a different rule setting out public-notice requirements). EFSC's

modification of its own list requirement was not arbitrary and raised no due process issues.

C. The asserted error cannot have been prejudicial because IPC ultimately broadened its noise analysis and agreed to site certificate conditions providing for additional mitigation.

As just noted, the error petitioner asserts in this assignment is ODOE's modification of OAR 345-021-0010(1)(x)(E)'s requirement that the applicant provide "a list" of noise sensitive property owners. That rule does not set out any notice requirements or establish the geographic scope of an applicant's noise analysis, and ODOE acted within the express terms of the rule in modifying the list application requirement.

But regardless, IPC ultimately expanded its noise analysis to identify noise sensitive properties within one mile of the proposed facility in areas where the late-night baseline sound level was low enough to make ambient-noise exceedances possible. (ER 844-45, 844 n 745; B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28 at 263-307). And EFSC also ultimately ordered site certificate conditions requiring a procedure for noise sensitive property owners within one mile of the facility to seek mitigation to address exceedances. (Final Order, Att 1 at 40-44 (site certificate, general noise-control conditions one and two)).

In short, IPC ultimately broadened its noise analysis and EFSC imposed site certificate conditions to ensure that impacts to noise sensitive properties

within one mile of the facility will be appropriately mitigated. Thus, although EFSC acted well within its authority in modifying its list requirement, EFSC's final order and site certificate conditions show that the asserted error cannot have prejudiced petitioner in any event.

ANSWER TO FOURTH ASSIGNMENT OF ERROR

EFSC properly relied on IPC's evidence about visual impacts in concluding that the proposed facility's visual impacts would not violate pertinent siting standards.

A. Preservation of Error

Respondents do not contest preservation.

B. Standard of Review

As noted, this court reviews agency final orders for legal error, action within the discretion delegated by the legislature, and factual findings supported by substantial evidence in the record. ORS 183.482(8). This claim poses an issue of law: Whether EFSC erred as a matter of law in relying on IPC's evidence about visual impacts to conclude that the facility's visual impacts would not violate pertinent siting standards.

ARGUMENT

Finally, petitioner challenges EFSC's reliance on IPC's evidence about the proposed facility's visual impacts on important scenic resources like the Oregon Trail Interpretive Center and Morgan Lake Park. Although IPC

employed a methodology that accounted for visual impacts on human viewers—and assumed that all viewers would be highly sensitive to the impact—petitioner nonetheless contends that IPC should have collected additional data regarding "constituent subjective feelings" about the visual change. (Pet Br 37). Petitioner's claim fails because no rule of law precluded EFSC's consideration of IPC's visual-impacts evidence nor required the evidence petitioner suggests.

A. EFSC permissibly relied on IPC's evidence about visual impacts in determining whether the proposed facility complied with EFSC siting standards.

As noted, the legislature expressly authorized EFSC to "set its own standards" for energy facility siting decisions. ORS 469.501(1); *see Marbet*, 277 Or at 458, 459 ("There is thus no doubt that the council is directed to exercise its own judgment in setting standards beyond the policies stated in the statute itself"). Pursuant to that authority, EFSC has adopted several siting standards that involve assessing a proposed facility's visual impacts on the landscape. *See, e.g.*, OAR 345-022-0040 (protected areas standard); OAR 345-022-0080 (scenic resources standard); OAR 345-022-0100 (recreation standard). Those standards call upon EFSC to decide whether the evidence shows that, "taking into account mitigation," the proposed facility will not cause "significant adverse impact" to scenic resources, recreational opportunities, or protected areas. *See id.*

By rule, EFSC defines "[s]ignificant" as

> Having an important consequence, either alone or in combination with other factors, based upon the magnitude and likelihood of the impact on the affected human population or natural resources, or on the importance of the natural resource affected, considering the context of the action or impact, its intensity and the degree to which possible impacts are caused by the proposed action. Nothing in this definition is intended to require a statistical analysis of the magnitude or likelihood of a particular impact.

OAR 345-001-0010(29). That is, an assessment of the "significan[ce]" of an impact requires assessing "the impact on the affected human population," but the rule does not otherwise prescribe any specific form or methodology for evidence bearing on that issue. *Id.*

Here, IPC adapted its visual-impacts methodology from existing methods established by the Bureau of Land Management and the United States Forest Service. (ER 602-06; SER 105-10). IPC incorporated a visual "sensitivity level" criterion and visual "concern" criterion into its methodology to account for the facility's visual impacts on human viewers. (*Id.*; SER 108-09, 124, 128-230). And, with respect to those criteria, IPC assumed that all viewers would be highly sensitive to the change caused by the proposed facility. (SER 124).

That evidence showed that, without mitigation, the proposed facility might cause significant visual impacts at various points, including where the facility would pass near the Oregon Trail Interpretive Center, outside of Baker City. (SER 133-42; SER 42 (map)). But IPC contended, and EFSC agreed,

that, with mitigation (including, among other things, modified, H-frame tower structures), visual impacts would be less than significant at those points and consistent with the pertinent EFSC siting standards. (ER 476-78, 481-85; SER 133-42). Accordingly, EFSC's site certificate requires that and other mitigation to address potential visual impacts. (Final Order, Attachment 1 at 35-36 (site certificate)).[14]

In sum, IPC's analysis supplied competent evidence of the visual impacts of the proposed facility, which specifically accounted for the visual impact on human viewers and assumed for purposes of EFSC's assessment that all viewers would be highly sensitive to visual impact of the proposed facility. *See* OAR 345-001-0010(29) (requiring assessment of the impact on "the affected human population" but not prescribing any specific evidence or methodology for making that assessment). EFSC's pertinent findings are based on substantial evidence in the record, and its conclusion is consistent with its governing statutes and administrative rules.

[14] EFSC also imposed site certificate conditions requiring additional county specific mitigation and other mitigation for visual impacts, outlined in a Historic Properties Management Plan. (ER 710; *see also* Final Order, Attachment S-9 (Draft Historic Properties Management Plan)).

B. Petitioner effectively argues that EFSC should not have been persuaded by IPC's visual impacts evidence, but that is not a valid basis for reversal.

Petitioner recognizes that no source of law requires any form or methodology for an applicant's evidence about the visual impact on the affected human population. (Pet Br 45). Nonetheless, petitioner asserts that EFSC could not find its siting standards satisfied based on IPC's evidence, but instead needed evidence of "constituent subjective feelings" about the visual change. (Pet Br 37).

But, without any source of law requiring petitioner's preferred evidence or barring IPC's, petitioner's argument reduces to the proposition that EFSC should not have been persuaded by IPC's evidence. That is not a viable basis for reversal on judicial review; EFSC based its conclusion on findings supported by substantial evidence in the record and acted within its legislatively delegated authority in reaching those conclusions. *See Save Our Rural Oregon v. Energy Facility Siting Council*, 339 Or 353, 386, 121 P3d 1141 (2005) (rejecting similar argument because decision at issue "was the council's" to make and the petitioner's disagreement with that choice "provide[d] no basis for this court to reverse the council's conclusion[.]"). Petitioner makes no cogent argument that EFSC's findings are not supported by substantial evidence and, in light of the evidence summarized above, any such challenge would fail

in any event. Petitioner's complaints about IPC's evidence supply no basis for reversal.

Moreover, as EFSC noted, the absence of evidence about "constituent subjective feelings" could not have prejudiced petitioner. In assessing the facility's visual impacts on human viewers, IPC's evidence assumed that *all* viewers would be highly sensitive to the visual change. (SER 124). In that way, data on "constituent subjective feelings" could only have *reduced* the significance of those impacts in the overall analysis. (SER 64 (contested case order explaining that issue)). The absence of petitioner's preferred evidence was accordingly harmless.

In sum, EFSC followed the law and made factual findings based on substantial evidence in the record when it concluded that the preponderance of evidence showed that the proposed facility's visual impacts would not violate EFSC siting standards. But the asserted error could not have prejudiced petitioner in any event. This court should reject petitioner's fourth assignment of error.

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CONCLUSION

This court should affirm EFSC's final order.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 3, 2023, I directed the original State Respondents' Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Karl G. Anuta and Mike J. Sargetakis, attorneys for petitioner, and upon Lisa F. Rackner, Sara Kobak, and Andrew Lee, attorneys for respondent Idaho Power Company, by using the court's electronic filing system.

I further certify that on January 3, 2023, I directed the original State Respondents' Answering Brief to be served upon Jocelyn Claire Pease, attorney for respondent Idaho Power Company, by mailing two copies, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 8,696 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

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IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line **MICHAEL McALLISTER**, Petitioner, vs. **OREGON DEPARTMENT OF ENERGY, OREGON ENERGY FACILITY SITING COUNCIL,** and **IDAHO POWER COMPANY,** Respondents.	Energy Facility Siting Council OAH Case No. 2019-ABC-02833 Supreme Court Case No. S069920 **Expedited Proceeding under ORS 469.403**

ANSWERING BRIEF FOR IDAHO POWER COMPANY

On Petition for Review of a Decision of the Energy Facility Siting Council

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STATEMENT OF THE CASE

I. Nature of the Proceeding and Order Below

As described in Idaho Power Company's ("Idaho Power") answering brief in S069919, this case concerns a final order of the Energy Facility Siting Council ("EFSC") issuing a site certificate for the construction and operation of a roughly 300-mile-long electric transmission line, plus related facilities, called the Boardman to Hemingway Transmission Line Project ("B2H" or "project"). In the application for site certificate, Idaho Power proposed two alternative routes through Union County: (1) the Proposed Route; and (2) the Morgan Lake Alternative, which diverts from the Proposed Route for approximately 18.5 miles. In its final order, EFSC approved both routes, finding that both alternatives satisfied EFSC's siting standards and authorizing Idaho Power to construct either (but not both) alternative routes.

Petitioner Michael McAllister ("McAllister") is the owner of real property near the Morgan Lake Alternative. In the contested-case proceeding on the site certificate application, McAllister sought to have EFSC consider a third route in Union County—referred to as the Glass

Hill Alternative—that was different from the Proposed Route and Morgan Lake Alternative and that was not proposed or otherwise included in Idaho Power's site certificate application.

In its order on party status and issues for consideration, EFSC determined that McAllister's issue about the Glass Hill Alternative was not properly raised in the contested-case proceeding. That is because EFSC has authority only to evaluate the merits of the site certificate application before it, determining only whether the application should be approved or rejected based on compliance with EFSC's siting standards. *See* ORS 469.370(7) ("the council shall issue a final order, either approving or rejecting the application"); *Teledyne Wah Chang Albany v. Energy Fac. Siting Council*, 298 Or 240, 258, 692 P2d 86 (1984) (holding EFSC is "obligated to accept or reject [a site] on its own merits, rather than engaging in a comparison" of other unselected sites; and EFSC may not "reject a proposed site because it believes another location is better"). In evaluating an application to determine compliance with siting standards, EFSC has no authority to compare or consider other potential sites not proposed in the site certificate application.

In his sole assignment of error, McAllister argues that EFSC erred in concluding that it lacked jurisdiction to consider the Glass Hill Alternative as an option to replace the Proposed Route and Morgan Lake Alternative. According to McAllister, Idaho Power was required to include, and EFSC was required to consider, the Glass Hill Alternative even if the site was not proposed in Idaho Power's site certificate application. That was so, in McAllister's view, because the Bureau of Land Management ("BLM") identified the Glass Hill Alternative as a preferable alternative in its process under the National Environmental Policy Act ("NEPA"), 42 USC 4321 *et seq*., and EFSC has a statutory duty under ORS 469.370(13) to conduct its review to avoid duplication and inconsistency with federal agency review. Because McAllister's proposed interpretation of ORS 469.370(13) is legally incorrect and EFSC correctly concluded that it lacked jurisdiction to consider alternative routes outside of the application, Idaho Power asks this Court to affirm EFSC's final order.

II. Basis for Jurisdiction and Timeliness of Petition

Idaho Power agrees with McAllister's statement on the basis for appellate jurisdiction and the timeliness of the petition for judicial

review. Idaho Power also agrees with McAllister's statement on the basis for EFSC's jurisdiction.

III. Questions Presented

A. Whether EFSC erred in interpreting ORS 469.370(13) as imposing only a duty for EFSC to avoid duplication and inconsistency, and to ensure coordination, with federal NEPA review to the maximum extent possible.

B. Whether EFSC erred in concluding that it lacked jurisdiction to consider alternative routes outside of the site certificate application.

SUMMARY OF ARGUMENT

This Court should reject McAllister's assignment of error. EFSC correctly concluded that it lacked jurisdiction to consider McAllister's proposed issues about the Glass Hill Alternative because that site was not proposed in Idaho Power's site certification application. Although McAllister argues that ORS 469.370(13) requires EFSC to consider sites identified as preferred in federal NEPA review, the statutory text, context, and legislative history does not support his proposed interpretation. ORS 469.370(13) requires only for EFSC to conduct its review in a way that avoids duplication and inconsistency with federal

agency review in order to reduce burdens in the permitting process for the applicant. Because EFSC's jurisdiction is limited to only review of the proposed site in the site certification application, this Court should affirm the final order.

STATEMENT OF FACTS

Idaho Power adopts the statement of facts from its answering brief in S069919, with the following supplemental facts about BLM's preferred alternative route and EFSC's decision denying McAllister's petition to raise issues in the contested-case proceeding about that route.

I. Background on NEPA Review

As explained in its answering brief in S069919, through its resource planning before the Public Utility Commission of Oregon ("OPUC") and other planning efforts, Idaho Power identified a critical need for a new transmission line to meet its customer needs, which also would serve to increase regional transmission capacity and meet clean energy goals. After identifying that critical need, Idaho Power engaged in an extensive corridor selection and analysis process spanning more than a decade to identify and evaluate the optimal corridor route for

B2H. (ER-980, EFSC Final Order ("FO") at 1; ER-1033-38, FO at 47-52; SER-7-54, ASC Ex. B at 9-48.) The study area included a highly complex assortment of siting constraints, as well as areas of public land administered by BLM, United States Forest Service ("USFS"), and other federal agencies charged with managing resources on federal lands. (SER-12, ASC Ex. B at 6.) Because the project would require federal rights-of-way grants over any such federally managed land, NEPA review was required. (ER-989, FO at 342.) *See also, e.g.*, USC § 4332(2)(C); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F3d 581, 640-41 (9th Cir 2014) (explaining NEPA's application to federal actions).)

The federal NEPA review process is extensive and highly detailed, considering a multitude of different environmental, economic, technical, cultural, and other issues. (ASC Ex. B at 40 (discussing same); *see also Pit River Tribe v. U.S. Forest Serv.,* 469 F3d 768, 781 (9th Cir 2006) (process must consider "every significant aspect of the environmental impact of a proposed action" (internal citation omitted)). However, unlike EFSC's review of a site certificate application, the NEPA process is neither standards based nor outcome determinative. Instead, the

purpose of NEPA is to require the reviewing federal agency to take a "hard look" at the environmental impacts of the proposed action, along with any reasonable alternatives. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F3d 800, 814 (9th Cir 1999); *see Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F3d 1114, 1121 (9th Cir 2008) (explaining analysis of any reasonable alternatives is "the heart of the environmental impact statement" under NEPA, citing 40 CFR § 1502.14). NEPA "does not mandate particular results, but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." *Muckleshoot Indian Tribe,* 177 F3d at 814 (internal citation and quotation marks omitted). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350, 109 S Ct 1835, 104 L Ed 351 (1989). NEPA "merely prohibits uninformed" decision-making with federal actions. *Id.*

As relevant to this case, after describing the various environmental impacts and undertaking a comparative analysis of

different sites, an agency may issue an Environment Impact Statement ("EIS") identifying an "environmentally preferable alternative" that results from its analysis. *See, e.g.*, *Wilderness Soc'y v. United States BLM*, 822 F Supp 2d 933, 941 n 4 (D Ariz 2011) (describing same). Separate from that, the agency then will identify its "Selected Alternative" in its Record of Decision ("ROD"). The ROD ultimately selects the route on federal lands administered by that agency, but it does not dictate or otherwise control the selection of any routes on private lands, such as the three alternative routes at issue in this appeal. BLM's ROD on B2H explained these points, stating:

> "***The issuance of a ROW for the B2H Project for a specific route and other decisions in this ROD apply only to BLM-administered lands.*** Other jurisdictional agencies will make decisions or issue authorizations in accordance with their respective authorities. Further, prior to construction, Oregon's EFSC must find that the route for the B2H Project ultimately identified in the Application for Site Certificate, on all lands in Oregon, complies with applicable EFSC siting standards and issue a site certificate for the B2H Project. The EFSC will consider county plans in its evaluation of the Applicant's application for a site certificate. In making the decision, EFSC considers not only its own standards but also the applicable rules and ordinances of State and local agencies."

ROD for B2H, Executive Summary, at p. iv (Nov. 2017), available at: https://eplanning.blm.gov/public_projects/nepa/68150/125243/152690/20

171117_Record_Of_Decision.pdf (last visited Dec. 31, 2022) ("BLM ROD") (emphasis added); *see* OEC 202(2) (allowing judicial notice of "official acts of … executive … departments of … the United States").

As discussed below, although the purpose and scope of EFSC and NEPA processes are different, ORS 469.370(13) was enacted to reduce burdens on energy facilities seeking concurrent state and federal review by requiring EFSC to "conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review."

II. Background on B2H's Corridor Selection Process

Idaho Power's corridor selection process was highly complex and spanned over a decade. (ER-1032-52, FO.) In 2010, Idaho Power developed its original siting study, detailing the company's siting process. (*Id.*; *see also* SER-15-54, ASC Ex. B, Project Description; SER-97-101, ASC Att. B-1, Intro. to 2010 Siting Study). Idaho Power developed three supplements to the siting study, describing changes to the route corridor and location of the project features. (SER-15-54, ASC Ex. B; SER-102-04, Intro. to Attach-B-2, 2012 Supp, Siting Study; SER-105-07, Intro. to Attach-B-4, 2015 Supp. Siting Study; SER-108-10,

Intro. to Attach-B-6, 2017 Supp. Siting Study.) The following discussion summarizes the siting process, the details of which are captured in the siting study and its supplements, and which also is summarized in EFSC's final order. (ER-1033-38, EFSC FO.)

Phase One of the corridor selection process occurred between 2008 and 2010. (SER-24-35, ASC Ex. B; SER 97-101, Attach-B-1, Intro. to 2010 Siting Study.) In October 2008, Idaho Power presented its initial proposed corridor to the public during scoping meetings conducted by ODOE and BLM. (*Id.*) Based on input received during those meetings, Idaho Power initiated its Community Advisory Process ("CAP")—an effort conducted voluntarily by Idaho Power, and in addition to the EFSC and NEPA processes, to work with local communities and other stakeholders to identify proposed and alternative corridors. (SER-31 ASC Ex. B.) In July 2010, after years of study and input from affected communities and reviewing agencies and other interested parties, Idaho Power filed its notice of intent to file an application for site certificate for B2H with its initial proposed route and proposed alternative route segments. (SER-31-40, ACS Ex. B; ER-988-98, EFSC FO.) BLM—the lead federal agency coordinating the NEPA review process for the

project—issued public notices jointly with EFSC and then initiated its NEPA assessments.[1] (ER-989, EFSC FO.)

Phase Two of the corridor selection process occurred between September 2010 and February 2013, as the NEPA review process also was ongoing. (SER-40-45, ASC Ex. B; SER-102-04, Intro. to Attach-B-2, 2012 Supp. Siting Study.) Following submittal of Idaho Power's notice of intent, ODOE held public informational meetings, and Idaho Power engaged in extensive discussions with landowners and performed more detailed engineering and constructability analysis. (SER-34, ASC Ex. B; SER-102-04, Intro. to Attach-B-2 2012 Supp. Siting Study.) After completing that public input process and accounting for the additional technical review, Idaho Power submitted its preliminary application for site certificate to ODOE, which incorporated over 48 route adjustments developed based on the input received and additional analysis completed after the notice of intent. (*Id.*).

Phase Three of the site selection process occurred between February 2013 and May 2016. (SER-45-47; SER-105-07, Attach-B-4

[1] In addition to the NEPA review spearheaded by BLM, the United States Department of the Navy also conducted its own separate NEPA review for the segment of the route for B2H that cross over portions of the Navy's training facility near Boardman. (ER-1033, FO at 47.)

2015 Supp. Siting Study.) After Idaho Power filed the preliminary application for site certificate, additional route modifications were identified for a variety of reasons, including: (1) to address route alternatives introduced in BLM's Draft EIS; (2) to respond to guidance from the Oregon Department of Fish and Wildlife on measures to avoid, minimize, and mitigate impacts to sage-grouse habitat; (3) to address further coordination with utilities to identify the appropriate electric grid connection point in the Boardman area; and (4) to incorporate additional engineering and design refinements. (SER-46-47, ASC Ex. B; SER-105-07, Attach-B-4, 2015 Supp. Siting Study.) In July 2018, Idaho Power submitted its amended preliminary application for site certificate, incorporating these changes.

The fourth and final phase of the corridor selection process occurred between May 2016 and September 2018. (SER47-48, ASC Ex. B; SER-108, Attach-B-5, 1017 Supp. Siting Study.) During Phase Four, additional route refinements were developed, primarily driven by: (1) route refinements identified in BLM's Final EIS; (2) further coordination with the Department of the Navy and other stakeholders in the Boardman area; (3) further coordination with landowners; and (4)

route refinements to avoid sensitive resources and incorporate design improvements. (ER-47-48, ASC Ex. B; SER-108, 2017 Supp. Siting Study.) In September 2018, Idaho Power submitted its complete final application for site certificate, with its proposed route and alternative routes reflecting these remaining route changes.

Due to competing siting considerations and Idaho Power's analyses during the final route selection phase, neither the amended preliminary application nor the complete application for site certificate included the Glass Hill Alternative route segment in Union County that is at issue in this appeal. (SER-47-54, ASC Ex. B (describing siting considerations).)

II. Background on McAllister's Issue Requests

In 2020, following a two-year process for public comment and input from different reviewing agencies and other interested parties, ODOE issued its proposed order recommending approval of Idaho Power's application and giving notice of the contested case. (ER-993-95.) Numerous parties, including McAllister, petitioned to participate in the contested case as parties. (ER-995-96.)

In his petition for party status, McAllister asserted that he sought to represent both his personal interest and the public interest about the choice of the proposed Morgan Lake Alternative segment. (ER-194.) McAllister explained that he was a property owner in Union County, with his property being "the nearest Morgan Lake estate to the transmission line on the route and the most directly and immediately impacted." (*Id.*) McAllister further explained that he wished to raise the issue of the exclusion of the Glass Hill Alternative route in this area, asserting that it was "unclear why [his] federally corroborated route was disregarded, while [his] neighbor was able to influence the proposed siting" on the Morgan Lake Alternative. (*Id.*)

In the order on party status and issues for consideration in the contested-case proceeding, the hearing officer ruled that McAllister's proposed issues were not properly raised in the proceeding. (ER-640.) The order described McAllister's proposed issues as:

> "(1) *Route Selection – Alternative Analysis*
>
> "(i) Whether Applicant was required to include the least significant route, the Agency Selected NEPA route, in its application to Council.
>
> "(ii) Whether Council's failure to consider the Agency Selected NEPA Route constitutes a violation of ORS

469.370(13)."

(ER-640 (italics in original).) In explaining why McAllister's issues on route selections were outside of EFSC's jurisdiction, the order pointed out that EFSC had authority only to approve or disapprove the filed application for site certificate, with no authority to compare or consider any other possible site locations or routes not included in the application. (*Id.*) Specifically, the order explained:

> "An applicant's choice of routes, and whether Applicant selects the route with the least environmental impact, are matters that fall outside Council's jurisdiction. There is no siting standard requiring Council to consider routes not proposed by the Applicant and no siting standard allowing Council to recommend routes that are not proposed in the ASC. Because Applicant's selection of the Morgan Lake Alternative route (instead of the Agency Selected NEPA Route, or other possible routes) falls outside of the Council's jurisdiction, the above issues are not properly raised for consideration in the contested case. OAR 345-015-00016(3)."

(ER-640.) McAllister timely appealed the order excluding the route-selection issues to EFSC under OAR 345-015-0016(6). (ER-996.) After interlocutory review, EFSC affirmed the hearing officer's order for reasons stated in her order. (ER-557.)

RESPONSE TO ASSIGNMENT OF ERROR

EFSC correctly interpreted ORS 469.370(13) as imposing only a

duty for EFSC to conduct its review of a site application to avoid duplication and inconsistency, and to ensure efficient coordination, with federal NEPA review to the maximum extent feasible. EFSC also correctly concluded that it had no authority to compare or consider other routes outside of those in the final site certificate application.

I. Preservation of Error

Idaho Power accepts McAllister's statement of preservation.

II. Standards of Review

This Court's review of EFSC's final order is governed by the standards for judicial review of contested-case orders in ORS 183.482. *See* ORS 469.403(6) (so stating). Under ORS 183.482(8), this Court reviews EFSC's interpretations of statutes for errors of law. *Save Our Rural Oregon v. Energy Fac. Siting Council*, 339 Or 353, 356, 121 P3d 1141 (2005); *State v. Ramoz*, 367 Or 670, 704, 483 P3d 615 (2021) (statutory interpretation is reviewed for legal error). This Court also reviews any determinations about agency jurisdiction for legal error. *State ex rel. Gattman v. Abraham*, 302 Or 301, 303, 729 P2d 560 (1986) (considering jurisdictional issue as a question of law).

III. Argument

In challenging EFSC's final order, McAllister argues that EFSC erred in concluding that it lacked jurisdiction to consider his proposed issues about Idaho Power's final route selections in the site certificate application—specifically, McAllister's issues with Idaho Power's inclusion of the Proposed Route and Morgan Lake Alternative, and not the Glass Hill Alternative that BLM identified as a preferred route in its EIS. According to McAllister, Idaho Power's site certificate application was incomplete without the inclusion of the Glass Hill Alternative. (McAllister-Br-25.) As his sole support for that position, McAllister points to ORS 469.370(13) and its mandate that "the council shall conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review." (*Id.*) In McAllister's view, ORS 469.370(13)'s mandate to avoid duplication and inconsistency, and to engage in coordination, means that an application always must include, and EFSC always must consider, a preferred alternative route from NEPA review.

As explained below, EFSC correctly rejected McAllister's position. Under ORS 469.370(7), EFSC has authority to approve or reject only

sites proposed in a site certificate application. As EFSC correctly found, there is "no siting standard that requires [an applicant] to propose … the route recommended by a federal agency[.]" (ER-640.) Nor is there any "siting standard requiring [EFSC] to consider routes not proposed" by the application, or any "siting standard allowing [EFSC] to recommend routes that are not proposed." (*Id.*) Far from requiring an applicant to select, or for EFSC to consider, all routes recommended from NEPA review, ORS 469.370(13) merely requires consistency and avoidance of duplication in how EFSC "conducts" its review to ensure efficient coordination and reductions of burdens in overlapping concurrent review. Simply put, ORS 469.370(13) does not dictate the Council's substantive review, or more particularly what routes the Council must consider. Because Idaho Power was not required to propose the route segment that McAllister prefers, and because EFSC had no authority to consider any route not proposed in the application, this Court should affirm.

A. ORS 469.370(13) does not mandate the inclusion or consideration of all sites from NEPA review.

A site certificate application is "a request for approval of a particular site or sites for the construction and operation of an energy

facility or the construction and operation of an additional energy facility[.]" ORS 469.300(2). An applicant is responsible for proposing the particular site or sites included in the application. ORS 469.300(2) (defining "site" as the "proposed location of an energy facility and related or supporting facilities"). An application is complete when "the applicant has submitted information adequate for the Council to make findings or impose conditions on all applicable Council standards" for the proposed site in the application. OAR 345-015-0190(5).

In reviewing an application, EFSC's jurisdiction is limited to approval or disapproval of the proposed site or sites based on its review of the siting standards adopted under ORS 469.501 and the evidence in the administrative record. *See* ORS 469.370(7) ("the council shall issue a final order, either approving or rejecting the application based upon the standards adopted under ORS 469.501" and any other applicable laws). EFSC has no authority to consider, or to make a comparison with, any other potential sites for the facility that are not proposed in the site certificate application. As this Court explained in *Teledyne Wah Chang Albany*, 298 Or at 258, EFSC must evaluate an application based "on its own merits, rather than engaging in a comparison" of

other potential unselected site locations. Under that review, an application's proposed "location either satisfies the standard[s] or it does not, and if it does … the applicant is entitled to a certificate for that location." *Id.*

Contrary to McAllister's argument, there is no siting standard that requires an applicant to propose, or EFSC to consider, the routes recommended in the federal NEPA review. ORS 469.370(13)—the sole authority cited for McAllister's position—certainly does not impose any such requirement. To the contrary, ORS 469.370(13) mandates only for EFSC to conduct its review to avoid inconsistency and duplication, and to ensure coordination, with the federal NEPA review process. ORS 469.370(13) provides:

> "(13) For a facility that is subject to and has been or will be reviewed by a federal agency under the National Environmental Policy Act, 42 U.S.C. Section 4321, *et seq*., ***the council shall conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review. Such coordination shall include, but need not be limited to***:
>
> "(a) Elimination of duplicative application, study and reporting requirements;
>
> "(b) Council use of information generated and documents prepared for the federal agency review;

> "(c) Development with the federal agency and reliance on a joint record to address applicable council standards;
>
> "(d) Whenever feasible, joint hearings and issuance of a site certificate decision in a time frame consistent with the federal agency review; and
>
> "(e) To the extent consistent with applicable state standards, establishment of conditions in any site certificate that are consistent with the conditions established by the federal agency."

(Emphases added.)

As explained below, the text and context, as well as the available legislative history, are clear that ORS 469.370(13) is intended only to reduce burdens and to ensure coordination with concurrent state and federal review. Nothing in ORS 469.370(13) imposes any mandate that a site certificate application must propose all recommended sites from federal NEPA review, or that EFSC always must consider such sites—and, indeed, any such mandate would be contrary to the purpose of Oregon's comprehensive siting standards.

B. The text, context, and history of ORS 469.370(13) does not support McAllister's proposed interpretation.

The meaning of ORS 469.370(13) is a question of statutory interpretation. In interpreting statutes, this Court's "paramount goal"

is to determine the legislature's intent. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009); *see* ORS 174.020(1)(a). Because the words of a statute are the best evidence of the legislature's intent, this Court gives "primary weight to the text and context" of the statute. *State ex rel. Rosenblum v. Nisley,* 367 Or 78, 83, 473 P3d 46 (2020). Statutory context includes "other provisions of the same statute and related statutes, as well as the preexisting common law and the statutory framework within which the statute was enacted." *Fresk v. Kraemer*, 337 Or 513, 520-21, 99 P3d 282 (2004). After examining statutory text and context, this Court reviews legislative history where that history is useful to determining the legislature's intent. *Gaines*, 346 Or at 172. If the intent still remains unclear, this Court applies maxims of statutory construction to determine the meaning of the text. *Id.*

In urging that ORS 469.370(13) requires the inclusion of routes recommended from the federal NEPA process for an application to be deemed complete, McAllister fails to engage in any examination of the text, context, or history of the statute. A statutory analysis, however, confirms that there is no support for his position. To start, the overall subject of ORS 469.370 has nothing to do with the substantive

requirements for site certificate applications; instead, the statute is concerned with the process for how EFSC conducts its review ***after*** an application already has been deemed complete and ODOE has issued a draft proposed order on the application. *See* ORS 469.370 (prescribing review process for proposed order on application); *see also Vsetecka v. Safeway Stores, Inc.,* 337 Or 502, 508, 98 P3d 1116 (2004) (statutory text must be construed in context). The relevant statute governing site certificate applications—ORS 469.350—confers authority on EFSC to prescribe application requirements, and EFSC never has adopted any requirements for an application to include any sites outside of the proposed sites for the energy facility. *See* OAR 345-021-0010 (prescribing requirements for contents of applications). EFSC has never adopted any standards limiting an applicant to the selection of only sites recommended from the NEPA process, regardless of their compatibility with the applicant's project objectives or the consideration of other factors and siting standards. *See* OAR 345-022-0000 *et seq*. (prescribing siting standards).

The plain text of ORS 469.370(13) also does not impose any requirement that an application always must include, or that EFSC

always must consider, all sites recommended in federal NEPA review. By its terms, ORS 469.370(13) provides only that "the council ***shall conduct its site certificate review***, to the maximum extent feasible, ***in a manner that is consistent with*** and ***does not duplicate the federal agency review***," followed by a list of specific examples of "***such coordination***." (Emphasis added.) In directing EFSC to "conduct" its review in a certain "manner" with the federal agency review, the text of ORS 469.370(13) speaks to EFSC's process for conducting review—and it assumes that EFSC's review process may be taking place concurrently with the federal review process.

The other statutory terms describe the "manner" in which EFSC must conduct its review. The term "consistent with" generally means: "agreeing or accordant; compatible; not self-contradictory" or "constantly adhering to the same principles, course, form, etc." *Webster's Unabridged Dictionary* at 434 (Second Edition (1987)). The term "not duplicate" generally means not "copy exactly" or not do "anything corresponding in all respects to something else." *Id.* at 607. The term "such coordination" refers to the "harmonious combination or interaction, as of functions or parts." *Id.* at 447. Taken together, the

plain meaning of those statutory terms is a requirement only for EFSC to engage in "such coordination" with federal agencies to minimize any conflicts and burdens from overlapping concurrent review processes. *See SAIF Corp. v. Ward*, 369 Or 384, 395, 506 P3d 386 (2022) (court assumes that the legislature intended plain and ordinary meaning of terms without special statutory definitions).

The correctness of that interpretation is confirmed by looking at the rest of the statutory text. Although McAllister entirely fails to acknowledge it, the remainder of ORS 469.370(13) lists out specific examples of "such coordination" intended by the statute. All of those examples concern the coordination of different steps in the siting review process to promote efficiencies and to reduce conflicting obligations for the applicant, such as: (1) eliminating duplicative study and reporting requirements; (2) sharing information and documents; (3) developing a joint record and engaging in joint hearings; (4) working on the same timeline; and (5) establishing consistent conditions in the site certificate and any federal approvals. *See* ORS 469.370(13)(a)-(e). None of the examples of "such coordination" required by ORS 469.370(13)—or any other part of the statutory text—suggests an intent to impose a

substantive requirement that a site certificate application always must propose, and EFSC must consider, sites recommended in the federal review process. Instead, the examples show that ORS 469.370(13) merely imposes a coordination requirement in undertaking the review of an application. *See Bellikka v. Green*, 306 Or 630, 636, 762 P2d 997 (1988) ("When the legislature chooses to state both a general standard and a list of specifics, the specifics do more than place their particular subjects beyond the dispute; they also refer the scope of the general standard to matters of the same kind"); *State v. James*, 266 Or App 660, 668 & n 4, 338 P3d 782 (2014) (courts ordinarily assume that a nonspecific term shares the same qualities as specific terms under the rule of *ejusdem generis* statutory construction).

The broader statutory context also supports that reading. ORS 469.370 is part of a "detailed statutory framework governing the site certificate application process." *Friends of Columbia Gorge v. Energy Fac. Siting Council*, 365 Or 371, 374, 446 P3d 53 (2019). Under that framework, EFSC is charged with promulgating comprehensive siting standards based on different public interests of Oregon that an application must satisfy to obtain a site certificate. *See* ORS 469.501

(conferring authority for EFSC to adopt standards and providing non-exhaustive list of subjects to be addressed in standards); OAR 345-022-0000 *et seq*. (prescribing siting standards). Unlike NEPA review—which is not based on standards and serves only an informative purpose—EFSC's decision to approve or reject a site certificate application must be based solely on its own standards and other laws deemed applicable. ORS 469.370(7). In directing EFSC to coordinate its review process with federal agencies engaged in NEPA review, ORS 469.370(13) does not supplant EFSC's standards. ORS 469.370(13) also does not change the nature of EFSC's review, or authorize EFSC to engage in any kind of comparative analysis of the proposed site in the application with other unselected sites. Nothing in the statutory framework provides any support for McAllister's claim that ORS 469.370(13) is intended to require site certificate applications to include, and for EFSC to consider, all sites recommended in the NEPA process.

The available legislative history also offers no support for McAllister's position. The relevant text of ORS 469.370(13) was adopted in 1993 as part of a broader revision of the energy facility siting

statutes. Or Laws 1993, ch 569, § 8. The legislative history suggests that ORS 469.370(13)'s mandate to avoid duplication and inconsistency with federal agency review generated little controversy or discussion, with neither ODOE nor EFSC even mentioning the mandate in their respective written testimony on the bill. (Appx-24-36.) Consistent with the statutory text, legislative staff's "Section-by-Section Analysis of Senate Bill 1016" described the provision as merely as a "coordination requirement" when there are overlapping federal and state reviews to avoid duplication of effort. Specifically, in explaining the provision, the analysis statement described:

> "Section (8): Renewable Resources/NEPA. (Page 12, line 44, 45; page 13, lines 1-14). Energy developers on federal lands or those who work with the Bonneville Power Administration usually must meet the requirements of the National Environmental Policy Act ('NEPA') and prepare an environmental impact statement ('EIS'). Much of the analytical work done in the EFSC process would be included in the EIS. Subsection (8) of SB 1016 provides that when a solar or geothermal resource projects with a generating capacity of less 100 megawatts, for which NEPA review is required, will be reviewed by EFSC, the EFSC will not duplicate federal agency review. ***Specific coordination requirements are set forth***."

(Appx-24 (emphasis added).) The legislative summary confirms that ORS 469.370(13) was intended only to promote coordination in

processes between EFSC and federal agencies. No support exists for McAllister's proposed statutory interpretation of ORS 469.370(13) to impose a substantive mandate that a site certificate must propose, and EFSC must consider, sites recommended from federal NEPA review.

C. EFSC did not err in ruling that it lacked jurisdiction to consider McAllister's issues about another route.

Lacking support in the text, context, and history of the statute, McAllister finally resorts to policy arguments to advance his proposed interpretation of ORS 469.370(13). According to McAllister, EFSC's interpretation of ORS 469.370(13) "promotes waste of both federal and state government resources" because "the federal government may spend resources to study routes and make findings, only to have its study disregarded at the applicant's behest" by the selection of a different route. (McAllister-Br-34.) But that argument misapprehends the different purposes of NEPA review and EFSC's review.

As discussed above, NEPA serves only to allow federal agencies to take a "hard look" at environmental impacts of proposed federal actions, not to mandate a particular approach. *Muckleshoot Indian Tribe,* 177 F.3d at 814. In contrast, the site selection process for an energy facility considers many significant factors and project objectives, and EFSC's

review of a proposed site is focused solely on the compliance of the site with its siting standards. Although ORS 469.370(13) aims to reduce administrative burdens and save resources by requiring coordination between EFSC and the federal reviewing agency, the nature and purpose of the reviews are different, and ORS 469.370(13) does not impose any restrictions on the sites that an applicant may select based on consideration of EFSC's standards and different project needs. Indeed, interpreting ORS 469.370(13) as effectively a restriction on the site selection process based on federal NEPA analysis, rather than EFSC's standards, would be contrary to the very purpose of Oregon's energy facility siting standards and the policy to impose a comprehensive system to independently evaluate impacts on Oregon's public interests. *See* ORS 469.310 (stating policy).[2]

[2] In its ROD, BLM makes clear that its decision is not intended to subvert the siting authority of other agencies like EFSC. (BLM ROD, Executive Summary, at p. iv ("Other jurisdictional agencies will make decisions or issue authorizations in accordance with their respective authorities. Further, prior to construction, Oregon's EFSC must find that the route for the B2H Project ultimately identified in the Application for Site Certificate, on all lands in Oregon, complies with applicable EFSC siting standards and issue a site certificate for the B2H Project.").)

D. Even if EFSC had considered the Glass Hill Alternative, it makes no difference to the approvals for the Proposed Route and Morgan Lake Alternative

Finally, even assuming *arguendo*, that McAllister is right that EFSC's duty of coordination with federal agency review under ORS 469.370(13) somehow required EFSC to consider the Glass Hill Alternative in EFSC's review process, it makes no difference to the correctness of EFSC's final order in any event. In conducting its review, EFSC determined that both the Proposed Route and Morgan Lake Alternative fully satisfied EFSC's standards and all other applicable requirements, and Idaho Power is authorized to construct on either of those routes. Although McAllister complains that EFSC also should have considered the Glass Hill Alternative as a third alternative route, McAllister makes no challenges to the correctness of EFSC's findings that the Proposed Route and the Morgan Lake Alternative fully satisfy EFSC's standards. Thus, even assuming *arguendo* that the Glass Hill Alternative should have been considered as a third alternative, McAllister's argument does not establish any legal error to support a remand of the final order. *See* ORS 183.482(7) (for alleged irregularities in procedure, court may remand for further action only if the court finds

that "the correctness of the action may have been impaired by a material error in procedure").

CONCLUSION

EFSC correctly determined that McAllister's issues about the excluded segment of BLM's preferred route in Union County were not properly raised in the contested-case proceeding because EFSC has no jurisdiction to consider sites not proposed in an application, and no statute or rule requires an application to propose only sites identified as preferred in federal NEPA review. This Court should affirm.

DATED this 3rd day of January, 2023

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05; and (2) the word-count of this brief, as described in ORAP 5.05(1)(b)(i)(3), is 5,931 words. I also certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 3rd day of January, 2023.

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 3, 2023, I filed the **ANSWERING BRIEF OF IDAHO POWER COMPANY** with the State Court Administrator via the eFiling system. I further certify that on January 3, 2023, I caused copies of the **ANSWERING BRIEF OF IDAHO POWER COMPANY** to be served on the following parties via the eFiling System, with courtesy copies by email.

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IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line MICHAEL MCALLISTER, Petitioner, v. OREGON DEPARTMENT OF ENERGY, OREGON ENERGY FACILITY SITING COUNCIL, and IDAHO POWER COMPANY, Respondents.	Energy Facility Siting Council No. 2019ABC02833 SC S069920 **EXPEDITED JUDICIAL REVIEW UNDER ORS 469.403**

STATE RESPONDENTS' ANSWERING BRIEF

On Direct Expedited Judicial Review

Continued…

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STATE RESPONDENTS' ANSWERING BRIEF

STATEMENT OF THE CASE

Respondents Energy Facility Siting Council (EFSC) and Oregon Department of Energy (ODOE) supplement the facts in the argument section below but otherwise accept petitioner's statement of the case.

Summary of Argument

This judicial review arises from EFSC's final order approving Idaho Power Company's (IPC) site certificate application for a new 300-mile, 500-kilovolt transmission line stretching from Boardman, Oregon, to Hemingway, Idaho. Petitioner participated as a limited party in the proceedings below, and one of his principal objections to the proposed facility was its location within a part of Union County. In his comments to the draft proposed order, petitioner argued that IPC's application for a site certificate was incomplete because it did not propose an alternative route segment that the Bureau of Land Management (BLM) had previously identified.

When deciding petitioner's application for party status, EFSC concluded that petitioner had adequately raised issues about several EFSC siting standards, though those issues were ultimately rejected on summary determination. Petitioner does not challenge those determinations on judicial review. Instead, petitioner challenges only EFSC's ruling that affirmed the exclusion of the BLM route issue as it specifically related to ORS 469.370(13), a statute that

generally requires EFSC to conduct its review in a manner that is "consistent with and does not duplicate the federal agency review." According to petitioner, that statute required IPC to include the BLM's route in its application for site certificate to ensure that EFSC's review process was "consistent" with the federal review process.

Petitioner's challenge fails. To properly raise an issue in a contested case, three requirements must be satisfied: (1) the issue must be within EFSC's jurisdiction; (2) a person must have raised the issue in person or in writing through the DPO public comment process; and (3) the issue must have been raised with sufficient specificity to afford the decisionmaker an opportunity to respond.

Here, EFSC correctly excluded petitioner's ORS 469.370(13) argument on the basis that an applicant's selection of routes in its application for site certificate is not within its jurisdiction. Additionally, to the extent that petitioner sought to raise a separate, broader argument regarding ORS 469.370(13) and the legal obligations it imposes on EFSC, he did not raise that argument with sufficient specificity during his comments on the draft proposed order to be properly raised in the contested case.

Regardless, even if excluding petitioner's ORS 469.370(13) argument from the contested case was error, that error does not warrant reversal because the argument fails on the merits. ORS 469.370(13) did not require IPC to

include the BLM route in its application, nor did it mandate that EFSC order IPC to do so. As such, the exclusion of that issue could not have affected the fairness of the proceedings or correctness of EFSC's decision to approve IPC's application for site certificate. This court should affirm the final order.

ANSWER TO ASSIGNMENT OF ERROR

EFSC correctly excluded petitioner's ORS 469.370(13) argument from the contested case. Regardless, any error does not warrant reversal because it fails on the merits.

A. Preservation

Respondents agree that petitioner preserved his claims regarding which issues he wanted raised in the contested case proceedings.

B. Standard of Review

This court reviews EFSC final orders to ensure that EFSC followed the law, acted within its discretion, and based its factual findings on substantial evidence in the record. ORS 469.403(6) (review is as provided in ORS 183.482); *Save Our Rural Oregon v. Energy Facility Siting*, 339 Or 353, 356, 121 P3d 1141 (2005).

ARGUMENT

A. Background

The legislature has conferred authority on EFSC to approve or deny applications for a site certificate for proposed energy facilities.

ORS 469.370(7). ORS 469.370 sets out the process by which an application for a site certificate is processed and ultimately approved or rejected by EFSC. EFSC utilizes the contested case process to resolve properly raised objections to a proposed facility. *See generally* ORS 469.370; OAR ch 345, div 15.

This case arises out of IPC's application for a site certificate to build a new 300-mile, 500-kilovolt transmission line. (ER 987, 990). After IPC submitted its notice of intent to submit that application, ODOE asked reviewing agencies to submit comments or recommendations regarding the application. (ER 990); OAR 345-021-0050(1); OAR 345-015-0180. BLM then issued an environmental impact statement and record of decision which, among other things, identified the "Glass Hill Alternative" route segment near La Grande in Union County (BLM route). (ER 121, 990). IPC's final application to EFSC did not include the Glass Hill segment in Union County. (*See* ER 104; B2HAPPDoc3-3 ASC 02a_Ex_B_Project Description_ASC 2018-09-28 at 9-10).

After ODOE issued the draft proposed order approving IPC's application, petitioner McAllister was one of several hundred persons who commented on the proposed order. *See* ORS 469.370(1)-(2) (providing for notice and public comment after ODOE issues the draft proposed order); (ER 106-16). At a public hearing held on June 20, 2019, in La Grande, petitioner stated that his focus was not to "explore the rightness or wrongness" of the proposed

transmission line but rather to have the line rerouted to conform to the BLM (Glass Hill) alternative route segment. (ER 107). In his written comments, petitioner expressed concern that IPC had submitted an incomplete application due to the omission of the BLM route, and he specifically requested that IPC amend the application for site certificate to include it. (*See* ER 108-16).[1]

After the public comment phase ended, petitioner submitted a petition for party status in the contested case proceedings. (ER 193-242; B2HAPPDoc73); *see* ORS 469.370(3)-(5) (providing for contested case proceedings under ORS chapter 183 to resolve objections to a proposed facility limited to issues raised in public comments). In that petition, petitioner argued for the first time that IPC's omission of the BLM route was in contravention of ORS 469.370(13). (*See* ER 195, 197-98).

EFSC ultimately granted petitioner limited party status and concluded that he had properly preserved for the contested case his arguments about the proposed facility as they related to EFSC siting standards for fish and wildlife and soil protection. (ER 557-58 (EFSC appeal decision concluding that

[1] ORS 469.370(13) states, in part: "For a facility that is subject to and has been or will be reviewed by a federal agency under the National Environmental Policy Act, 42 U.S.C. Section 4321, et seq., the council shall conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review."

petitioner adequately preserved those issues); ER 639-40 (amended party-status order).

But EFSC excluded two other interrelated arguments that petitioner had sought to raise in the contested case. First, EFSC affirmed the hearing officer's conclusion that, to the extent that petitioner objected to the proposed facility solely based on IPC's omission of the BLM route, that issue was not proper for the contested case because an applicant's choice of routes, or whether the applicant has selected a route with the least environmental impact, were matters that fell outside EFSC's jurisdiction. (*See* ER 446, 557-58, 639-40). Second, EFSC affirmed the hearing officer's exclusion of petitioner's ORS 469.370(13) argument—whether EFSC's failure to consider the BLM route constituted a violation of ORS 469.370(13)—for the same reasons. (*See* ER 446, 557-58, 639-40).

As for the arguments that petitioner had properly raised regarding the fish and wildlife and soil protection standards, EFSC subsequently affirmed the hearing officer's rejection of those arguments on summary determination. (*See* B2HAPPDoc 787 FW-13, SP-2, & R-2 Interlocutory Appeal_McAllister_2021-09-17 at 6-7, 9-10). Petitioner does not challenge those rulings on judicial review.

Instead, petitioner's sole assignment of error on judicial review is that EFSC erred by "excluding Petitioner's properly raised issue relating to

ORS 469.370(13) from the contested case." (Pet Br 16). However, for the reasons explained below, EFSC properly excluded petitioner's ORS 469.370(13) argument after correctly assessing the scope of its jurisdiction. Further, to the extent that petitioner intended to raise a separate, broader argument about what ORS 469.370(13) required of EFSC, petitioner failed to raise any such argument with sufficient specificity to be included in the contested case. At all events, however, any error excluding petitioner's ORS 469.370(13) argument does not warrant reversal because, contrary to petitioner's assertions, that statute did not require IPC to include the BLM route in its application or require that EFSC so order.

B. EFSC correctly excluded petitioner's "consistency of review" argument relating to ORS 469.370(13) from the contested case.

As noted, petitioner's sole contention on judicial review is that EFSC erred by failing to consider his ORS 469.370(13) argument. But as explained below, that issue was ultimately outside of EFSC's jurisdiction and thus could not be considered in the contested case. And to the extent that petitioner intended to raise a separate, broader argument about ORS 469.370(13) and what that statute legally required of EFSC, that argument was not raised with sufficient specificity so as to be raised in the contested case.

1. EFSC correctly concluded that petitioner's ORS 469.370(13) argument was outside of EFSC's jurisdiction.

To properly raise an issue in a contested case, three requirements must be satisfied: (1) the issue must be within EFSC's jurisdiction; (2) a person must have raised the issue in person or in writing through the DPO public comment process; and (3) the issue must have been raised with sufficient specificity to afford the decisionmaker an opportunity to respond.[2] *See* ORS 469.370(3); OAR 345-015-0016(3). In this case, petitioner's contention that, pursuant to ORS 469.370(13), IPC was required to include the BLM's selected route in its application so that EFSC could consider it failed at the first step and was therefore properly excluded from the contested case.

EFSC is charged with reviewing an application for an energy facility and determining if the proposed facility qualifies for a site certificate; the ultimate issue for EFSC is whether the evidence shows that a proposed facility will comply with all application requirements identified in the project order. ORS 469.503(1), (3). In general, an issue falls *within* EFSC's jurisdiction only if it relates to compliance with one or more of those siting requirements. *See*

[2] There is an exception to the requirement that an issue be raised during the DPO public comment period that applies if ODOE "did not follow the requirements of ORS 469.370(2) or (3)" or if "the action recommended in the proposed order described in OAR 345-015-230, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order." OAR 345-015-0016(3). Petitioner does not contend that that exception is applicable in this case.

ORS 469.501 (EFSC "shall adopt standards for the siting, construction, operation and retirement of facilities"). EFSC's standards for what must be provided in an application for a site certificate are found in OAR chapter 345, division 21, and its standards addressing what an applicant must demonstrate to be issued a site certificate are in OAR chapter 345, division 22. The project order also identifies other Oregon statutes and administrative rules (adopted by agencies other than EFSC) with which a proposed facility must comply. ORS 469.503(3).

None of those siting requirements require an applicant to propose an energy facility or route that—independently of its compliance with EFSC siting requirements—is less impactful than others or one that is recommended by a federal agency. There is also no standard that requires EFSC to consider alternative facilities or routes that were not proposed by the applicant, or to recommend alternatives to applicants. Put a different way, EFSC does not ask whether a better facility exists, it asks whether the *proposed* facility complies with siting requirements. *See, e.g.*, *Teledyne Wah Chang v. Energy Fac. Siting Council*, 298 Or 240, 257-58, 692 P2d 86 (1984) (holding that EFSC could not reject a proposed waste disposal site because it believed that another location was "better" or "more suitable"). As a result, an alternative facility is relevant only as it relates to the proposed facility's compliance with those requirements.

Here, EFSC allowed petitioner's arguments as they related to EFSC's siting standards for fish and wildlife and soil protection. (ER 557-58, 639-40). As noted, EFSC subsequently rejected those arguments on summary determination, and petitioner does not challenge those rulings on judicial review. (B2HAPPDoc 787 FW-13, SP-2, & R-2 Interlocutory Appeal_McAllister_2021-09-17 at 6-7, 9-10). But as far as petitioner's contention that IPC's omission of the BLM route was a basis for objecting to the proposed facility independently of any EFSC siting requirement, EFSC correctly concluded that that issue was not one within its jurisdiction to resolve.

In arguing to the contrary, petitioner concedes that there is no site certificate standard "expressly requiring IPC to propose the least impactful route or the route recommended by a federal agency[.]" (Pet Br 28-29). But now, on judicial review, he maintains that such a requirement is nonetheless found in ORS 469.370(13). (Pet Br 25-26, 28-32). To the contrary, however, ORS 469.370(13) did not require IPC to include the BLM route in its application.

ORS 469.370(13) provides that, "to the maximum extent feasible," EFSC shall conduct its site certificate review "in a manner that is consistent with and does not duplicate" prior federal agency review. ORS 469.370(13). Several aspects of that statute show that it does not require what petitioner contends it does.

First, nothing in ORS 469.370(13) requires an applicant to propose the exact same facility to federal agencies as it does to EFSC; instead, the statute expressly contemplates variation. It requires only that EFSC's review be "consistent with" the federal review—a phrase that contemplates any manner of independent action that is *not inconsistent* with the federal agency review. And it requires that "consisten[cy]" only "to the maximum extent feasible"—a phrase that recognizes that avoiding inconsistency may not always be feasible. In short, ORS 469.370(13) does not mandate adherence to federal review, but rather expressly contemplates independent action consistent with federal review, and even inconsistent action under appropriate circumstances. Indeed, the project order in this case noted that, "the NEPA requirements and EFSC standards are different, and compliance with NEPA does not ensure compliance with an EFSC standard." (ER 101-02).

Second, ORS 469.370(13) is directed at conserving resources. Given the examples of coordination between EFSC and federal agencies provided in the statute (*e.g.*, eliminate duplicative application requirements, when feasible conduct joint hearings, etc.), the intent of the statute is to promote efficiency in review of applications. Its purpose in requiring that EFSC generally "not duplicate" prior federal review is for EFSC to do less work, not more. ORS 469.370(13).

Those aspects of ORS 469.370(13) undermine petitioner's construction of that statute as mandating inclusion of the BLM route in IPC's application. Nothing about a federal agency's conclusions about one facility is *necessarily* inconsistent with EFSC's conclusion that a different facility satisfies EFSC siting requirements. And construing ORS 469.370(13) to require EFSC to *expand* its proceedings to include an alternative facility is inconsistent with ORS 469.370(13)'s purpose of reducing, rather than increasing, EFSC's work.

2. To the extent that petitioner intended to raise a separate, broader argument about ORS 469.370(13) and the legal requirements it imposes on EFSC, that issue was not raised with sufficient specificity.

For the foregoing reasons, EFSC correctly assessed the scope of its jurisdiction as it related to petitioner's argument about IPC's omission of the BLM route from its application and, in that respect, correctly excluded petitioner's ORS 469.370(13) argument as outside its jurisdiction. However, to the extent that petitioner intended to raise a separate, broader argument about what ORS 469.370(13) legally required of EFSC under the circumstances, petitioner did not raise that argument with sufficient specificity during his comments on the draft proposed order so as to raise it in the contested case.

Per statute and implementing EFSC rule, only issues raised in public comment phase with "sufficient specificity to afford [EFSC, ODOE,] and the applicant an adequate opportunity to respond" may be included in the contested

case proceeding. ORS 469.370(3); OAR 345-015-0016(3). What is required to raise an issue with "sufficient specificity" thus poses a question of statutory interpretation, but one that arguably includes a delegation of authority to EFSC to decide for itself the level of "specificity" necessary to provide "an adequate opportunity to response." *Springfield Education Assn. v. School Dist.*, 290 Or 217, 228-30, 621 P2d 547 (1980) (explaining that legislature's use of "delegative terms" like "'good cause' * * * 'fair,' 'unfair,' 'undue,' 'unreasonable,' or 'public convenience or necessity'" in defining agency authority empowers the agency "to make delegated policy choices of a legislative nature within the broadly stated legislative policy").

Here, ORS 469.370(3)'s phrase "sufficient specificity" is arguably a delegative term; if it is, then EFSC's interpretation of that standard as applied to this case is entitled to deference. *See id.* At a minimum, however, "sufficient specificity" is an "inexact term" that means what the legislature intended it to mean. *Springfield*, 290 Or at 224. This court discerns the legislature's intent by examining the text of the statute in context, along with any useful legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). That same analytical method applies to construction of the rule. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993) (method for statutory construction applies to regulations).

The plain text of ORS 469.370(3) indicates that, to raise an issue with "sufficient specificity," it is not enough to make a broad or general argument during the public comment period on the draft proposed order. The word "sufficient" is an adjective meaning "marked by quantity, scope, power, or quality to meet with the demands, wants, or needs of a situation or of a proposed use or end." *Webster's Third New Int'l Dictionary* 2284 (unabridged ed 1993). "Specificity" refers to the "quality or state of being specific," with "specific" meaning "characterized by precise formulation or accurate restriction (as in stating, describing, defining, reserving) **:** free from such ambiguity as results from careless lack of precision or from omission of pertinent matter." *Id.* at 2187. Moreover, the statute expressly provides that the purpose of raising an issue with "sufficient specificity" is "to afford the council, the department and the applicant an adequate opportunity to respond to each issue." ORS 469.370(3). That all indicates that, to properly raise an issue for a contested case, a person must raise an issue in a precise and unambiguous manner, enough to allow EFSC, ODOE, and the applicant the opportunity to actually respond to it.

The context of the governing statutory scheme also supports that interpretation. As previously noted, ORS 469.370 governs the process by which ODOE and EFSC must process and ultimately approve or reject an application for a site certificate. That statute contemplates that, after persons

submit their comments on the draft proposed order, ODOE must review those comments before issuing the proposed order recommending approval or rejection of the application. ORS 469.370(4). To that end, the requirement that a person raise an issue with "sufficient specificity" is a practical one, because it is meant to ensure that ODOE and the applicant can address and, if possible, resolve the issue prior to issuing the proposed order. If the issue is not resolved, then ORS 469.370(5) contemplates that it can be addressed through the contested case proceeding. Indeed, only those issues raised in comments on the draft proposed order "may be the basis for a contested case." ORS 469.370(5). That framework supports the conclusion that an issue raised with "sufficient specificity" in the public comment phase cannot be broad or ambiguous, because it would undermine the process for reviewing and addressing an issue prior to the contested case.

Thus, under ORS 469.370(3) and OAR 345-015-0016(3), petitioner would have had to raise any other argument about ORS 469.370(13) and the legal requirements it imposed on EFSC in a manner that practically allowed EFSC, ODOE, and IPC the opportunity to actually respond to it. He did not do so.

In his oral and written comments during the DPO comment period, petitioner essentially argued that IPC had submitted an incomplete application because it did not include BLM's agency selected route, and he requested that

IPC amend their application to include it. (*See* ER 107-16). In doing so, he provided a comparative analysis of the various routes and requested that EFSC ask IPC to amend its application. (ER 111-16 ("I am now asking EFSC, to ask Idaho Power Corporation, to amend their Oregon Application for Site Certificate – Include the *Agency Identified Route A* for consideration." (Emphasis in original.)). But an argument that IPC *should* amend its application to include the BLM route is a far cry from an argument about what, in particular, ORS 469.370(13) *legally* required in this context. *Cf. Peiffer v. Hoyt*, 339 Or 649, 655-58, 125 P3d 734 (2005) (noting similar distinction in preservation law between (1) arguing that that factfinder should not be persuaded by the evidence; and (2) arguing that the evidence is legally insufficient to support a decision).

As noted above, EFSC allowed some of petitioner's arguments as they related to EFSC siting standards but rejected his ORS 469.370(13) argument in so far as he requested that IPC amend its application to include the BLM route, concluding that such issue was outside its jurisdiction. Petitioner raised *those* arguments with sufficient specificity. But, having never identified ORS 469.370(13) specifically in his comments, petitioner never indicated what, in his view, EFSC was legally obligated to do pursuant to the statute. Indeed, even on judicial review, petitioner is not clear on that point. At times, he mentions EFSC's role in the application process, stating that EFSC can amend

the project order at any time and determines when an application is complete. (*See* Pet Br 29-31). But he also mentions EFSC's review function, suggesting that, under ORS 469.370(13), EFSC has an obligation to "review assessments of the reviewing federal agency," and that it must "rely on a joint record to assess compliance with state standards." (*See* Pet Br 26-29). Petitioner has not identified any comments on the draft public order to establish that he advanced those broader arguments regarding ORS 469.370(13). (*See* Pet Br 19-21). On the contrary, petitioner acknowledges that he did not reference ORS 469.370(13) in his comments, though he claims, without elaboration, that he was not required to do so under OAR 345-015-0016(3). (Pet Br 20).

In short, to the extent that petitioner intended to raise a separate, broader argument about ORS 469.370(13) and what it required of EFSC under the circumstances presented, EFSC was not required to include that issue in the contested case because petitioner did not raise that issue with sufficient specificity. Again, although petitioner argued that IPC's application *should* include the BLM route, he failed to adequately raise the more specific claim about what ORS 469.370(13) *requires* EFSC to do about such an omission. As a result, petitioner did not raise that ORS 469.370(13) argument in a way that allowed EFSC, ODOE, and the applicant to respond to it in the proposed order. Petitioner thus failed to raise the issue with "sufficient specificity" to be able to raise it in the contested case.

Petitioner nonetheless suggests that his comments were sufficient to raise the ORS 469.370(13) issue more broadly, pointing to three specific comments he made. (Pet Br 19). That includes the following comment:

> I am requesting that Idaho Power Corporation amend their Oregon EFSC Application for Site Certificate to include the U.S. Bureau of Land Management's Agency Identified Route A for consideration by the State of Oregon EFSC board members. It is the only route that was fully subjected to environmental analysis and public comment during the Federal EIS. It was established through community consultation and environmental review in a multi-year process. It must be on the table for full consideration by Oregon EFSC for a 'Complete Application' review.

(Pet Br 19-20). But those statements, at most, indicated that petitioner wanted IPC to include the BLM's selected alternative route because he believed it was important for EFSC's thorough review of the application to determine compliance with applicable standards. What petitioner's comments did *not* convey were any contentions related to ORS 469.370(13) and the legal obligations it imposed on EFSC.

Petitioner also asserts that his comments were sufficiently specific because following his remarks an EFSC member asked IPC why it had not included BLM's proposed route as part of his application. (*See* Pet Br 21). But that question merely reflects that the council member understood petitioner to be arguing that IPC should have included the BLM's alternate route in the application for site certificate. That exchange does not indicate that the council member understood petitioner to be raising a separate argument about what

EFSC was legally required to do under ORS 469.370(13) with regard to IPC's omission. Accordingly, petitioner did not raise that ORS 469.370(13) issue with sufficient specificity.

C. Petitioner's substantial evidence and substantial reason arguments also present no basis for reversal.

Petitioner suggests that EFSC's final order, which incorporates its Order on Appeals and the Amended Order on Party Status, (*see* ER 557, 640), is not supported by substantial evidence and substantial reason. (*See* Pet Br 22-26). Although petitioner's arguments are largely aimed at the merits of his legal contention, (*see* Pet Br 22-26), to the extent that petitioner raises a substantial evidence and substantial challenge to EFSC's final order, that challenge fails.

Substantial evidence exists "to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). The substantial evidence standard has an inherent substantial reasoning requirement, which may require an explanation of the basis of the agency's inferences. *See Jenkins v. Board of Parole*, 356 Or 186, 196, 335 P3d 828 (2014) (citing *City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 271-72, 639 P2d 90 (1981)). However, this court has indicated that such explanation "need not be complex" but enough to allow for judicial review. *Id.* ("The explanation need not be complex, but it should be sufficient

to demonstrate the existence of a rational basis and to allow for judicial review.").

In this case, EFSC's final order—the order directly at issue in this proceeding—considered and rejected the exceptions petitioner filed regarding the exclusion of his ORS 469.370(13). (ER 998). In doing so, it affirmed the hearing officer's determination, incorporating its prior Order on Appeals. (*See* ER 998). Thus, it is clear from the final order why EFSC rejected petitioner's exceptions related to the exclusion of his ORS 469.37(13) argument. Furthermore, the Amended Order on Party Status, which the final order also implicitly incorporates, adequately identified the route selection issues raised by petitioner—including his ORS 469.370(13) argument—and explained the legal basis for excluding them from the contested case: there is no siting standard that would require an applicant to include a particular route in its application for site certificate and therefore the issues were squarely outside EFSC's jurisdiction. (ER 640). Petitioner provides no authority to support his claim that the hearing officer, or EFSC, had to specifically address each of his points or arguments and explain why those were wrong. Ultimately, the basis for the agency's decision is discernable from the final order, enough to allow this court's review of the issue raised by petitioner. No more was required.

D. Even if EFSC erred by concluding that the "consistency of review" issue was not properly raised and in excluding it from the contested case, that does not warrant reversal because petitioner's arguments fail on the merits.

Finally, even if EFSC erred in excluding petitioner's ORS 469.370(13) argument from the contested case, that issue fails on its merits as a matter of law. Therefore, the exclusion of that argument does not warrant reversal, because the "fairness of the proceedings or the correctness of the action" could not "have been impaired." *See* ORS 183.482(7) (requiring remand if "either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure, including a failure by the presiding officer to comply with the requirements of ORS 183.417(8)"); *see also Pulito v. Board of Nursing*, 366 Or 612, 625-26, 468 P3d 401 (2020) (stating that "ORS 183.482(7) guides a reviewing court in determining the appropriate remedy where the fairness of the proceedings *may have* been impaired by a material error in procedure." (Emphasis in original; internal quotation marks omitted.)).

As explained above (*see* Section B, *supra* at 10-12), ORS 469.370(13) did not require IPC to include the BLM route in its application, nor did it require EFSC to address that omission. That statute directs EFSC to conduct its review, "to the maximum extent feasible, in a manner that is *consistent with and does not duplicate*" any prior federal agency review. ORS 469.370(13)

(emphasis added). Nothing about the omission of the BLM route from IPC's application is *necessarily* inconsistent with BLM's NEPA review and interpreting that statute to require EFSC to *expand* its proceedings to include alternative facilities not proposed in the application is inconsistent with ORS 469.370(13)'s resource-conservation purpose.

In short, even if EFSC erred in excluding petitioner's ORS 469.370(13) argument from the contested case, that error does not warrant reversal. Because petitioner's legal claim fails on the merits, the exclusion of that issue from the contested case could not have affected the fairness of the proceedings or the correctness EFSC's approval of IPC's application for site certificate.

CONCLUSION

For the foregoing reasons, this court should reject petitioner's challenge and affirm EFSC's final order approving IPC's application for site certificate.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 3, 2023, I directed the original State Respondents' Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jesse A. Buss, attorney for petitioner, and upon Lisa F. Rackner, Sara Kobak, and Andrew Lee, attorneys for respondent Idaho Power Company, by using the court's electronic filing system.

I further certify that on January 3, 2023, I directed the original State Respondents' Answering Brief to be served upon Jocelyn Claire Pease, attorney for respondent Idaho Power Company, and upon Hailey R. McAllister, attorney for petitioner, by mailing two copies, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 4,925 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

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IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line

IRENE GILBERT,

Petitioner,

vs.

OREGON DEPARTMENT OF ENERGY, OREGON ENERGY FACILITY SITING COUNCIL, and **IDAHO POWER COMPANY,**

Respondents.

Energy Facility Siting Council

OAH Case No. 2019-ABC-02833

Supreme Court Case No. S069924

Expedited Proceeding under ORS 469.403

ANSWERING BRIEF FOR IDAHO POWER COMPANY

On Petition for Review of a Decision of the Energy Facility Siting Council

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STATEMENT OF THE CASE

I. Nature of the Proceeding and Order Below

As described in Idaho Power Company's ("Idaho Power") answering brief in S069919, this case concerns a final order of the Energy Facility Siting Council ("EFSC") issuing a site certificate for the construction and operation of a roughly 300-mile-long electric transmission line, plus related facilities, called the Boardman to Hemingway Transmission Line Project ("B2H" or "project"). Petitioner Irene Gilbert ("Gilbert") is a resident of La Grande and co-chair of the STOP B2H coalition, the petitioner in S069919. In the contested-case proceeding on the site certificate application for B2H, Gilbert sought to present 19 discrete issues raising a multitude of assertions about many facets of the project. The hearing officer granted her limited party status to participate in connection with eight issues identified as properly raised.

The first four of Gilbert's five assignments of error on appeal relate to her participation in the contested-case proceeding on issues regarding the project's mitigation for impacts to the Oregon Trail under EFSC's Historic, Cultural, and Archaeological Resources ("HCA")

standard. In those assignments of error, Gilbert argues that EFSC adopted an issue statement for her limited participation on this issue that impermissibly limited the scope of her arguments. She also contends that EFSC erred by issuing the site certificate with insufficient specificity regarding mitigation of adverse impacts on Oregon Trail resources; by delegating final approval of related mitigation measures to the Oregon Department of Energy ("ODOE"); and by relying on federal, and not state, processes to determine Oregon Trail mitigation measures. In a fifth assignment of error, Gilbert also argues that EFSC's final order changed an applicable Oregon Administrative Rule ("OAR") without sufficient procedure. Because Gilbert's arguments miscomprehend the law or facts governing each of her assignments of error, Idaho Power asks this Court to affirm.

II. Basis for Jurisdiction and Timeliness of Petition

The final order is subject to direct expedited appeal to this Court, under ORS 469.403. Gilbert timely filed a petition for review consistent with ORS 469.403. EFSC had jurisdiction under ORS 469.320(1).

III. Questions Presented

A. Whether EFSC abused its discretion by framing Gilbert's issue statement too narrowly, thereby limiting her participation under ORS 469.370, OAR 345-015-0016(3), and OAR 137-003-0005(8).

B. Whether substantial evidence in the record permitted EFSC to conclude that the final order provides for sufficient mitigation of adverse impacts to historic, cultural, or archeological resources under OAR 345-022-0090.

C. Whether EFSC abused its discretion when it adopted HCA Condition 2, which delegates approval of a final EFSC Historic Properties Management Plan ("EFSC HPMP") to the Oregon Department of Energy ("ODOE").

D. Whether EFSC impermissibly conditioned approval of B2H on federal and not state requirements for mitigation of adverse impacts to historic, cultural, or archeological resources.

E. Whether the Court should reverse and remand the final order because it adopts non-substantive changes to OAR 345-025-0006(5), which concerns a certificate holder's rights to begin construction on parts of a site while negotiating construction rights on

other parts, even though nothing would change if the prior version applied instead.

SUMMARY OF ARGUMENT

This Court should reject Gilbert's assignments of error. To start, EFC correctly articulated Gilbert's issue on HCA Condition 1. Gilbert develops no argument to show how her issue was improperly framed, nor does she otherwise demonstrate any way in which the fairness or the correctness of the final order may have been impaired by any material error. ORS 183.482(7). Second, substantial evidence supports EFSC's final order determining that the project, considering mitigation for impacts, satisfies OAR 345-022-0090 and more likely than not that one or more of those actions will likely prevent significant adverse impacts to historic, cultural, and archaeological resources. Third, EFSC did not abuse its discretion in delegating approval of mitigation measures to ODOE because ORS 469.402 expressly authorizes such delegation. Fourth, contrary to Gilbert's argument, EFSC did not erroneously rely on only federal processes to determine mitigation requirements; to the contrary, Idaho Power developed an HPMP specific to EFSC's standards. Finally, as to her fifth assignment of error,

Gilbert waived any objection to the modified condition language in OAR 345-025-0006(5) by not raising the issue in the proceeding, and her argument provided no basis for remand in any event.

STATEMENT OF FACTS

Idaho Power adopts the statement of facts from its answering brief in S069919, with supplemental facts provided within each of its responses to Gilbert's assignments of error below.

RESPONSE TO FIRST TO FOURTH ASSIGNMENTS OF ERROR

EFSC's final order did not reflect any legal errors, abuse of discretion, or lack of substantial evidence as to the issues concerning the project's mitigation for impacts to the Oregon Trail.

I. Standard of Review

This Court's review of a final order of EFSC approving a site certificate application is governed by ORS 183.482, which generally governs judicial review of contested-case orders. ORS 469.403(6). Under ORS 183.482(8), this Court reviews EFSC's final orders "for errors of law, abuse of agency discretion, and lack of substantial evidence in the record to support challenged findings of fact." *Save Our Rural Oregon v. Energy Fac. Siting Council*, 339 Or 353, 356, 121 P3d

1141 (2005). Gilbert's first four assignments of error implicate all three of those review standards.

In reviewing EFSC's exercise of discretion, this Court examines whether the decision was outside the range of discretion delegated to the agency by law, inconsistent with an agency rule or established practice, or otherwise in violation of a constitutional or statutory provision. ORS 183.482(8)(b); *see also Blue Mt. Alliance v. Energy Fac. Siting Council*, 353 Or 465, 492, 300 P3d 1203 (2013). In reviewing for substantial evidence, this Court examines whether "the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c); *Friends of Parrett Mt. v. Nw. Gas Co.*, 336 Or 93, 79 P3d 869 (2003). This Court may not "substitute its judgment for that of the agency as to any issue of fact or agency discretion." ORS 183.482(7). *See, e.g.*, *Multnomah Cty. Sheriff Office v. Edwards*, 361 Or 761, 776, 399 P3d 969 (2017) ("we do not examine the record to determine whether evidence supports a view of the facts different from those found by the agency").

For alleged irregularities in procedures, this Court will remand for further action only "if the court finds that either the fairness of the

proceedings or the correctness of the action may have been impaired by a material error in procedure[.]" ORS 183.482(7); *see also Pulito v. Or. State Bd. of Nursing*, 366 Or 612, 626, 468 P3d 401 (2021) (discussing standard for remand under ORS 183.482(7)).

II. Argument

A. Response to First Assignment of Error: EFSC correctly framed Gilbert's issue on HCA Condition 1, and Gilbert identifies no error or prejudice.

In her first assignment of error, Gilbert argues that the statement of her contested case improperly limited the scope of her arguments from her accepted issues. (Gilbert-Br-4.) Gilbert then sets out an excerpt from her petition for party status, which stated her interest in raising an issue about HCA Condition 1 relating to mitigation for crossings of Oregon Trail resources.[1] (*Id.*; ER-75, Petition at 4.) Gilbert does not identify how her issue was improperly limited, nor does she otherwise develop any argument on this issue.

Under ORS 469.370(5) and OAR 345-015-0016(3), a person may request to participate in the contested-case proceeding as a party or

[1] In her arguments, Gilbert refers to this as "HPMP Condition 1." (Gilbert-Br-3.) The HPMP is the plan, but the conditions are contained in EFSC's final order. The relevant condition is HCA Condition 1.

limited party if the person submitted comments at the public hearings on the draft proposed order ("DPO") on the site certificate application. The issues that may be raised in the contested case are limited to only those issues properly raised on the record of public hearings on the DPO. ORS 469.370(5). The sole exception to that preservation requirement applies when "the action recommended in the proposed order, including any recommended conditions of the approval, differs materially from that described" in the DPO. ORS 469.370(5)(b). In that circumstance, a party is restricted to raising "only new issues related to such differences" between the DPO and proposed order. *Id.* To preserve an issue for consideration in the contested case, the person also must raise the issue "with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond to each issue." ORS 469.370(3).

In this case, Gilbert petitioned for full party status and requested to raise 19 discrete issues on different aspects of the project and its compliance with EFSC's standards. (ER-71-87, Petition.) Gilbert's seventh issue in her petition—the one at issue in this appeal—concerned HCA 1 and mitigation for impacts on Oregon Trail resources.

(ER-75, Petition at 4.) The hearing officer allowed eight of Gilbert's proposed issues as properly raised, including her seventh issue on HCA Condition 1. (ER-89-94, HO Order.) Specifically, the hearing officer approved the following issue for Gilbert: "Whether the Proposed Order's revisions to Historic Cultural and Archeological Resources Condition 1 (HPMP) related to mitigation for crossings of Oregon Trail resources provides adequate mitigation for visual impacts and sufficient detail to allow for public participation." (ER-91, HO Order.)

Gilbert timely filed an interlocutory appeal under OAR 345-015-0016(6) to challenge the disallowance of her other proposed issues and her request to participate as a full party. (*See* ER-100-101, EFSC Order.) EFSC affirmed her limited party status designation for the reasons stated in the order, but overruled the hearing officer's denial of one of her proposed issues. (*Id.*; ER-106-114, Amended Order.)

In asserting that her issue on HCA Condition 1 was improperly limited in the contested-case proceeding, Gilbert does not offer any explanation at all of how the issue was limited improperly. Nor does she offer any explanation of how the fairness or outcome of the proceedings may have been materially affected by this supposedly

improper limitation. ORS 183.482(7). Because Gilbert has failed to identify any error or prejudice, or otherwise develop her argument, this Court should reject her first assignment of error. *See Meek v. Myers*, 330 Or 332, 334 n 2, 999 P2d 1138 (2000) (court will not consider undeveloped arguments); *Vukanovich v. Kine*, 302 Or App 264, 287, 461 P3d 223 (2020) ("It is not our proper function to make or develop a party's argument when that party has not endeavored to do so itself." (internal citation and quotation marks omitted)).

B. Response to Second Assignment of Error: Substantial evidence supported EFSC's conclusion that the final order is sufficiently specific regarding mitigation under OAR 345-022-0090.

Gilbert's second assignment of error avers that EFSC issued the final order without sufficient documentation because, according to Gilbert, the certificate lacks "specific information identifying what [Oregon Trail] resources will be impacted, the extent of the negative impacts and how those impacts will be mitigated[.]" (Gilbert-Br. 5-6.) More specifically, Gilbert argues that the mitigation described in Table HCA-4b of the final order is impermissibly vague, citing to several different Oregon cases. Gilbert's argument has no merit.

1. Overview of Applicable Standards

Under OAR 345-022-0000, to issue a site certificate, EFSC must determine that the preponderance of the evidence supports the conclusion that the facility complies with the governing siting standards, or that the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards that the facility does not meet. Those standards include consideration of historical, cultural, and archaeological resources. Specifically, under OAR 345-022-0090, EFSC must conclude the project, considering mitigation, is "not likely to result in significant adverse impacts" to historic, cultural, or archaeological resources that have been listed on, or would likely be listed on the National Register of Historic Places ("NRHP"), and certain other archaeological objects and sites. *See* OAR 345-001-0010(29) (defining "significant"). "Mitigation" in this context can be one or more of six different actions. OAR 345-001-0010(22). Thus, the level of specificity on mitigation measures in the final order must establish it is more likely than not that one or more of those actions will likely prevent significant adverse impacts to historic, cultural, and archaeological resources.

2. EFSC's Final Order Had Ample Evidentiary Support

Contrary to Gilbert's arguments, the record contains substantial evidence supporting EFSC's final order concluding that the final order's mitigation measures comply with applicable law. To evaluate this issue, Idaho Power developed a method to determine potential impacts to historic, cultural, and archaeological properties under the EFSC HCA standard, as well as to assess compliance with Section 106 of the National Historic Preservation Act ("NHPA"). Specifically with respect to visual impacts to such resources, which was the focus of Gilbert's issue on Condition 1, Idaho Power developed a methodology that incorporated some aspects of the Bureau of Land Management's ("BLM") visual-impacts methodology, and some aspects of the Oregon State Historic Preservation Office's ("SHPO") methodology used for establishing the thresholds for a significant adverse impact to a historic property. (*See* ER-7-8, ASC, Exhibit S, Attachment S-2: VAHP Study Plan, Section 4.5 at 14–15 (ODOE–B2HAPPDoc3-36 ASC 19_Exhibit S_Cultural_ASC_Public 2018-09-28. Page 217-218 of 783).) Idaho Power then used this single methodology for an intensive, segment-by-segment analysis of the entire length of the proposed transmission line.

(*See* ER-118, Ranzetta Test., HCA-2, HCA-4, HCA-7, at 84-86.) Idaho Power also committed to continue using this methodology for segment-by-segment analysis for future project refinements consistent with EFSC requirements and the requirements of the Section 106 Programmatic Agreement to which ODOE, SHPO, BLM, and Idaho Power are parties. (*Id.*) Given this detailed evaluation, EFSC had substantial evidence that B2H will comply with its HCA standard.

In addition to the site-specific analysis required by EFSC's standards, Idaho Power also engaged in additional analysis to evaluate potential impacts. Specifically, as required for the Section 106 analysis, Idaho Power contracted with AECOM to prepare a cumulative impacts analysis for the Oregon Trail, utilizing various Oregon Trail Geographic Information System ("GIS") data sets from the National Park Service, the SHPO, and the BLM. (ER-4, ASC, Exhibit S at S-143 (ODOE-B2HAPPDoc3-36 ASC 19_Exhibit S_Cultural_ASC_Public 2018-09-28. Page 98 of 783).) AECOM collected this data on a cumulative basis to provide a general indication of potential cumulative visual impacts from within the Visual Assessment Analysis Area based on a "bare earth" digital-elevation model. (*Id.*; ER-8, Exhibit S at S-143 (ODOE-

B2HAPPDoc3-36 ASC 19_Exhibit S_Cultural_ASC_Public 2018-09-28. Page 218 of 783).) This modeling consists of establishing project heights and using ground-elevation data to determine whether an area would have views of the project or whether intervening landforms would block views. AECOM further considered several variables that would bear on the magnitude of the cumulative impacts to the Oregon Trail, including: (1) distance to the project; (2) intervening topography; (3) vegetation; (4) atmospheric conditions; and (5) the built environment. (*Id.*, ASC, Exhibit S at S-143 (ODOE - B2HAPPDoc3-36 ASC 19_Exhibit S_Cultural_ASC_Public 2018-09-28. Page 98 of 783).) This analysis provided additional substantial evidence that the final order complied the applicable standards.

Also, consistent with ODOE's direction in the Project Order to provide information regarding proposed mitigation (*see* ER-2, 2nd Amend. Proj. Ord. at 19), Idaho Power prepared a draft management plan for historic, cultural and archaeological resources designed specifically to comply with EFSC's standards—the EFSC HPMP. (*See generally* ER-9-29, Appendix A-1.) Among other things, that plan outlined a framework by which the company would protect resources

before, during, and after construction, and mitigate any potential impacts. (*Id.*) Notably, Idaho Power prepared a separate HPMP to comply with federal requirements. (ER-124-131, EFSC Historic Property Management Plan for Oregon Department of Energy Compliance Appendix A.2, BLM HPMP Framework (federal HPMP).) Both the EFSC and federal HPMPs will need to be finalized and approved by the appropriate agencies–including ODOE—prior to construction. (ER-132-34, Ranzetta Test., HCA-2, HCA-4, HCA-7, at 81-83.)

To the extent that Gilbert argues that the EFSC HPMP is unclear as to which mitigation measures are being considered for a particular resource—specifically as related to Oregon Trail or National Historic Trail segments—the argument is demonstrably incorrect. Appendix A.1 of the EFSC HPMP includes Tables HCA-2 and HCA-3, which list out specific resources, impacts to the resources, and potential mitigation measures for such resources. (*See* ER-9-29, Appendix A-1.) Table HCA-2, in particular, lists specific Oregon Trail and National Historic Trail segments where either Idaho Power will avoid direct impacts or where there are no anticipated impacts. (ER-12-19, Table HCA-2.) Measures

to avoid direct impacts are described in detail in the table. (*Id.*) For instance, for the Whiskey Creek Segment of the Oregon Trail, the summary in the "Avoidance Measure and/or Management Recommendation" column provides, in part: "For the new road, [Idaho Power] will relocate or reduce the size of the new road to avoid Site # B2H-UN-005; for the existing road, all improvements will be made within the existing road prism thereby avoiding any new impacts[.]" (ER-17.)

Table HCA-3 also provides ample detail. That table lists specific Oregon Trail and National Historic Trail segments that are: (a) eligible for listing on the NRHP; and (b) may experience indirect (*i.e.*, visual) impacts from the project. (ER-21-29, Table HCA-3.) The table further provides a summary of potential mitigation measures for visual impacts. (*Id.*) For instance, for Segment 6B2H-RP-09 of the Oregon Trail, the "Avoidance Measure and/or Management Recommendation" column provides, in part: "Archival research and documentation [t]esting [is] needed" and it may be prudent to "publish [a] research focus article on professional society presentation, or public education and outreach[.]" (ER-22.)

Viewing the record as a whole, a reasonable person would easily conclude, as EFSC did, that the final order contains sufficiently specific detail regarding mitigation of adverse impacts on historic, cultural, and archaeological resources. Moreover, it is not necessary for mitigation plans to be finalized for EFSC to decide whether to grant a site certificate, and the issuance of the final order does not end the project's processes for identifying still more specific mitigation measures. ORS 469.402 allows EFSC to approve a site certificate based on draft plans and to impose conditions requiring subsequent review and approval by ODOE. Here, after site certification, Idaho Power will perform Phase 2 surveys of Oregon Trail resources located on properties that were previously inaccessible to determine site-specific impacts and mitigation measures for such resources. Per the final order's HCA Condition 2, Idaho Power also will be required to provide ODOE, SHPO, and interested tribal governments with updated site-specific mitigation measures based on new survey data and updated NRHP eligibility information. (ER-123, FO Excerpts.) Accordingly, the final order fully ensures that Idaho Power will determine site-specific impacts, NRHP eligibility, and mitigation measures for all trail resources—and that

such determinations will be updated and reviewed by appropriate agencies and tribes prior to construction. Ample evidence supported EFSC's determination that the B2H project meets all requirements regarding mitigation for adverse impacts to historic, cultural, and archaeologic resources.

3. The Cases Cited by Gilbert Are Inapposite

EFSC's final order correctly concluded that the preponderance of the evidence demonstrated that Idaho Power's mitigation measures are sufficiently detailed for particular resources in compliance with applicable law. None of the cases cited by Gilbert have any relevance. Gilbert first points to the decision in *Sisters Forest Planning Comm. v. Deschutes Cty.*, 198 Or App 311, 108 P3d 1175 (2005). That case, however, arose in an entirely different context. Specifically, the case concerned LUBA's determination that a county imposed insufficiently clear fire-prevention conditions when it approved a conditional use permit to build a dwelling on a 320-acre tract of forest land. *Id.* at 1175. A letter from the applicant's expert served as the record evidence of the conditions, but the record was not clear that meeting the letter conditions would necessarily meet the county code requirements. *Id.* at

1179. Thus, the Oregon Court of Appeals held that the letter recommendations were too imprecise or hypothetical to serve as conditions of approval, and it remanded for clarification. *Id.*

Sisters Forest Planning also is inapposite. To start, it is clear that compliance with the HPMP will satisfy the requirements of OAR 345-022-0090. Regarding the specificity of mitigation measures, there also is no rule preventing EFSC from relying on the information that Idaho Power provided and on processes yet to occur as the project progresses.

The other cases cited by Gilbert are similarly inapplicable. *Gould v. Deschutes County,* 216 Or App 150, 171 P3d 1017 (2007), concerned a LUBA opinion generally upholding a county approval of a conceptual master plan for a destination resort. The county code required the plan to include "methods employed to mitigate adverse impacts on [wildlife] resources," but the approval was based on only contingent mitigation plans that *might* come to fruition. *Id.* at 1019-1020. The *Gould* court held that the county code "allows little speculation" and thus, "[t]he county's substitute of an uncertain plan, a plan yet to be composed, violates those requirements." *Id.* at 1023. Here, EFSC is not subject to the standard that applied to the county in *Gould.* Even more

importantly, the final order is based on substantial evidence, described above, that contingent mitigation plans will come to fruition since ODOE must approve a final HPMP before construction begins.

Gilbert's final case pertaining to her second assignment of error, *Scott vs. City of Jacksonville*, LUBA No. 2009-107 (Jan 12, 2010), also involves enforcement of a permitting statute that does not apply to EFSC. In that case, a municipal city code required the city to find that proposed uses of the property would have "minimal adverse impact upon adjoining properties." *Id.* at 7. Yet, the planning commission approved a use that allowed noise levels above applicable state maximums with no specific findings and only a bare conclusion that the applicable approval criteria were satisfied. *Id.* at 8. LUBA remanded for the city to provide the missing findings. *Id.* at 9. Unlike the approval in *Scott*, EFSC's final order has specific findings, and it does not authorize any conduct that violates state law.

To the extent the three cases cited by Gilbert apply at all, they stand for the unremarkable proposition that a body charged with approving a land-use application must adhere to the rules that it is bound to follow. Because Gilbert does not identify rules applicable to

EFSC that it did not follow, and because the record contained ample evidence in support of EFSC's findings, this Court should hold that substantial evidence supports EFSC's determination that the project satisfies OAR 345-022-0090.

C. Response to Third Assignment of Error: EFSC did not abuse its discretion by delegating approval of the final HPMP to ODOE.

In her third assignment of error, Gilbert argues that EFSC should not have delegated approval of mitigation measures to ODOE because, according to Gilbert, such delegation avoids public participation in the siting process. Gilbert's argument fails because EFSC's governing law expressly and unambiguously authorizes the delegation.

Under ORS 469.402, EFSC's authority to make this delegation is entirely discretionary:

> "If the Energy Facility Siting Council elects to impose conditions on a site certificate or an amended site certificate, that require subsequent review and approval of a future action, ***the council may delegate the future review and approval to the State Department of Energy if, in the council's discretion, the delegation is warranted under the circumstances of the case***."

(Emphasis added.)

The final order establishes mitigation conditions, and it requires subsequent review and approval: "If not duplicated through the federal

Section 106 process, the applicant shall establish the scope and scale of Table HCA-4b mitigation, prior to construction, subject to Department [of Energy] review and approval in consultation with SHPO, its consultants, or other entities with expertise with historic trails." (ER-122, FO Excerpts at 497.) This delegation is squarely within EFSC's statutory authority.

Faced with the express statutory authority in ORS 469.402, Gilbert complains that the delegation deprives the public of the opportunity to participate in the siting process. She argues that the legislature could not have intended to allow ODOE to fulfill this role since it did not adopt a statute that requires—rather than merely allows—the delegation. (Gilbert-Br. at 9.) That argument, however, entirely disregards that the legislature adopted ORS 469.402 specifically and unambiguously to grant EFSC with discretionary authority to make the delegation. Gilbert also disregards that the final order is the result of an exhaustive administrative review process, with extensive opportunity for public input and participation. The plain language of the statute clearly authorizes delegation and requires that this Court reject Gilbert's third assignment of error. *See, e.g.*, *White v.*

Jubitz Corp., 347 Or 212, 223, 219 P3d 566 (2009) (explaining the primacy of statutory text that is truly capable of only one meaning).

D. Response to Fourth Assignment of Error: EFSC did not erroneously rely on only federal processes to determine mitigation requirements.

Gilbert's fourth assignment of error mistakenly argues that the final order impermissibly relies upon compliance with federal HPMP developed for Section 106 compliance to determine mitigation for historic properties. (Gilbert-Br. at 12.) Gilbert lists six ways that she thinks the federal HPMP fails to comply with state law, rendering it insufficient for approval of the site certificate. *Id*. at 12–13. However, Gilbert ignores the fact that Idaho Power has developed an HPMP specific to EFSC's standards, as discussed above, and she has misinterpreted the final order, which expressly requires compliance with state law.

Under ORS 469.370(13), EFSC is to conduct site certificate review, to the maximum extent feasible, in a manner consistent with and not duplicative of any applicable federal agency review. EFSC also must eliminate duplicative application, study, and reporting requirements; use information and documents generated by federal

processes; work with federal agencies to develop and rely on a joint record; and, "[t]o the extent consistent with applicable state standards, establish[ ] conditions in any site certificate that are consistent with the conditions established by the federal agency." *Id.*

Consistent with ORS 469.370(13), the final order provides that Idaho Power may satisfy EFSC's mitigation requirements through the federal Section 106 compliance review for "listed or likely NRHP-eligible Oregon Trial/NHT trail segments," but only "if applicant can demonstrate that it addresses both the design modifications and the restoration; preservation and maintenance; or compensation mitigation within the affected area (county)," as included in Table HCA-4b. (ER-122, FO at 497.) Further, the same paragraph of the final order requires Idaho Power to complete any mitigation measures required under state law that that are not duplicated in the Section 106 process, subject to ODOE's review and approval. (*Id.*)

Gilbert's fourth assignment of error fails because, contrary to her assertions, the final order allows reliance on the federal Section 106 compliance review ***only if*** Idaho Power demonstrates that it addresses state requirements and supplements the federal requirements with

mitigation required by state law prior to construction, subject to approval by ODOE. Gilbert establishes no legal error. *See Save Our Rural Oregon*, 339 Or at 356 (review for legal error).

RESPONSE TO FIFTH ASSIGNMENT OF ERROR

Gilbert's fifth and final assignment of error accuses EFSC of trying to sneak a rule change into the final order. (Gilbert-Br. at 16.) But the premise of her assignment of error is not correct. In fact, EFSC introduced its proposed change to the mandatory condition language in OAR 345-025-0006(5) in the draft proposed order in May 2019 and again in the proposed order in July 2020 (ER-32, DPO at 53, ER-60, PO at 58.) Gilbert is wrong that there was "no discussion," and "no notice to the public" about the change in advance of the final order. (Gilbert-Br. at 15.)

Gilbert also is precluded from complaining about the modified condition language for that same reason. ORS 469.403(2) limits issues on appeal to only "those raised by the parties to the contested case proceeding before the council." Because Gilbert did not raise her objection to the modified condition language until her opening brief on

appeal, Gilbert has waived this issue.[2] Moreover, even if the claim of error were preserved, it would still fail because Gilbert raises, at most, a harmless error that provides no basis for remand.

I. Standard of Review

This Court reviews procedural objections for EFSC's substantial compliance with ORS 183.335. *Friends of the Columbia Gorge v. Energy Facility Siting Council*, 365 Or 371, 378, 446 P3d 53, 58 (2019). For alleged irregularities in procedures, this Court will remand only "if the court finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure[.]" ORS 183.482(7). That is, harmless error is not reversible error.

[2] In the contested case proceeding, Gilbert proposed additional condition language in connection with the General Standard of Review Condition 7, in which she proposed *adding* the following language to the condition: "Prior to starting construction on any segment of the B2H transmission line, Idaho Power must provide convincing documentation that the portion would be constructed even if the remainder of the development were not built per OAR 345-025-0006(5)." (ER-143, Irene Gilbert / Site Certificate Conditions (Sept. 17, 2021) / p. 9 of 13.) Gilbert did not raise any issue in connection with the Council's modification to the mandatory condition language in OAR 345-025-0006(5).

II. Argument

Gilbert's fifth assignment of error objects to EFSC's decision to adopt a proposed modification to OAR 345-025-0006(5), General Standard of Review Condition 7 ("Condition 7"), regarding when construction may begin. (Gilbert-Br. at 14.) Gilbert did not preserve any argument regarding Condition 7; EFSC substantially complied with ORS 183.335 in adopting the changes; and the changes do not alter how Condition 7 operates. Accordingly, this claim of error is not preserved, but it fails even if considered on the merits.

A. Background on EFSC's procedure for modifying Condition 7.

On May 22, 2019, ODOE issued its DPO and a public notice regarding the DPO and opportunities for public comment. (ER-33-35, DPO Public Notice.) ODOE sent the public notice by email to 1,624 subscribers to EFSC's meeting notices (ER37-56, DPO Public Notice Special and General Email), and it mailed it to hundreds of property owners and newspapers. (ER-57-58, DPO Public Notice Mailing Property Owners (Excerpt).) The DPO explained that a public comment period was open on the draft order and application, that EFSC would hold public hearings in each county crossed by the proposed facility, and

that interested parties must testify on the record of public hearings during the comment period, "in order to preserve their right to participate further in the process." (ER-31, DPO at 1.)

Condition 7 contains language applicable to transmission lines, but also to "wind energy facilities" and "pipelines". *See* OAR 345-025-0006(5). The DPO recommended EFSC modify Condition 7 "to remove the language of the condition that does not apply to transmission lines and maintain the portion of the condition that would apply to the proposed facility." (ER-32, DPO at 53.) In redline form, the DPO recommended the following changes:

> ~~Except as necessary for the initial survey or as otherwise allowed for wind energy facilities, transmission lines or pipelines under this section, t~~The certificate holder may ~~not~~ begin construction, as defined in OAR 345-001-0010, or create a clearing on any part of the site ~~until the~~ if the certificate holder has construction rights on ~~all~~ that part~~s~~ of the site and the certificate holder would construct and operate part of the facility on that part of the site even if a change in the planned route of a transmission line occurs during the certificate holder's negotiations to acquire construction rights on another part of the site. ~~For the purpose of this rule, "construction rights" means the legal right to engage in construction activities. For wind energy facilities, transmission lines or pipelines, if the certificate holder does not have construction rights on all parts of the site, the certificate holder may nevertheless begin construction, as defined in OAR 345-001-0010, or create a clearing on a part of the site if the certificate holder has~~

~~construction rights on that part of the site and:~~

~~(a) The certificate holder would construct and operate part of the facility on that part of the site even if a change in the planned route of a transmission line or pipeline occurs during the certificate holder's negotiations to acquire construction rights on another part of the site; or (b) The certificate holder would construct and operate part of a wind energy facility on that part of the site even if other parts of the facility were modified by amendment of the site certificate or were not built.~~

EFSC held hearings in June 2019, and the public comment period closed July 23, 2019. (*See* ER-33, DPO Public Notice.) In this appeal, Gilbert does not allege or provide evidence that she testified about Condition 7 during the comment period.

On July 2, 2020, ODOE engaged in substantially identical notice procedures when it issued a proposed order. (*See, e.g.*, ER-61-66, Proposed Order_CC Public Notice.) Gilbert received public notice of the proposed order proceedings by email because she provided public comment on the DPO. (ER-67, 70, Proposed Order Notice DPO Comment Contacts at Cover Sheet and p 16.) The proposed order recommended the same change to Condition 7 that appeared in the DPO. (ER-60, PO at 58.) On appeal, Gilbert does not allege or provide evidence that she sought to raise an issue regarding Condition 7 in her petition for party status.

In the final order, EFSC adopted the proposed modifications to Condition 7, making non-substantive changes "to remove the language of [Condition 7] that does not apply to transmission lines and maintain the portion of the condition that would apply to the facility." (ER-120, FO at 95.) There is no difference between how Condition 7 would operate as to B2H in its existing or modified form: Idaho Power may begin construction on any part of the site where it acquires construction rights as long as it would operate part of the facility there even if the routing changes during this process. Thus, EFSC did not modify the actual standard that applies; it merely changed the words used to express it.

B. Gilbert did not preserve her assignment of error regarding Condition 7.

ORS 469.403 prescribes the rules for judicial review of contested case proceedings. Pursuant to ORS 469.403(2), "[i]]ssues on appeal shall be limited to those raised by the parties to the contested case proceeding before the council." Further, each assignment of error in an appellant's opening brief must demonstrate that the appellant properly raised and preserved the question. ORAP 5.45(4)(a). And, this Court "may decline to consider any assignment of error that requires the court

to search the record to find the error or to determine if the error properly was raised and preserved." *Id*.

Gilbert had ample opportunity to object to EFSC's modification of Condition 7. Gilbert participated in hearings regarding the DPO, received notice of the proposed order, and continued to participate with access to the proposed changes in the DPO and the proposed order. Gilbert has not alleged that she objected to the changes, nor has she provided any evidence that she raised this argument. Indeed, during the contested case, Gilbert even proposed additional condition language related to Condition 7, proposing that Idaho Power be required to provide "convincing documentation" before beginning construction demonstrating that the portion would be constructed even if the remainder of the development were not built. (ER-143, Irene Gilbert / Site Certificate Conditions (Sept. 17, 2021) / p. 9 of 13.) Yet, Gilbert did not raise the issue of the modified condition language below, and because Gilbert's challenges were not presented below, those challenges are waived.

C. EFSC substantially complied with ORS 183.335.

If this Court is inclined to consider Gilbert's unpreserved

argument, the argument lacks merit because EFSC substantially complied with the provisions of ORS 183.335 that she complains about. Gilbert appears to argue primarily about the inadvertent omission in the final order's footnote 77 of the requirement that the certificate holder begin construction only on parts of the site that it would operate even if the final route changes. (Gilbert-Br. at 15.) Specifically, Footnote 77 in the final order includes a redline representation of the proposed modification that inadvertently omitted part of the relevant text. That inadvertent error is irrelevant because EFSC and Idaho Power are bound to follow the actual language of Condition 7, not the incorrect redline in the footnote. (ER-120, FO at 95 fn. 77.)

To the extent Gilbert argues more broadly that there was "no discussion or approval of this change," no rule revision under ORS 183.355, and "no notice to the public," those allegations are demonstrably wrong. The record is clear that EFSC complied with the notice-and-comment requirements of the statute.

The procedures for agency adoption of rules are set forth in ORS 183.355. An agency must give notice of its intended action up to 49 days before the effective date, including a short description of the

intended action and an understandable summary of its subject matter and purpose. ORS 183.335(1), (2)(a). The statute prescribes specific content for the notice, which must generally explain how the rule will operate, and must request public comment. ORS 183.335(2)(b). The agency must give interested persons reasonable opportunity to submit data and views, including at oral hearings upon request, with notice of such hearings. ORS 183.335(3). An agency may amend a rule without notice or hearing if the amendment is solely to correct grammatical mistakes in a manner that does not alter the scope, application, or meaning of the rule. ORS 183.335(7)(d). If requested, the agency must maintain a mailing list and record of all mailings made. ORS 183.335(8)(c).

EFSC substantially complied with these rules. On May 22, 2019, EFSC issued public notice about the DPO and provided opportunities for public comment. (ER-33-36, DPO Public Notice.) The notice clearly described the B2H project, and it included a link to the DPO. (*Id.*) The notice identified the date, time, and location of hearings; described the EFSC review process; explained the public hearings and comment period; and told interested parties how to find more information and

sign up to receive further notices. (*Id.*) The notice was widely distributed to potentially interested parties. (ER-37-56, DPO Public Notice Special and General Email; ER-57-58, DPO Public Notice Mailing Property Owners (Excerpt).) A similar notice process occurred more than one year later in the proposed order proceedings. (ER-61-66, Proposed Order_CC Public Notice; Proposed Order Notice DPO Comment Contacts at Cover sheet and p 16.)

Gilbert has not explained how any of this process was deficient. In fact, the record confirms that there was robust notice and ample opportunity to comment—and that Gilbert consistently participated, even at one point raising unrelated concerns about Condition 7. EFSC substantially complied with ORS 183.335.

D. At most, Gilbert raises a harmless error that does not justify remand.

Finally, even if EFSC's process was somehow deficient, Gilbert identifies, at most, a harmless and immaterial error in the final order. As the final order explained, the adopted changes to Condition 7 were non-substantive changes designed "to remove the language of [Condition 7] that does not apply to transmission lines and maintain the portion of the condition that would apply to the facility." (ER-120,

FO at 95.)[3] Because Condition 7 operates as to the B2H project in exactly the same way regardless of which version applies, any error in procedure to make the change is immaterial since the change was a clean-up measure that affects nothing in the final order. This Court should reject Gilbert's fifth assignment of error.

CONCLUSION

EFSC's final order was supported by substantial evidence and was consistent with applicable law. Because Gilbert's arguments to the contrary have no merit, this Court should affirm.

[3] In seeking a different result, Gilbert cites to *Kisor v. Wilkie*, - US -. 139 S Ct 2400, 204 L Ed 2d 841 (2019), and *Application of Portland Gen. Elec. Co.*, 277 Or 447, 561 P2d 154 (1977). Neither help her argument. *Kisor* concerned the application of *Auer* deference to certain federal agency decisions, an issue irrelevant to this Court's review of EFSC's final orders on site certificate applications. *Portland Gen. Elec.*, 277 Or at 458, evaluated EFSC's statutory authority and discretion to establish its own standards, holding that EFSC must be able to adopt standards after initiation of review proceedings.

DATED this 3rd day of January, 2023

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05; and (2) the word-count of this brief, as described in ORAP 5.05(2)(a), is 7,564 words. I also certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 3rd day of January, 2023.

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 3rd, 2023, I filed the **ANSWERING BRIEF OF IDAHO POWER COMPANY** with the State Court Administrator via the eFiling system. I further certify that on January 3rd, 2023, I caused copies of the **ANSWERING BRIEF OF IDAHO POWER COMPANY** to be served on the following parties via the eFiling System, except as noted.

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IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line IRENE GILBERT, Petitioner, v. OREGON DEPARTMENT OF ENERGY, OREGON ENERGY FACILITY SITING COUNCIL, and IDAHO POWER COMPANY, Respondents.	Energy Facility Siting Council No. 2019ABC02833 SC S069924 **EXPEDITED JUDICIAL REVIEW UNDER ORS 469.403**

RESPONDENTS' BRIEF OF THE OREGON DEPARTMENT OF ENERGY AND THE ENERGY FACILITY SITING COUNCIL

Petition for Judicial Review of the Final Order
of the Oregon Energy Facility Siting Council

Continued…

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RESPONDENTS' BRIEF OF THE OREGON DEPARTMENT OF ENERGY AND THE ENERGY FACILITY SITING COUNCIL

STATEMENT OF THE CASE

The agency respondents, the Oregon Department of Energy (ODOE) and the Energy Facility Siting Council (EFSC), present the following Statement of the Case for the convenience of the court. Petitioner appears *pro se* and has not tendered a statement.

Nature of the Proceedings and Relief Sought

Petitioner Irene Gilbert challenges EFSC's Final Order approving the Application for Site Certificate filed by respondent Idaho Power Company. Petitioner asks the court to set aside that order.

Nature of the Order Sought to Be Reviewed

EFSC's order approved the siting of a 300-mile high voltage transmission line known colloquially as the Boardman-to-Hemingway (B2H) transmission line.

Statutory Basis for Appellate Jurisdiction

This court has jurisdiction to review EFSC's order pursuant to ORS 469.403(3). EFSC served its final order on October 18, 2022. Petitioner timely filed her petition for judicial review on December 6, 2022, within 60 days of service of the final order.

Jurisdictional Basis of Agency Action

EFSC has authority to review an application for a site certificate for an energy facility pursuant to ORS 469.350 *et seq*.

Questions Presented

Petitioner's opening brief poses the following questions for this court's review:

(1) Did EFSC err in limiting petitioner's participation in the agency proceedings to the particular issues she presented?

(2) Did EFSC err in approving an application for site certificate without requiring mitigation for impacts to historic properties?

(3) Did EFSC err in delegating approval of a final mitigation plan to ODOE for properties that Idaho Power Company was unable to access until the site certificate was approved?

(4) Did EFSC err in relying on a federal Environmental Impact Statement to determine the impacts to historical, cultural, and archeological resources?

(5) Did the conditions in EFSC's final order comply with its own rules setting forth mandatory conditions for transmission lines?

Summary of Arguments

EFSC did not err in limiting petitioner's participation in the contested case proceeding to issues that she herself raised. Under the applicable statutes and rules, person who submit oral or written comments at a public hearing on an application for site certificate may apply to participate in a contested case hearing as to those issues. Both EFSC's rules and the Model Rules of Procedure for contested cases allow an agency to limit party participation, and specifically to limit participation to certain issues. EFSC did not abuse its discretion in limiting the participation of dozens of parties to defined issues that could be litigated in the contested case.

EFSC's approval of the application for site certificate required extensive and specific mitigation for impacts on Historical, Cultural and Archaeological resources, including requiring avoidance of direct physical impacts and mitigation of indirect impacts such as visual impacts.

Because the applicant was unable to access private properties to be crossed by the transmission line until the site certificate was approved, it was unable to survey some properties that may have Oregon Trail and other historical resources. This is commonly the case in energy facility siting, and the legislature has granted EFSC express statutory authority to delegate to ODOE the approval of a final Historical Properties Mitigation Plan, subject to input from the State Historic Preservation Office and affected Indian tribes. EFSC

did not err in relying on that express authority.EFSC also did not err in relying on parallel procedures used by federal agencies for the protection of historically significant resources. Again, EFSC is granted express statutory authority to align its procedures with federal requirements for the approximately one-third of the transmission line that traverses federally owned or managed lands. Finally, EFSC did not violate its own rules in setting forth the conditions of approval for the application for site certificate. EFSC merely rephrased the requirements of its rule for initiating construction; it did not relieve the applicant from any of the mandatory requirements. EFSC did not err in approving Idaho Power Company's application for a site certificate, and its final order should be affirmed.

Statement of Material Facts

A. Procedural History

Petitioner does not assign error to any of EFSC's Findings of Fact. Those findings are therefore the established facts for purposes of judicial review. *Meltebeke v. Bureau of Labor and Industries,* 322 Or 132, 903 P2d 351 (1995), *abrogated on other grounds by State v. Hickman/Hickman,* 358 Or 1, 24, 358 P3d 987 (2015).

In this case, the Idaho Power Company ("IPC") submitted a preliminary application for a site certificate for a new 500-kilovolt transmission line in February 2013. Final Order at 4; B2HNOIDoc1 (ER 600). The proposed

facility would be approximately 300 miles long, extending from a yet-to-be-built switch station in Boardman, Oregon to the Hemingway Substation in Owyhee County, Idaho. FO at 3 (ER 599).

In May 2013, the Bureau of Land Management (BLM) identified the routes it intended to analyze as part of its Draft Environmental Impact Statement for IPC's proposed facility. Final Order at 4 (ER 600). BLM issued its Final Environmental Impact Statement in November 2016 and published its Record of Decision in November 2017, which identified its selected route.

In September 2018, IPC filed its completed application for site certificate. FO at 5 (ER 601). The complete application for site certificate triggered ODOE to issue a public notice of the application. FO at 6 (ER 602). ODOE then held five public information meetings on IPC's application in several Eastern Oregon cities. *Id.*

In May 2019, EFSC appointed an Administrative Law Judge (ALJ) with Oregon's Office of Administrative Hearings to conduct the public hearing on the expected draft proposed order and contested case proceedings.[1] That same month, ODOE issued the draft proposed order, recommending approval of the

[1] EFSC is not required to utilize ALJs from the Office of Administrative Hearings, ORS 183.635(2)(k), but has opted to do so by interagency agreement with OAH.

site certificate for the proposed facility, subject to recommended conditions. FO at 7 (ER 603); B2HAPPDoc3.

In June 2019, the ALJ conducted a series of public hearings regarding the draft proposed order in each Oregon county crossed by the proposed facility: Malheur, Baker, Union, Umatilla, and Morrow. FO at 7 (ER 603). Notice of the draft proposed order and the public hearings was provided by publishing in 10 newspapers within the vicinity of the proposed facility in Oregon and Idaho; emailing or mailing notice to persons on ODOE's general mailing list and on a special mailing list set up for the facility; and mailing printed copies to property owners. FO at 8 (ER 604). Over 400 persons commented on the draft proposed order. (B2HAPPDoc5 - DPO Comment Index Spreadsheet; 2B2HAPPDoc5-1 (actual comments combined)).

In July 2020, ODOE issued a draft proposed order, having taken into consideration, among other things, the comments received on the record of the public hearing. FO at 8-9 (ER 604-5). Concurrently, ODOE issued a Notice of Proposed Order and Contested Case. FO at 9 (ER 605).

Fifty-two persons and entities, including petitioner, requested party status by the deadline, and virtually all requested party status, not limited party status. FO at 9-10 (ER 605-6); B2HAPPDoc104 at 3. ODOE had an opportunity to consider and respond to the petitions for party status. (*See* B2HAPPDoc193 (Second Amended Response to Petitions for Party Status)). In

October 2020, the ALJ issued an Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case ("Order on Party Status"). (ER 17 *et seq.*) In that order, the ALJ granted limited party status to 35 petitioners and identified 70 properly raised, discrete contested case issues.[2] FO at 10 (ER 606); B2HAPPDoc219 (ALJ Order, ER 17 *et seq.*).

Twenty-six persons filed appeals of the ALJ's Order on Party Status. In November 2020, EFSC issued an Order on Appeals of Hearing Officer Order on Party Status, Authorized Representatives, and Issues ("Order on Appeals). FO at 10 (ER 606); B2HAPPDoc288 (included in excerpt at ER 105 *et seq.*).

The matter proceeded to a contested case, and EFSC ultimately issued a draft Final Order and Contested Case Order approving the site certificate application. FO at 44-45 (ER 640-1). On September 27, 2022, EFSC voted to approve the final order by a 6-0 vote. FO at 46 (ER 642). This judicial review proceeding stems from that final order.

B. EFSC's Findings

The applicant, Idaho Power Company (IPC), proposed to build a 300-mile long, 500-kV transmission line with its northern endpoint at Boardman, Oregon, chosen because it is the easternmost point at which IPC could connect

[2] Pursuant to ORS 469.370(5) and OAR 345-015-0080(2), ODOE and IPC, as the applicant, were automatically parties to the contested case proceeding. (B2HAPPDoc104 at 3; ER 245).

to the Pacific Northwest market. FO at 49 (ER 645). The southern endpoint is an existing substation in Idaho known as the Hemingway Substation, the westernmost point in IPC's existing transmission system that could accommodate termination of a 500-kV transmission line. *Id.* The corridor for the line will cross five Oregon counties, Morrow, Umatilla, Union, Baker, and Malheur. FO at 57 (ER 653).

Because approximately 32% of the proposed facility will be located on land owned by federal agencies, the U.S. Bureau of Land Management (BLM) led the required review process under the National Environmental Policy Act (NEPA).[3] FO at 47 (ER 643). The Navy conducted a separate review for the Naval Weapons Systems Training Facility at Boardman. *Id.* Part of the federal process is determining whether particular resources are eligible to be included on the National Register of Historic Places, because adverse impacts to eligible resources must be avoided or mitigated. FO at 86 (ER 682). BLM, not the state agencies, will make the final determination of eligibility but not until the applicant gains access to all areas proposed for the facility. *Id.*

EFSC's rules also require applicants to avoid, minimize, and mitigate impacts to cultural resources. *See* OAR 345-022-0090. Historic, Cultural, and

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[3] Sixty-nine percent (69%) of the proposed facility will be located on private lands, with .4% located on state lands. FO at 466.

Archaeological Resources Condition 2 requires the applicant to submit a final HPMP to ODOE for review and approval prior to construction of a phase or segment of the facility, in consultation with tribal governments and the State Historic Preservation Office (SHPO). FO at 87 (ER 683). The final HPMP must include:

> • Final eligibility determinations for resources from the lead federal agencies;
>
> • Final avoidance and impact information based on the final design of a phase or segment of the facility, or specific facility component;
>
> • Final mitigation for impacts to resources based on final design of a phase or segment of the facility, or specific facility component.

FO at 87 (ER 683). The final HPMP will be based on field surveys, including surveys of private property, and on coordination with federal agencies. FO at 91 (ER 687).

As part of its application, IPC prepared and submitted a preliminary Historic Properties Mitigation Plan to inform EFSC how IPC will avoid, minimize, and mitigate impacts to resources that are protected under the EFSC standard. FO at 87 (ER 683). EFSC's final order addressed those resources in detail (*see* Section IV.K) and incorporated an EFSC-specific HPMP for private and state lands not covered by the federal HPMP, as well as federal lands also subject to NEPA and other processes. FO at 467 (ER 1063). The EFSC-specific HPMP includes an inadvertent discovery plan for previously

unidentified cultural resources identified during construction, including work stoppage; notification and consultation with tribal governments; and data recovery or other protection measures. FO at 467-468 (ER 1063-4). To allow time to complete the consultations and determinations required for the final HPMP, including potential appeals, EFSC allowed IPC a four-year deadline to begin construction. *Id.*

The final order reflects the interconnection and interplay between the federal process and the EFSC standard regarding cultural, historic, and archaeological resources. FO at 468 (ER 1064). Because many, if not all, of the historical, cultural, and archaeological resources that IPC assessed as "not eligible" will ultimately be deemed ineligible by BLM, it is likely that the impacts and required mitigation from construction and operation are overestimated in the Final Order. *Id.* at 86, 469 (ER 682, 1065).

INTRODUCTION TO ARGUMENT

The introduction to petitioner's brief draws the court's attention to "some things [petitioner] found to be of concern regarding the processes that were used in the Contested Case procedures." BROP at 2. But petitioner has not assigned error to any of those concerns, and they are not presented for review by this court. *See* ORAP 5.45(1). Nonetheless, the state agencies briefly explain why those concerns are unfounded.

1. Summary Determination

Petitioner complains that the ALJ granted motions for summary determination, asserting that the ALJ's ruling "denied access to a Contested Case process." BROP at 2. Her contention is puzzling, since petitioner herself advocated for the use of motions for summary determination in the contested case. And motions for summary determination are a part of the contested case process, and allow the agency or parties and limited parties to seek a ruling on any or all legal issues presented in the contested case. OAR 137-003-0580(1).[4] Summary determination is granted only if there is no genuine issue as to any relevant material fact as to the legal issue on which resolution is sought. OAR 137-003-0580(6)(a). Summary determination thus allows for narrowing of legal issues to those which are actually in dispute. Rulings on summary determination are subject to review by this court if properly preserved and assigned as error. Thus, the granting of a motion for summary determination does not deprive a party of access to the contested case process.

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[4] Although the Model Rules of Procedure that are applicable to cases where OAH is involved do not generally apply to EFSC, the Attorney General has issued an order allowing EFSC to use a combination of the Model Rules applicable in non-OAH cases, OAR 137-003-0000 *et seq.;* EFSC's own procedural rules; and certain of the OAH Model Rules. *Attorney General Exemption under ORS 183.630(2) for Contested Cases Before the Energy Facility Siting Council,* October 21, 2020.

2. Discovery Requests

Petitioner incorrectly asserts that "[a]ll citizen requests to require discovery" from IPC or ODOE were denied. BROP at 2. Both ODOE and the applicant responded to interrogatories and requests for production posed by the limited parties, and the limited parties also conducted depositions. *E.g.,* ALJ Proposed Contested Case Order (B2HDoc1340) at 5 (detailing deposition subpoenas) (ER 255-6). To be sure, the ALJ denied motions to compel filed on behalf of limited parties, but petitioner has not assigned error to the denial of any such motion.

3. Site Certificate Conditions

Petitioner is also incorrect to assert that all citizen requests for site certificate conditions were denied. BROP at 2. For example, Stop B2H, which has also petitioned for review from EFSC's final order, made a number of comments on proposed conditions related to noise. In response, ODOE revised the proposed noise-related conditions to incorporate nearly all of Stop B2H's proposals. *See* ODOE Response to Closing Briefs, B2HAPPDoc1339, pp 80-86 (summarizing those changes). The ALJ accepted those revisions and included the revised conditions in her Proposed Contested Case Order. *See* B2HAPPDoc1340 at p 204 (explaining process) (ER 456) and p 207 (Amended Recommended Noise Control Condition 2) (ER 459). Stop B2H filed

exceptions, and EFSC modified the language of the Noise Control Condition, 1.c.iii. FO at 685, B2HAPPDoc 31 (ER 1281).

4. Issue Statements

Petitioner complains that ODOE was "allowed to develop the Statements of the Contested Case Issues resulting in narrowing of issues." BROP at 2. It is true that ODOE attempted to distill the many issues raised by the numerous limited parties into a coherent list of issues that could be litigated as part of the contested case. But the framing of the issues was discussed at two prehearing conferences at which the limited parties participated, and the ALJ's proposed statement of issues was reviewed by EFSC. Order, November 25, 2020, B2HAPPDoc288 (ER 105 *et seq.*). To the extent petitioner challenges the scope of the issues she was allowed to raise, that challenge is addressed below as the first assignment of error. Petitioner has not otherwise explained what issues that should have been included were omitted.

5. Referencing Methods

Petitioner notes that she was required to use "the referencing methods developed by ODOE" to cite documents. BROP at 2. Because of the size of the record that was before EFSC, ODOE suggested and the ALJ required the parties to refer to documents in the record by a standard referencing method to be used by all parties and limited parties. Petitioner has not explained why the use of that referencing method was unlawful or how it prejudiced her.

ANSWER TO FIRST ASSIGNMENT OF ERROR

EFSC did not err in affirming the ALJ's order that granted petitioner limited party status and defined the scope of the issues that were properly raised.

Preservation of Error

The state agencies agree that error is preserved. Petitioner filed exceptions to the ALJ's proposed order on party status and statement of issues in which she was granted limited party status. (ER 1 *et seq.*) The ALJ considered all petitions for party status and requests for hearing on issues and issued an order dated October 29, 2020. (ER 17 *et seq.*) EFSC considered the ALJ's order and issued an Order on Appeals of Hearing Officer Order on Party Status, Authorized Representatives and Issues on November 25, 2020, Final Order at page 12 (ER 608). EFSC reaffirmed that order in its final order. *Id.*

Standard of Review

Pursuant to ORS 469.403(6), this court reviews under the standards set forth in ORS 183.482. With respect to this assignment of error, this court reviews EFSC's exercise of discretion to determine whether it is outside the range of discretion delegated by law, ORS 183.482(8)(b)(A); inconsistent with agency position, rules, or practices, ORS 183.482(8)(b)(B); or otherwise in violation of a statutory or constitutional provision. ORS 183.482(8)(b)(C). The

court "shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion. ORS 183.482(7).

ARGUMENT

ORS 183.310(7) defines the term "party" for purposes of the APA. In general terms, a party is any person who is entitled to a hearing as a matter of right; any person named as a party by the agency; or any person who has requested to participate as a party or a limited party "which the agency determines either has an interest in the outcome of the proceeding or represents a public interest in such result." ORS 183.310(7)(c). Here, Idaho Power was entitled to a contested case hearing as a matter of right under the applicable statutes and administrative rules and was accordingly a full party to the contested case. *See also* ORS 469.370(5) ("The applicant shall be a party to the contested case.") Numerous other persons and entities sought party or limited party status in the contested case; as noted above, the ALJ issued an order, dated October 30, 2020, resolving those petitions. B2HAPPDoc219 (included in excerpt at ER 17 *et seq.*).

Petitions for limited party status in a contested case proceeding before EFSC are governed by a combination of statutes, Model Rules of Procedure, and EFSC's own rules. Under 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." Persons who submitted issues for consideration in the contested case may request party status. ORS 469.370(5).

The ALJ granted limited party status to each person who requested to participate in the contested case and met the eligibility requirements in EFSC's rule, including petitioner. Each limited party's participation was limited to the specific issues raised in their petition for party status. B2HAPPDoc219 at 10 (ER 26). The ALJ found that petitioner demonstrated both a personal interest and qualifications to represent a public interest on behalf of Stop B2H, an organization of which she was a co-chair. With regard to the issues regarding Historical, Cultural, and Archaeological resources that are raised by this appeal, the ALJ found, and EFSC agreed, that it was not necessary for petitioner to raise those issues in comments on the draft proposed order prepared by ODOE, because those issues arose for the first time at a later phase of the proceedings. Order on Appeals of Hearing Officer Order on Party Status, Authorized Representatives and Issues, B2HAPPDoc288 (ER 17).

Thus, petitioner was not denied the opportunity to litigate the issues presented in this judicial review proceeding.

With regard to limited party status, the APA provides that an agency may adopt rules for participation. ORS 183.417(2). EFSC has done so, both in the form of its own procedural rules, and by adopting the Attorney General's Model Rules of Procedure. OAR 345-001-0005(1). As noted above, the governing

statutes require that any issues that may be the basis for a contested case hearing must be raised before ODOE issues its proposed order, and persons who raise such issues may seek party status by filing a petition with the hearing officer. OAR 345-015-0016(1). The person must have commented in person or in writing on the record of the public hearing, and must have raised the issue with sufficient specificity to allow the decision maker an opportunity to address the issue, by presenting facts that support the person's position. OAR 345-015-0016(3).

The ALJ correctly ruled that there is no statutory right to full party status for any person who demonstrates an interest in the outcome of the proceeding and satisfies the requirements for standing. *See* OAR 349-015-0016(5)(b)-(c) (requiring a petition for party or limited party status to include a "short and plain statement of the issue or issues that the person desires to raise," as well as a reference to the person's comments at the public hearing showing that they previously raised those issues). And the Model Rules recognize that, if the petition is granted, the agency may specify areas of participation as it deems appropriate. OAR 137-003-0005(9).

As her opening brief states, petitioner requested party status to contest the mitigation that was proposed for Historic, Cultural, and Archaeological resources. Her petition to participate on those issues was allowed. The relevant statutes and rules do not require that EFSC allow any petitioner to participate as

to all other issues raised by other parties or limited parties.[5] EFSC did not abuse its discretion in allowing all persons who petitioned for and were eligible for party status to participate as limited parties as to the issues they themselves raised.

ANSWER TO SECOND ASSIGNMENT OF ERROR

EFSC's Final Order provides for the mitigation measures required by the relevant statutes and administrative rules.

Preservation of Error

The state agencies agree that petitioner raised this issue in her exception to the Proposed Contested Case Order. Error is preserved.

Standard of Review

This court reviews for legal error, unlawful exercise of discretion, and for substantial evidence in the record. ORS 183.482(8)(a)-(c).

ARGUMENT

Petitioner argues that the Final Order provides legally insufficient mitigation for the impact that the project will have on Oregon Trail resources. But the Final Order complies with the relevant statutes and administrative rules regarding mitigation of impacts.

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[5] EFSC did allow all limited parties to comment on conditions proposed by others, by the applicant, and by ODOE. OAR 345-015-0085(2).

ORS 469.501(1) requires that EFSC adopt standards for the siting, construction, operation, and retirement of energy facilities. Those standards may address a number of subjects, including "impacts of the facility on historic, cultural or archaeological resources listed on, or determined by the State Historic Preservation Office to be eligible for listing on, the National Register of Historic Places or the Oregon State Register of Historic Properties." ORS 469.501(1)(f). Pursuant to that mandate, EFSC has adopted OAR 345-022-0090(1), which provides in relevant part,

> [To] issue a site certificate, the Council must find that the construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse impacts to:
>
> (a) Historic, cultural or archaeological resources that have been listed on, or would likely be listed on the National Register of Historic Places;
>
> (b) For a facility on private land, archaeological objects, as defined in ORS 358.905(1)(a), or archaeological sites, as defined in 358.905(1)(c); and
>
> (c) For a facility on public land, archaeological sites, as defined in ORS 358.905(1)(c).

Thus, EFSC must conclude that there will not be significant adverse impacts to Historical, Cultural, and Archaeological resources with the mitigation that is imposed.

Petitioner contends that the HPMP is not sufficiently specific and detailed or sufficiently final to allow EFSC to conclude that mitigation will be sufficient. EFSC concluded otherwise.

As noted above, slightly less than 1/3 of the proposed project will traverse federal lands, while 69% will cross privately held properties. FO at 466. For the federal properties, the project was subject to NEPA requirements, including the preparation of a Final Environmental Impact Statement by the Bureau of Land Management in 2016. *Id.* ORS 469.370(13) requires that EFSC "conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review." EFSC is thus explicitly empowered to use information and documents generated during the federal process, ORS 469.370(13)(b), and to establish conditions that are consistent with those imposed by federal agencies. ORS 469.370(13)(e).

As part of the site application process, the applicant prepared an EFSC-specific HPMP in addition to the HPMP developed to comply with the federal process. The HPMP was included in the attachments to the Final Order. *See* Attachment S-9. Based on the extent of potential adverse visual impacts, EFSC adopted requirements for the Final HPMP for segments of the Oregon Trail that are eligible for National Register of Historic Places (NHRP) designation. The mitigation that is required for those segments must include design modification

and at least one of a number of mitigation methods with a demonstrated direct benefit to the affected area, defined as the county of the resource site.[6] Table HCA-4b: Mitigation for NRHP-Eligible Oregon Trial/NHT Segments, FO at 497 (ER 1093).

To the extent possible, EFSC's order incorporates site-by-site mitigation measures or plans for further study. The HPMP includes Table HCA-2, which details those measures. FO at 478 *et seq* (ER 1074 *et seq).* For example, for a site assigned ID "35MW00227" and described as "Archaeological Site – Road," there was as yet no evaluation of eligibility for inclusion on the National

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[6] Those methods are, in order of priority:

Purchase of conservation easement or other land protection where trail traces exist

Historic trails restoration within and outside the facility area

Land acquisition

Public signage, publication/print/media, and/or interpretive plans

Trail segment management plans

Additional literature or archival review (e.g. historic maps, local papers);

Remote sensing

National Register nomination

Recording—including HABS/HAER/HALS

Funding for public interpretation, archeological resource, or other program benefiting Oregon Trail resources

Register of Historic Places. The Avoidance Measure or/and Management Recommendations were:

> Avoid. Subsurface probing needed. If the Section 106 determination is eligible, applicant will avoid Site #35MW227 as follows: Approved Route: For the structure work area and pulling & tension site, applicant will relocate or reduce the size of those areas to avoid Site #35MW227; for the existing road, all improvements will be made within the existing road prism thereby avoiding any new impacts; applicant will flag any portion of the boundary of Site #35MW227 that occurs within 100 feet of construction activity. West of Bombing Range Road Alternatives 1 & 2: No avoidance measures are necessary as there are no direct impact proposed for these alternatives.

FO at 478 (ER 1074).

Similar measures are required for numerous sites that have not yet been determined to be eligible, as well as for sites already determined to be eligible, e.g., FO at 483 (Whiskey Creek Segment of Oregon Trail) (ER 1079). This treatment was consistent with EFSC's rule, OAR 345-022-0090

EFSC also adopted several conditions of approval to ensure that direct impact to Oregon Trail Resources on private property are avoided, and indirect impacts mitigated:

> **Historic, Cultural, and Archaeological Resources Condition 1:**
>
> During final design and construction of the facility, the certificate holder *shall design and locate facility components to avoid direct impacts* to Oregon Trail/National Historic Trail resources consistent with Attachment S-9 Historic Properties Management Plan (HPMP)of the Final Order on the ASC.

FO at 500 (emphasis added) (ER 1096).

Historic, Cultural, and Archaeological Resources Condition 2:

Prior to the construction of a phase or segment of the facility, subject to confidential material submission procedures, and based on 1) new survey data from previously unsurveyed areas and 2) the final design of the facility, the certificate holder shall submit to the Department, the State Historic Preservation Office (SHPO), and applicable Tribal Governments, for review and Department approval a final Historic Properties Management Plan (HPMP) Attachment S-9 of the Final Order on ASC. The Department may engage its consultant to assist in review of the HPMP. *The certificate holder shall conduct all construction activities in compliance with the final Department-approved HPMP.*

FO at 539 (emphasis added) (ER 1135).

Historic, Cultural, and Archaeological Resources Condition 3:

Within three years after construction is completed, the certificate holder shall finalize, and submit to the Department for its approval, a final Cultural Resources Technical Report.

a. The results of all cultural resource monitoring required by the Historic Properties Management Plan (HPMP) referenced in Historic, Cultural, and Archaeological Resources Condition 2; and

b. The results of all cultural resources testing or data recovery conducted as a result of unanticipated discoveries as required by the Inadvertent Discovery Plan in the in the Historic Properties Management Plan referenced 1 in Historic, Cultural, 2 and Archaeological Resources Condition 2.

FO at 539-540 (ER 1135-1136).

With those conditions in place, EFSC concluded that the proposed facility is not likely to result in significant adverse impacts to any HCA resource. FO at 540 (ER 1136).

Petitioner asserts that the mitigation measures adopted by EFSC are inadequate. BROP at 5-6. But the HPMP and the Final Order include much specific mitigation information. And the conditions of site approval require that direct impacts be avoided, and that indirect impacts and proposed measures be determined and submitted to ODOE, to SHPO, and to affected Tribes before construction may begin on a segment of the project. Petitioner does not explain why those safeguards are inadequate.

ANSWER TO THIRD ASSGNMENT OF ERROR

EFSC properly delegated approval of the final Historic Properties Mitigation Plan to ODOE.

Preservation of Error

Petitioner filed exceptions that preserved this claim of error.

Standard of Review

Whether EFSC may delegate approval of the final HPMP to ODOE is an issue of law. This court therefore reviews for errors of law.
ORS 183.482(8)(a).

ARGUMENT

As noted above, IPC had no legal right to access and assess Oregon Trail and other Historical, Cultural, and Archaeological resources on private land, a majority of the transmission line corridor, prior to the approval of the application for site certificate. As a result, the Historic Properties Mitigation

Plan proffered by the applicant and approved by EFSC was necessarily preliminary. HCA Resources Condition 2, quoted above, thus required the applicant to submit final plans for each segment of the project to ODOE, to the State Historic Preservation Office, and to relevant tribal governments, and to obtain ODOE's approval before construction begins. EFSC has specific statutory authority to do just that.

ORS 469.402 provides:

> If the Energy Facility Siting Council elects to impose conditions on a site certificate or an amended site certificate, that require subsequent review and approval of a future action, *the council may delegate the future review and approval to the State Department of Energy* if, in the council's discretion, the delegation is warranted under the circumstances of the case.

(Emphasis added.)

Legislative history of that provision demonstrates that the legislature foresaw and provided for exactly the circumstance that exists here: the need for further review and approval of a final mitigation plan to be developed after a site certificate is approved and an applicant is able to obtain better, on-the-ground information. The acting director of the Department of Energy presented to the House Legislative Rules Committee a summary of the 1995 legislation prepared for ODOE by the Department of Justice:

> Site certificates often contain conditions that require further action by the applicant, and subsequent review and approval of that action. *Final development of monitoring or mitigation plans and programs are just one example of this type of condition*. There has

> been continuing uncertainty under existing law regarding whether the EFSC may delegate the approval of the fulfillment of conditions to a site certificate. These reviews commonly require relatively little discretion, or require the expertise of particular state agencies other than the EFSC. Some site certificates contain a relatively large number of these types of conditions, and at the same time there is often a need for quick action in order to avoid project delays. *This section clarifies that the Council may, where it deems it appropriate, delegate the final review and action on the fulfillment of conditions to the Department of Energy.*

App-9. This legislative history is included in the appendix to this brief. While the quoted statement was not made by a legislator, it is properly considered as legislative history because legislators may have relied on it in in understanding the legislation. *See, e.g.*, *State v. Zolotoff*, 354 Or 711, 717–18, 320 P3d 561 (2014) (quoting statements of prosecutors who proposed legislation); *State v. Marshall*, 350 Or 208, 223–24, 253 P3d 1017 (2011) (quoting statements of bill proponents and opponents); *State v. Partain*, 349 Or 10, 20, 239 P3d 232 (2010) (quoting letter that nonlegislator proponents of the bill submitted); *Snider v. Prod. Chem. Mfg., Inc.*, 348 Or 257, 266–67, 230 P3d 1 (2010) (discussing statement of representative of the Oregon State Bar, which sponsored the bill).

Although petitioner argues that EFSC could not delegate final approval to ODOE, the statutes that she cites do not negate EFSC's express statutory authority to do so. BROP at 8. ORS 469.370(7) requires that EFSC issue a final order, either approving or rejecting the application for site certificate, based on the siting standards adopted by rule. ORS 469.401(2) provides that

"[t]he site certificate or amended site certificate shall contain conditions for the protection of the public health and safety, for the time for completion of construction, and to ensure compliance with the standards, statutes and rules described in ORS 469.501 and 469.503." And ORS 469.405 refers to amendment of site certificates, an issue not presented by this case. None of those statutes prevent EFSC from imposing conditions of approval that require the gathering of additional data and formulation of more specific mitigation plans, based on the criteria already adopted by the council.

ANSWER TO FOURTH ASSIGNMENT OF ERROR

Petitioner did not raise the issue of the application of the federal process for determining eligibility for the National Historic Register before the agency, and it is not properly before this court.

Preservation of Error

While ORS 469.403(2) affords parties or limited parties to a contested case a right to judicial review in this court, "[i]ssues on appeal shall be limited to those raised by the parties to the contested case proceeding before the court." Petitioner did not raise this issue in the contested case proceeding, and may not raise it now. Petitioner's exceptions regarding Historical, Cultural, and Archaeological Resources are included in the excerpt of record. (ER 139 *et seq.*)

Standard of Review

Whether an error is properly preserved is a question of law for this court.

ARGUMENT

In this court, petitioner argues that EFSC could not rely on the federal NEPA review to assess impacts to historical, cultural, and archeological resources because state law defines those resources differently from federal law. BROP at 12. But while petitioner raised numerous issues below, she did not raise any issue about the alleged divergence between the state and federal standards for historic, cultural, and archeological resources.[7] This court should decline to address that issue. *See* ORS 469.403(2) ("Issues on appeal shall be limited to those raised by the parties to the contested case proceeding before the council.").

In any event, EFSC did not err in relying on the Section 106 process applicable to federal agencies. As noted above, ORS 469.370(13) requires that EFSC conduct its site certificate review in a manner that is consistent with and does not duplicate federal NEPA processes. That includes using information and documents prepared for federal agency review, ORS 469.370(13)(b), and establishing conditions of approval that are consistent with federal conditions, ORS 469.370(13)(e). The lead federal agency, BLM, will determine eligibility

[7] Petitioner's exceptions are included in the excerpt of record. B2HAPPDoc1219

of particular sites for inclusion on the National Register of Historic Places, and the conditions imposed by EFSC require the certificate holder to avoid direct impacts and to mitigate indirect impacts with specific measures. EFSC properly relied on the federal review to the extent it addressed resources covered by state law as well.

ANSWER TO FIFTH ASSIGNMENT OF ERROR

EFSC did not modify a mandatory condition of approval.

Preservation of Error

Petitioner preserved this assignment of error by proposing an alternate condition of approval. *See* Proposed Contested Case Order at 288 (B2HAPPDoc1340) (ER 540).

Standard of Review

An agency must comply with its own rules. Whether the council did so is a question of law, and is reviewed for errors of law under ORS 183.482(8)(a).

ARGUMENT

Petitioner has not identified where in the Final Order the error that she complains of occurred.[8] She may be referring to General Standard of Review Condition 7 on page 95 of the Final Order (ER 691), which addresses when

[8] While petitioner asserts that she had difficulty accessing the record electronically filed with the court, nothing prevented her from referencing the page or pages on which the alleged error occurred, or the number of the footnote that she complains about.

construction can begin at particular sites along the route. EFSC explained the change from the Draft Proposed Order prepared by ODOE as follows:

> The Council modifies General Standard of Review Condition 7 below to remove the language of the condition that does not apply to transmission lines and maintain the portion of the condition that would apply to the facility.

(ER 691.) As modified, General Condition 7 is as follows:

> **General Standard of Review Condition 7**: The certificate holder may begin construction, as defined in OAR 345-001-0010(12), or create a clearing on a part of the site if the certificate holder has construction rights on that part of the site and the certificate holder would construct and operate part of the facility on that part of the site even if a change in the planned route of transmission line occurs during the certificate holder's negotiations to acquire construction rights on another part of the site.

FO at 95 (ER 691).

Petitioner argues that as modified, General Condition 7 does not comply with OAR 345-025-006(5). BROP at 15. But the condition does not change the rule's requirements; it merely rephrases the rule and omits references to facilities other than transmission lines. The referenced rule provides:

> Except as necessary for the initial survey or as otherwise allowed for wind energy facilities, transmission lines or pipelines under this section, *the certificate holder may not begin construction*, as defined in OAR 345-001-0010, or create a clearing on any part of the site *until the certificate holder has construction rights on all parts of the site*. For the purpose of this rule, "construction rights" means the legal right to engage in construction activities. For wind energy facilities, transmission lines or pipelines, *if the certificate holder does not have construction rights on all parts of the site, the certificate holder may nevertheless begin construction*, as defined in OAR 345-001-0010, or create a clearing on a part of the site *if*

> *the certificate holder has construction rights on that part of the site and*:
>
> (a) *The certificate holder would construct and operate part of the facility on that part of the site even if a change in the planned route of a transmission line or pipeline occurs during the certificate holder's negotiations to acquire construction rights on another part of the site*; or
>
> (b) The certificate holder would construct and operate part of a wind energy facility on that part of the site even if other parts of the facility were modified by amendment of the site certificate or were not built.

(Emphasis added.) The rule thus establishes a general principle that a certificate holder may not begin construction on any part of an energy facility unless it has secured construction rights for the entire facility. The rule then establishes exceptions to that general principle. With regard to a transmission line, only exception (a) is applicable: the certificate holder can begin construction on part of a site, even if it does not have construction rights for the entirety of the transmission line, if it would construct and operate that part of the line if the planned route were to change elsewhere.

General Condition 7 thus merely restates the rule. Instead of stating that construction *may not* occur unless condition (a) is met, the condition states that construction *may* occur if condition (a) is met. While that change may be unnecessary and inartful, it amounts to a plausible interpretation of a rule that EFSC itself has adopted, and is therefore binding on this court. *See Don't Waste Oregon Com. v. Energy Facility Siting,* 320 Or 132, 142, 881 P2d 119

(1994) ("Where, as here, the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted 'erroneously'").

There is no merit to the Fifth Assignment of Error.

CONCLUSION

The Energy Facility Siting Council and the Oregon Department of Energy did not err in any of the ways petitioner claims. EFSC's final order approving the application for site certificate should therefore be affirmed.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 3, 2023, I directed the original Respondents' Brief of the Oregon Department of Energy and the Energy Facility Siting Council to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Lisa F. Rackner; Sara Kobak and Andrew Lee attorneys for respondent Idaho Power Company, by using the court's electronic filing system.

I further certify that on January 3, 2023, I directed the Respondents' Brief of the Oregon Department of Energy and the Energy Facility Siting Council to be served upon Irene Gilbert, *pro se* petitioner and Jocelyn Claire Pease, attorney for respondent Idaho Power Company, by mailing two copies, with postage prepaid, in an envelope addressed to:

Irene Gilbert
2310 Adams Ave.
La Grande, OR 97850

Jocelyn Claire Pease
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419 SW 11th Ave., Ste. 400
Portland, OR 97205

Continued…

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 7,017 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

/s/ Denise G. Fjordbeck

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DOCKET PCN 5 - CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2023 Idaho Power Company's Letter regarding EFSC Appeals – Idaho Power's and State Respondents' Answering Briefs submitted in Oregon Supreme Court dockets S069919, S09920, and S069924 and Attachments was served by USPS First Class Mail to said person(s) at his or her last-known address(es) as indicated below:

By: USPS First Class Mail:

John C. Williams
PO Box 1384
La Grande, OR 97850

DATED: January 4, 2023

/s/ Suzanne Prinsen
Suzanne Prinsen
Legal Assistant