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VIA ELECTRONIC FILING

Oregon Public Utility Commission
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RE: Docket AR 626 – Initial Comments of Consumer-Owned Utilities

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 the Commission's Notice of Proposed Rulemaking filed with the Secretary of State on March 31, 2022 ("Notice"), this letter serves as the COUs' joint comments regarding the Commission's proposed rules relating to the process for utilities to obtain a Certificate of Public Convenience and Necessity ("CPCN" or "Certificate").

The COUs participated in the informal proceedings that preceded the Notice. We appreciate the robust discussion that has occurred over the years with Commission Staff and stakeholders. We want to specifically acknowledge the work of the Commission in developing a final version of the proposed rules, which resulted in meaningful improvements to the rules compared to earlier discussion drafts. We look forward to working with the Commission and others to develop a final, sharper version of the rules that will meet the needs of all stakeholders.

Our comments to the proposed rules take multiple forms. In this letter we describe the principles that have guided, and will continue to guide, our involvement during the rulemaking process, along with a narrative explaining the COUs' position on some of the major substantive provisions in the proposed rules. We also offer specific language changes the COUs believe will make the final rules clearer and more consistent.

I. Guiding Principles

There are several principles that serve as the basis for the COUs' comments. First, it is important that the rules clearly distinguish between the criteria the Commission will use for its

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decision to approve or deny a Certificate and the information the Commission will use to determine if those criteria are satisfied. The Commission's proposed rules do this in a much clearer way than earlier discussion drafts.

Second, the rules must acknowledge the complexity of planning, designing, permitting, and constructing a transmission line. The CPCN process is only one small step in the overall process of completing a transmission line. Further, the Commission's statutory role is to "determine the necessity, safety, practicability and justification in the public interest for the proposed transmission line." The Commission's process must necessarily be in sync with the myriad other agencies and regulators that determine the ultimate configuration of a transmission line. An appropriate lens for reviewing the proposed rules is that the Commission's role is to confirm why a utility is building a transmission line, whereas other agencies and regulators determine where or how a utility constructs the line.

Third, the rules should be structured in a way that acknowledges the Commission's limited role in condemnation proceedings, as the rules are triggered only when condemnation is required. As set forth in ORS 758.015(2), a CPCN is used in the condemnation process as "conclusive evidence that the transmission line for which the land is required is a public use and necessary for public convenience." Condemnation, however, is a much broader issue that requires consideration of more than just public necessity. For example, a condemner must also establish that the "improvement or project is planned or located in a manner which will be most compatible with the greatest public good and the least private injury."¹ That determination, however, is left to the condemning entity and the courts, and it is not part of what the Commission has been tasked to review through the CPCN statutes. And, while that determination may be reviewable by the courts, the Oregon Supreme Court has made clear "that the condemnor has a right to select the route it desires to acquire for a right of way, with which selection the courts will not interfere except in case of a clear showing of bad faith [, fraud or abuse of discretion] on the part of the condemnor in making such selection."²

Finally, the rules should reflect the variety of utilities that are subject to the CPCN rules. With only a few exceptions – the CPCN process being one of them – COUs are not subject to Commission regulation. Being consumer-owned and not-for-profit, the COUs simply have a different process for planning and funding transmission facilities. That process is ultimately led by a governing body to which COU customers not only have direct access, but which those customers directly elect to the governing body. While the proposed rules do a better job acknowledging how the Commission regulates COUs, we are nevertheless proposing revisions that help adhere to this guiding principle.

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¹ ORS 35.235(2).

² See *Moore Mill & Lumber Co. v. Foster*, 216 Or 204, 237 (1959) also stating "There is necessarily entrusted to those who possess the power of eminent domain a broad discretion in the selection of the property essential to the contemplated public use. . . ." at 243-44 (1959).

II. Substantive Issues

A. Land Use Approval

The COUs appreciate that the Commission's proposed rules do not appear to require a utility to have full land use approval prior to submitting a petition for a CPCN or prior to the Commission approving the petition. As we understand the rules, a utility that has not yet obtained land use approval can seek a waiver that, if approved, would allow the Commission to proceed with its consideration of the petition and adopt its own findings addressing whether the proposed transmission line is compatible with Statewide Planning Goals.

While the proposed rules are a marked improvement from earlier discussion drafts, the proposed rules lack several details, or fail to address several areas, which are necessary for the final rules to be workable.

As an initial matter, the proposed rules contemplate that the Commission can take up to 90 days after the petition is filed before acting on a waiver request.³ The proposed rules, however, do not address what Commission Staff, the petitioner, or participating stakeholders are to do during that time period. The COUs recommend that the rules be revised to state that, unless and until the Commission denies the waiver, the petition should be processed in the normal course. In our experience, the CPCN process at the Commission takes at least seven months, and the Commission did not take final action on one petition for almost two years after it was filed. Adding three months to this long of a process, even when the waiver is going to be approved, is unnecessary.

Second, the proposed rules do not establish any standard the Commission will apply for approving or denying a waiver. The COUs request that the Commission and stakeholder discuss this issue further so that the Commission can develop language that will help identify a standard the Commission can apply in this context.

Third, the proposed rules appear to allow a waiver only where land use approval cannot be obtained and the proposed rules do not address a situation where it is prudent for a utility to seek land use approval at a later time. For example, in some jurisdictions a conditional use or other permit is valid for a limited duration, such as one year. In those circumstances, a petitioner required to obtain land use approval in advance of a CPCN petition may find that the land use approval has lapsed given the amount of time it can take to assemble a petition and get through the CPCN process. Even if the CPCN process were expedited, the petitioner must still go through a very prescriptive condemnation process, which it cannot begin until the CPCN process has concluded. In those circumstances, it may be more prudent for the petitioner to initiate the CPCN process and the land use process at the same time and, even though the petitioner could

³ The proposed rules are vague in a sense that it is not clear if the 90-day time limit applies to the time in which Staff has to make a recommendation, or the time for the Commission to take an action. We assume it is the latter, but this language, too, should be clarified.

obtain land use approval first, a waiver allowing the petition to proceed without land use approval would be in the public interest.

Similarly, the proposed rules make no distinction between discretionary land use approvals and non-discretionary land use approvals. Most jurisdictions categorize discretionary land use decisions as either “Type 2” or “Type 3” decisions. Zone changes, conditional use permits, waivers, and some administrative decisions fall within that category. Non-discretionary decisions are usually categorized as “Type 1” decisions. These include zoning permits, site plan reviews, or other ministerial actions that an applicant has a right to obtain and that simply document compliance with the local code. However, it does not always make sense to obtain such non-discretionary permits until just before construction of the project. These permits often rely on a final design to show for example, that a setback is being met. The COUs recommend that the Commission grant a waiver for any Type 1 decisions that have not yet been obtained at the time a petition for a CPCN is filed.

During the informal stages of this proceeding, the COUs recommended that the Commission consider granting CPCNs provisionally, expressly subject to final land use approval. So far, we have not heard any arguments explaining why such an approach is not possible. One concern expressed was that the Commission may not want to grant a CPCN, which is a precursor to condemnation, if it did not have confidence land use approval could be obtained. Respectfully, this should not be a concern. No transmission line will be constructed if the petitioner cannot obtain all necessary land use approvals. The COUs recommend the Commission revise the proposed rules to allow the grant of a petition for a CPCN even if land use approvals have not yet been obtained, provided that the final order be conditioned on obtaining those land use approvals. Specifically, the COUs recommend language similar to the following;

A petitioner may not rely on the approval of a petition to construct any portion of a proposed transmission line for which a future land use review is required until such review has been completed and any portion of the proposed transmission line subject to that review has been approved by the applicable planning jurisdiction.

B. Other Regulatory Approvals

The utilities in this docket, including the COUs, have supported language that would require the Commission to give deference to other regulatory approvals that have acknowledged the need for a transmission line. For some utilities, this may come in the form of an acknowledged Integrated Resource Plan. For the COUs, this comes in the form of its own governing body.

The proposed rules indicate that the Commission will give “due consideration” to other regulatory reviews and approvals for the transmission line. The COUs recommend this language

be revised to expressly acknowledge that such consideration will be given to the governing body of a COU. As noted above, COUs are consumer-owned and not-for-profit. As a result, there is no incentive for a COU to construct a line that it does not need. Further, COU customers can play a direct role in the decision-making process and, if a COU makes a decision its customers do not agree with, there is direct recourse through the ballot that is used to elect the COU's board, whether the COU is a private cooperative or a public entity like a city or people's utility district. These public bodies should be afforded the same deference the Commission is willing to give to other public agencies.

C. Other Proposed Language Changes

In addition to the substantive language changes proposed above, the COUs have identified several specific changes that should be made to the proposed rules to make them clearer and easier to apply. The COUs will eventually provide a redline version of the rules to address all of their proposed changes based on the discussions that occur during the formal proceeding. In the meantime, the COUs identify the following changes that could be made immediately and included in any future version of the rules:

1. The rules interchangeably refer to the "proposed transmission line," "transmission line," "transmission line project," "project," and "line." The COUs recommend the rules refer only to the "proposed transmission line," which is the most accurate and complete of the various uses.
2. As drafted, OAR 860-025-0030(2)(b) and OAR 860-025-0030(2)(c)(B) are redundant. Each requires the petitioner to include the petition a description or narrative of the "proposed route, voltage, and capacity" of the proposed transmission line. If the language in OAR 860-025-0030(2)(c)(B) is intended to apply only to the maps and figures that accompany the description or narrative, that needs to be clarified.
3. OAR 860-025-0030(2)(c)(F) includes language that parcels of land, or any interests therein, must be identified and "show the general contour, uses and improvements." This language should be removed. First, it does not make sense to show a contour, use, or improvement for an interest in land. Second, this language is ambiguous and terms like "contour" and "use" are not defined. To the extent contours require surveys, it may not be possible to show such details until a petitioner has the right to enter onto the property. Similarly, the specific use of the property may not be evident. The rules should allow petitioners an option to generally describe uses based on what is evident in the area or allowed in the applicable zoning designation.
4. OAR 860-025-0030(2)(f) requires a petition to include a "certificate of service" showing notice of the petition was mailed to persons "who have interests, known or of record, in the land to be affected or traversed by the proposed route." This

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language needs several revisions. First, the Commission rules for service are specific to contested case proceedings and relate to providing documents to parties. The language in this rule, which is triggered prior to any participant obtaining party status, should refer to a “certificate of mailing.” Second, petitioners should be required to provide notice only to owners of record and not to anyone else “known” to have an interest, as it is not clear whether or how it will be determined that a person was known to have an interest. Finally, the phrase “to be affected or” should be removed from this rule. “Affected” is subjective and could apply to property that the transmission line does not cross.

5. OAR 860-025-0030(2)(h) required the petition to include “[s]uch additional information as may be needed for a full understanding of the petition.” This language should be modified. At the time a petition is filed, only the petitioner can determine what is necessary for a full understanding of the petition. This language should read: “Such additional information Petitioner determines is necessary for a full understanding of the petition.”

III. Conclusion

The COUs appreciate the Commission’s willingness to continue the discussions we have had and its commitment to continue refining the proposed rules. We look forward to responses from the Commission and other stakeholders to each issue we have commented on, as well as our specific suggestions to amend the proposed rules.

Sincerely,

A handwritten signature in blue ink, appearing to read 'T. Brooks', with a stylized flourish at the end.

Tommy A. Brooks