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VIA ELECTRONIC FILING

Oregon Public Utility Commission
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RE: Docket AR 626 – Consumer-Owned Utilities’ Land Use Comments

Dear Commissioners:

This letter is being submitted on behalf of the Oregon People’s Utility District Association (“OPUDA”), the Oregon Rural Electric Cooperative Association (“ORECA”), Oregon Municipal Electric Utilities (“OMEU”), and Eugene Water & Electric Board (“EWEB”). Collectively, OPUDA, ORECA, OMEU, and EWEB comprise Oregon’s consumer-owned electric utilities (“COU”). Pursuant to Administrative Law Judge (“ALJ”) Christopher Allwein’s Memorandum, dated June 8, 2022, the COUs provide these comments to address various land use issues raised in this proceeding.

The COUs appreciate the extra attention the Commission, the ALJ, and Commission Staff have paid to the intersection of local land use regulations and the process for utilities to obtain a Certificate of Public Convenience and Necessity (“CPCN” or “Certificate”). In particular, the Commission’s willingness to involve local planning agencies has served to help crystalize the issues the Commission must address to meet its obligations for state agency coordination under ORS 197.180.

ORS 197.180 requires the Commission to make findings that its actions are compatible with Statewide Planning Goals and acknowledged comprehensive plans (“Compatibility Findings”). To better address the Commission’s obligation, it is useful to review some of the history of this rulemaking proceeding specifically and land use planning in Oregon generally.

With respect to this proceeding, many of our prior comments to the Commission and to Commission Staff were precipitated by early versions of the draft rules that created unnecessary hurdles in the CPCN petition process. The latest version of the proposed rules, issued as part of the Notice of Proposed Rulemaking on March 31, 2022 (“Proposed Rules”), included a major change to earlier versions of the rules by removing the language in OAR 860-025-0030(3) that

would have prevented a petitioner from even applying for a Certificate without having first obtained land use approval. With that change, stakeholders and the Commission can now focus on the type of evidence the Commission needs to make its Compatibility Findings.

With respect to land use in Oregon generally, much has changed since the Commission first adopted its state agency coordination rules. One change to consider is that all local land use jurisdictions in the state now have acknowledged comprehensive plans and implementing land use regulations. The significance of this fact is that compliance with Statewide Planning Goals is achieved through direct compliance with those comprehensive plans and regulations.¹ In other words, if the Commission has evidence that a proposed transmission line is compatible with the affected city or county's land use regulations, it necessarily has evidence sufficient to find that the line is compatible with the Statewide Planning Goals.

Another change that has occurred on a broad scale is the adoption by state agencies of the LUCS (land use compatibility statement) mechanism. Two agencies of note that have adopted the LUCS process are the Oregon Department of Environmental Quality ("DEQ") and the Oregon Department of State Lands ("DSL"). DEQ's use of the LUCS mechanism is express in its rules.² DSL's rules are not as express, but that agency does use the LUCS mechanism to implement its rules. One specific DSL rule is OAR 141-085-0565, which states in part:

(3) Department Determinations. The Department will issue a permit if it determines the project described in the application:

(a) Has independent utility;

(b) Is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.990; and

(c) Would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation, when the project is on state-owned lands.

(4) Department Considerations. In determining whether to issue a permit, the Department will consider all of the following:

* * *

(g) Whether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the

¹ See ORS 197.175(2)(d). See also *Byrd v. Stringer*, 295 Or 311, 317 (1983) ("The statewide goals are necessarily met if the county's decision comports with the acknowledged plan and implementing ordinances.").

² See, e.g., OAR 340-018-0050(2)(a)(B), stating "The Department shall rely on an affirmative LUCS as a determination of compatibility with the acknowledged comprehensive plan unless otherwise obligated by statute."

area where the proposed fill or removal is to take place or can be conditioned on a future local approval to meet this criterion;

A LUCS submitted to DSL is the local planning jurisdiction's method of informing that agency if the proposed permit is compatible with land use regulations, whether or not a land use permit has already been obtained or will be obtained in the future.

As the Commission develops final rules in this proceeding, the COUs strongly urge the Commission to expressly adopt a LUCS mechanism like other state agencies have. The LUCS is the most straightforward way for a petitioner and the Commission to determine compatibility with local land use regulations.

During the informal workshops the ALJ organized around land use issues, stakeholders discussed the "typical" LUCS structure, which allows a local planner to make one of three determinations: (1) the project is compatible with land use regulations because it has already received land use approval; (2) the project is compatible with land use regulations because it is an outright permitted use that does not require land use approval; or (3) the project will be rendered compatible with land use regulations if it obtains land use approval. During one of those workshops, the ALJ noted that the Commission's current rules already mirror that structure. The current version of OAR 860-025-0030(3) states that the Commission must make Compatibility Findings based on at least one of the following:

(a) A copy of the local land use permit from each affected city or county planning agency, building department, or governing body stating that the proposed transmission project has received the jurisdiction's approval; or

(b) A copy of a letter from each affected local planning agency, building department, or governing body stating that the proposed transmission project is permitted under the jurisdiction's comprehensive plan, land use regulations, and development codes, but does not require specific approval by the jurisdiction; or

(c) Other written or oral land use information and documentation equivalent to OAR 860-025-0030(3)(a) or (b) above properly presented to the Commission from an authorized representative from each affected city or county. . . .³

The only difference between the existing rule language and the LUCS structure the COUs are advocating for is the language in OAR 860-025-0030(3)(c), which is vague with respect to the kind of "other information" that is sufficient to make Compatibility Findings. Because the Commission has already allowed "other information" to serve as the basis for Compatibility Findings, the COUs believe the best approach is to expressly clarify that a LUCS can serve as

³ The Proposed Rules include the same language, renumbered as OAR 860-025-0040(2).

that other information. To that end, the COUs recommend adding an additional section to the Proposed rules, which is provided in a redline format in the attached Exhibit A.⁴

During the informal workshops, there was strong support for the LUCS mechanism from the participating county planners. The staff representative from the Department of Land Conservation and Development (“DLCD”) was also supportive, provided that any final rule language should not allow the Commission to supplant the local planning jurisdiction’s regulations with its own.

One key piece of the COU proposal is that it provides a mechanism for the Commission to develop a record for Compatibility Findings even if land use permits have not yet been obtained. It does this by allowing the city or county to identify in the LUCS all permits that need to be obtained in order to make a project compatible with land use regulations. In response to the feedback from county planners and DLCD staff, the proposed language provides that any LUCS that is not based on land use permits having already been issued, or that is not based on a transmission line project being an outright permitted use, must confirm the acknowledged comprehensive plan’s general provisions will not be substantially affected by issuance of a certificate if the permits identified in the LUCS are obtained. This approach is consistent with DLCD’s rules, which state an agency program or action is compatible when the agency determines “that the acknowledged comprehensive plan’s general provisions will not be substantially affected by the agency’s program or action.”⁵ In this way, it also addresses DLCD’s concern that new rule language not supplant local land use regulations.

One obvious benefit of relying on a LUCS is that it leaves the determination of land use compatibility with the land use experts – city and county planners. Indeed, by relying on a LUCS, the Commission would not only ensure “compatibility” with local land use regulations, it would ensure compliance with those regulations, which is, at heart, what ORS 197.180 aims to achieve. Further, the city and county process is the primary venue in which the public weighs in on siting decisions – whether as part of the adoption of development regulations in general, or as part of a specific permit application like a conditional use permit.

Another benefit of the COU proposal is that it negates the need to distinguish between land use approvals that are discretionary in nature (e.g. Type III conditional use permits) and those that are ministerial in nature (e.g. Type I zoning permits). As the Commission seemed to acknowledge, it makes little sense to require a petitioner to obtain, or even apply for, some non-discretionary, ministerial land use permits until just before construction of a project. Yet, it is difficult to categorize land use permits into these various categories for rulemaking purposes because they are treated differently in different land use jurisdictions. The LUCS approach would allow each affected jurisdiction to identify all permits that are needed to make the project compatible with land use regulations, whether or not they are discretionary or non-discretionary permits.

⁴ The language proposed by the COUs was developed by treating the language of the Proposed Rules as the starting point, and then adding redline edits to that language.

⁵ See OAR 660-030-0070(2)(b).

Another benefit of the COU proposal is that it addresses the situation where a petitioner cannot, as a matter of law, seek land use approval until it holds an interest in the property to be developed. As the COUs have described in earlier comments to the Commission, some cities and counties do not allow a petitioner to apply for land use approval if it does not have an interest in the property being developed. The petitioner may therefore need to complete the CPCN process to begin the process of acquiring the property right before it can even begin the land use process. But if the Commission cannot make Compatibility Findings because the land use process has not concluded, the petitioner would not be able to complete either process. The LUCS mechanism avoids this Catch-22 scenario and allows the petitioner to proceed with the CPCN and land use permits in parallel.

One potential concern the Commission and at least one stakeholder has expressed is that the approval of a Certificate prior to a petitioner obtaining final land use approval could create risk for a property owner, because the petitioner could proceed with condemnation without a final land use determination. The COUs appreciate this concern, as they have been consistent in their position that condemnation is a process of last resort. However, notwithstanding that concern, the LUCS mechanism does not add any additional risk to a property owner. If the petitioner does not obtain land use approval for the transmission line project, it cannot construct that project. The CPCN is only one step in a much larger regulatory process involving many agencies, and the issuance of a Certificate simply does not allow a utility to construct a transmission line unless and until all other regulatory approvals have been acquired. However, if the Commission believes that a LUCS that makes a provisional determination does create some additional risk for the property owner, the Commission could add language to the Proposed Rules to expressly clarify that the Certificate cannot be relied on for construction of a project until all land use approvals identified in the LUCS have been obtained.

During the informal workshops the ALJ organized around land use issues, stakeholders also discussed the “waiver” language in the Proposed Rules (OAR 860-025-0030(3)). The purpose of that language is to provide a mechanism for a petitioner to seek a waiver of the Commission’s rules if it cannot otherwise provide information sufficient for the Commission to make Compatibility Findings. The COUs have considered whether that language should be revised to make clear that the “waiver” proposed in the rules is a waiver to the Commission’s application requirement and not a waiver of any applicable local land use regulations. Upon further consideration, however, the COUs believe the waiver language is unnecessary and should be deleted altogether.

First, the Commission already has authority to grant a waiver from its rule requirements. Second, the purpose of the proposed rule language was apparently to allow a petitioner to proceed with a CPCN petition even if it had not yet obtained land use approval for the transmission line project – i.e. by seeking a waiver of the application requirements. The Commission has already proposed deleting the language in OAR 860-025-0030(3) that would have prevented a petitioner from even applying for a Certificate without having first obtained land use approval. The waiver language therefore does not seem to serve its original purpose. Further, if a petitioner includes a LUCS with the petition, no waiver would be required because

the Commission would have sufficient information on which to make a decision regarding Compatibility Findings, and a waiver of any Commission rule would not be required.

If the Commission does decide to keep the waiver language, the COUs recommend that the language be modified to clarify that “waiver” refers to a waiver of Commission rules rather than a waiver of any local land use provision. If the Commission also adopts language like that proposed by the COUs relating to the LUCS mechanism, the waiver language will require slight modifications because the language in the proposed sections of OAR 860-025-0030(3) contains cross references to the proposed language of 860-025-0040 that would need to be updated. The COUs have provided suggested edits to that section in the attached Exhibit B.

The COUs look forward to the upcoming hearings in the proceeding and will be available to discuss their proposal in more detail.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Tommy A. Brooks', with a stylized, cursive script.

Tommy A. Brooks

Exhibit A

OAR 860-025-0040

(1) The Commission, as part of its approval of a petition filed under OAR 860-025-0030, shall adopt findings which assure the proposed transmission project complies with the Statewide Planning Goals and is compatible with the acknowledged comprehensive plan(s) and land use regulations of each local government where the project is to be located. The Commission's findings shall be developed consistent with the rules and procedures in the Commission's state agency coordination program pursuant to ORS 197.180.

(2) The Commission's land use findings assuring the proposed project's goal compliance and plan compatibility shall be based on the hearing record, which shall include at least one of the following:

(a) A copy of the local land use permit from each affected city or county planning agency, building department, or governing body stating that the proposed transmission project has received the jurisdiction's approval; or

(b) A copy of a letter from each affected local planning agency, building department, or governing body stating that the proposed transmission project is permitted under the jurisdiction's comprehensive plan, land use regulations, and development codes, but does not require specific approval by the jurisdiction; or

(c) Other written or oral land use information and documentation equivalent to OAR 860-025-0040(2)(a) or (b) above properly presented to the Commission from an authorized representative from each affected city or county.

(3) In making findings under section (2) of this rule, the Commission may rely on a Land Use Compatibility Statement ("LUCS") issued by an authorized representative from an affected city or county to the extent the LUCS:

(a) confirms the city or county has issued a land use permit approving the proposed transmission project;

(b) states the applicable city or county acknowledged comprehensive plan does not require specific approval of the proposed transmission project; or

(c) states the proposed transmission project will be compatible with the jurisdiction's acknowledged comprehensive plan if petitioner obtains the land use permits identified in the LUCS, and the LUCS confirms the acknowledged comprehensive plan's general provisions will not be substantially affected by issuance of a certificate if those permits are obtained.

(4) In the event that the Commission cannot make findings under section (2) of this rule for any of the reasons enumerated in OAR 660-030-0065(3), the Commission may adopt goal compliance findings pursuant to OAR 660-030-0065(3).

(5) If a proposed transmission line is subject to the jurisdiction of the Energy Facility Siting Council (EFSC), the Commission will not take final action until EFSC has issued a site certificate for the transmission line, and the requirements of OAR 860-025-0040(1), (2), and (3) shall not apply.

Exhibit B

860-025-0030

Petitions for Certificate of Public Convenience and Necessity (CPCN) for Construction of Overhead Transmission Lines

* * *

(3) At the time of filing, if the petitioner cannot include documentation to support a finding under OAR 860-025-0040(2) or (5), the petitioner must submit a request for a waiver of those rules concurrent with the petition. The petitioner will provide notice that the petition includes a request for waiver at the time of filing. The waiver request must include:

- (a) The specific part of the rule under OAR 860-025-0040 for which a waiver is being sought;
- (b) An explanation that clearly and comprehensively explains the need for the waiver, including a narrative of why the required documentation cannot be obtained, along with any reliable evidence to support and verify the petitioner's claim that such documentation cannot be obtained;
- (c) In the event that the petitioner seeks a waiver for OAR 860-025-0040(2); the petitioner shall request that the Commission make its findings under OAR 860-025-0040(4).
- (d) In the event that the petitioner seeks a waiver for OAR 860-025-0040(5), the petitioner will provide information from the relevant, pending Energy Facilities Siting Council (EFSC) proceeding to demonstrate that EFSC approval is being sought.
- (e) Staff will review the waiver request upon receipt of the petition. If Staff finds the waiver request is reasonable and adequately supported, it will recommend the Commission approve the waiver request within 90 days of the receipt of the petition at a regular public meeting.
- (f) If Staff finds the waiver request is not supported, it will recommend the Commission make a finding that the petition is incomplete and that it will not be considered by the Commission, pursuant to 860-025-0030(4).