

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

PCN 5

In the Matter of	GREG LARKIN'S BRIEF
Idaho Power Company	OBJECTING TO THE
PETITION FOR CERTIFICATE OF	ISSUANCE OF A
PUBLIC CONVENIENCE AND	CERTIFICATE OF
NECESSITY	PUBLIC CONVENIENCE
	AND NECESSITY

Please consider the following arguments regarding the lack of justification for the issuance of a Certificate of Public Convenience and Necessity.

OREGON STATUTES AND RULES SUPPORTING THE CONTESTED CASES IN
THIS BRIEF

PUC STATUTES

ORS 758.015 (1)

(1) In order to condemn land for the overhead transmission line, the **developers** shall petition the Public Utility Commission for a certificate of public convenience and necessity setting forth a detailed description and the purpose of the proposed transmission line, the estimated cost, the route to be followed, the availability of

alternate routes, a description of other transmission lines connecting the same areas, and **such other information in such form as the commission may reasonably require in determining the public convenience and necessity.**

(2) **The commission shall give notice and hold a public hearing on such petition.** The commission, **in addition to considering facts presented at such hearing, shall make the commission's own investigation to determine the necessity, safety, practicability and justification in the public interest for the proposed transmission line and shall enter an order accordingly.**

ORS 756.040 General powers.

(1) In addition to the powers and duties now or hereafter **the commission shall represent the customers of any public utility or telecommunications utility and the public generally in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction.** transferred to or vested in the Public Utility Commission, In respect thereof **the commission shall make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. The commission shall balance the interests of the utility investor and the consumer** in establishing fair and reasonable rates. ...”.

(3) The commission may participate in any proceeding before any public officer, commission or body of the United States or any state for the purpose of **representing**

the public generally and the customers of the services of any public utility or telecommunications utility operating or providing service to or within this state.

756.062(2) Compliance with laws

(2) The provisions of such laws shall be liberally construed in a manner consistent with the directives of ORS 756.040 (1) to promote the public welfare, efficient facilities and substantial justice between customers and public and telecommunications utilities.

ORS 772.055 Condemnation procedure. No condemnation of private property shall be made under ORS 772.010 to 772.020 or 772.030 to 772.050 until compensation is made to the owner thereof, irrespective of any increased value thereof by reason of the proposed improvement by such corporation, in the manner provided in ORS chapter 35.

ORS 772.210 (4) FOREST LAND VALUES

The proceedings for the condemnation of such lands shall be the same as that provided in ORS chapter 35, provided that any **award shall include**, but not be limited to, damages for **destruction of forest growth**, premature cutting of timber and diminution in value to remaining timber caused by increased harvest costs.

Rule 860-025-0030

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

(1)

Petitions under ORS 758.015 (Certificate of public convenience and necessity), for a certificate of public convenience and necessity to construct an overhead transmission line, which will necessitate a condemnation of land or an interest therein, shall contain the following information:

(a)

The information required under OAR 860-025-0005 (Applicability and Formal Requirements).

(b)

A detailed description and the purpose of the proposed transmission line which shall include but not be limited to a general description of the proposed route, voltage and capacity of the line. The project description should be in sufficient detail to enable a full understanding of the public convenience, necessity and justification in the public interest for the proposed transmission line and the benefits to be derived therefrom, and to enable a determination of its safety and practicability.

(c)

A map or maps drawn to appropriate scale showing the general location and boundaries of petitioner's service area to be connected or served by the proposed transmission line and showing, by appropriate distinguishing colors and symbols, but not limited to, the following information:

(A)

Proposed route, voltage and capacity of the proposed transmission line.

(B)

Available alternate routes.

(C)

Other transmission lines and substations of petitioner connecting or serving or capable of being adopted to connect or serve the areas covered by the proposed transmission line.

(D)

The terminals, substations, sources of energy, and load centers related to the proposed project.

(E)

Land to be condemned.

(d)

An estimate of the cost of developing the project including:

- (A) **Land and land rights to be condemned.**
- (B) **Other land and land rights acquired or to be acquired.**
- (C) Transmission facilities.
- (D) **Substation, accessory and miscellaneous labor, plant and equipment.**
- (E) **Indirect and overhead costs including engineering, legal expense, taxes, interest during construction, and itemized administrative and general expenses.**
- (F) **Any other costs, direct or indirect, relating to the project.**
- (G) **Such explanation of the various cost estimates as needed to enable a full understanding of their basis and derivation.**
- (e) **An explanation of the financial feasibility of the proposed project, including the kind, nature, extent and estimated growth of the energy requirements or reasonably anticipated need, load or demand, for the proposed transmission line.**
- (f) **A description of the property and interest to be condemned, a full explanation of the intended use, and the specific necessity and convenience for the taking of said property:**
 - (A) A map must be included whereon the land to be condemned is clearly marked, and the general contour, culture and improvements along that portion of the route are clearly shown.
 - (B) The names and addresses of all persons who have interests, known or of record, in the land to be affected or traversed by the proposed route from whom applicant has not acquired the necessary rights of way or option therefor.
- (g)

A statement and explanation with supporting data comparable to that described in subsections (d) and (e) of this section for possible alternative routes.

(h)

Such additional information as may be needed for a full understanding of the situation.

(i)

Such information and supporting data needed for the Commission to satisfy the land use findings requirement described in sections (2), (3), and (4) of this rule.

(4)

If a proposed transmission line is subject to the jurisdiction of the Energy Facility Siting Council (EFSC), the Commission shall adopt findings which assure the project and route have been certified by EFSC, and the requirements of OAR 860-025-0030 (Petitions for Certificate of Public Convenience and Necessity for Construction of Overhead Transmission Lines)(2) and (3) shall not apply.

OAR 860-025--0035

CPCN Review Criteria

(1) The Commission may approve a petition filed under OAR 860-025-0030 by **determining the necessity, safety, practicability and justification in the public interest** of the proposed transmission line upon consideration of the following:

(a) Whether the transmission line will meet a demonstrated need for transmission of additional capacity or improved system reliability that enables the petitioner to provide or continue to provide adequate and reliable electricity service;

(b) **Whether the petitioner has demonstrated that it will ensure the transmission line is constructed, operated, and maintained in a manner that protects the**

public from danger and conforms with applicable Commission rules, and other applicable safety standards and best industry practices;

(c) Whether the transmission line using petitioner's proposed route is **practicable and feasible, whether it will be effectively and efficiently constructed in a commercially reasonable manner;**

(d) Whether petitioner has **justified construction of the proposed transmission line as in the public interest**, as compared with feasible alternatives for meeting the identified need, **considering the public benefits and costs of the project**, as they relate to the **interests in land proposed to be condemned**, petitioner's existing facilities and equipment, **petitioner's Oregon customers, and other considerations that may be relevant to the public interest**. Other such considerations include, but are not limited to, **the benefits and costs** to other Oregon utilities, their customers, and **all Oregonians**, the value of connections to regional and inter-regional electricity grids and to a petitioner's non-Oregon service territories, and all Oregonians;

(e) The Commission may also consider other factors it deems relevant to the statutory criteria.

(2) In evaluating a petition under this rule, the Commission will give due consideration to related regulatory reviews and permitting approvals as pertinent

to the proposed transmission line, if the transmission line has already been acknowledged or approved by regulatory or permitting authorities.

OAR 860-025-0040 Developer must comply with Land Use law.

EFSC LAWS

ORS 469.010 Policy. The Legislative Assembly finds and declares that:

(1) Continued growth in demand for nonrenewable energy forms poses a serious and immediate, as well as future, problem. It is essential that future generations not be left a legacy of vanished or depleted resources, resulting in massive environmental, social and financial impact.

(2) It is the goal of Oregon to promote the efficient use of energy resources and to develop permanently sustainable energy resources.

ORS 469.401 Energy facility site certificate; conditions; effect of issuance on state and local government agencies. (1) ...”The certificate or amended certificate shall authorize the **applicant** to construct, operate and retire the facility subject to the conditions set forth in the site certificate or amended site certificate.”

(2) The 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. The site certificate or amended site certificate shall require both

parties to abide by local ordinances and state law and the rules of the council in effect on the date the site certificate or amended site certificate is executed,....”

“ (4) Nothing in ORS chapter 469 shall be construed to preempt the jurisdiction of any state agency or local government over matters that are not included in and governed by the site certificate or amended site certificate.”

ORS 469.421 Fees; exemptions; assessment of certain utilities and suppliers;

penalty. (1) Subject to the provisions of ORS 469.441, **any person** submitting a notice of intent, a request for exemption under ORS 469.320, a request for an expedited review under ORS 469.370, a request for an expedited review under ORS 469.373, a request for the State Department of Energy to approve a pipeline under ORS 469.405 (3), an application for a site certificate or a request to amend a site certificate **shall pay all expenses incurred by the Energy Facility Siting Council and the department related to the review and decision of the council.** Expenses under this subsection may include:

(a) Legal expenses;

(b) Expenses incurred in processing and evaluating the application;

(c) Expenses incurred in issuing a final order or site certificate;

(d) Expenses incurred in commissioning an independent study under ORS 469.360;

(e) Compensation paid to a state agency, a tribe or a local government pursuant to a written contract or agreement relating to compensation as provided for in ORS 469.360;

or

(f) Expenses incurred by the council in making rule changes that are specifically required and related to the particular site certificate

EFSC is to address issues regarding the developer and the location where the development is to be built.

469.504 Facility compliance with statewide planning goals;

“ (2) The council 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. Notwithstanding the requirements of ORS 197.732, the statewide planning goal pertaining to the exception process or any rules of the Land Conservation and Development Commission pertaining to an exception process goal,...”

ORS 469.507 Monitoring environmental and ecological effects of construction and operation of energy facilities. (1) The site certificate holder shall establish programs for monitoring the environmental and ecological effects of the construction and operation of facilities subject to site certificates to assure continued compliance with the terms and conditions of the certificate. The programs shall be subject to review and approval by the Energy Facility Siting Council.

(2) The site certificate holder shall perform the testing and sampling necessary for the monitoring program or require the operator of the plant to perform the necessary testing or sampling pursuant to guidelines established by the Energy Facility Siting Council or its designee.

ORS 197.250 states: “ all comprehensive plans and land use regulations adopted by a local government to carry out those comprehensive plans and all plans, programs, rules or regulations affecting land use adopted by a state agency or special district shall be in compliance with the goals within one year after the date those goals are approved by the Land Conservation and Development Commission.”

RULES

OAR 860-025-0030

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

(1) Petitions under ORS 758.015, for a certificate of public convenience and necessity to construct an overhead transmission line that will necessitate a condemnation of land or an interest therein, must be filed in accordance with OAR 860-001-0170.

(2) Petitions under ORS 758.015 must contain the following information:

(a) The information required under ORS 758.015 and the additional information set forth in this rule;

(b) A thorough description of the information listed in subsection (c) of this rule, including but not limited to the proposed route, voltage and capacity of the line.

The description must include a comprehensive narrative that provides sufficient

detail to enable a full understanding of the public convenience, necessity and justification in the public interest for the proposed transmission line and the benefits to be derived therefrom, and to enable a determination of its safety and practicability under normal and emergency conditions, as well as the foreseeable or potential consequences of not building the proposed transmission line;

(F) Each parcel of land that the petitioner has either acquired or has determined it should acquire an interest in to construct and operate the transmission line.

The parcels of land that the petitioner has determined it should acquire an interest in must be clearly marked, and must clearly show the general contour, uses, and improvements along that portion of the proposed route, inclusive of structures and agricultural uses;

(d) An estimate of both already incurred and forecasted costs of developing the transmission line project, including:

(C) Transmission facilities, including but not limited to, poles, lines, substations, accessory and miscellaneous labor, plant, and equipment inclusive of any communication apparatus and environmental mitigations;

(D) Indirect and overhead costs including engineering, legal expense, taxes, interest during construction, and itemized administrative and general expenses;

(E) Any other costs, direct or indirect, relating to the transmission line project including but not limited to operating and maintenance costs of the project;

(F) Explanation of the foregoing cost estimates as needed to enable a full understanding of their basis and derivation;

(e) An explanation of the financial feasibility of the proposed transmission line, including any expected costs, revenues, and financing tools;

(h) Such additional information as petitioner determines is necessary for a full understanding of the petition;

(i) A summary of petitioner's plan to ensure compliance with applicable Commission rules, including but not limited to OAR Chapter 860, Division 24, and other safety standards for the safe construction, operation and maintenance of the transmission line.;

(j) Estimated revenue requirement impact. At a minimum, petitioner must include an estimate of the levelized, annual revenue requirement of the transmission line as a percentage of its estimated annual revenue requirement. A revenue requirement estimate provided under this rule may be used solely for the purposes of evaluating the petition;

(k) Public benefits and costs of the transmission line, if any, that are reasonably known to petitioner, including but not limited to:

(A) Costs and benefits to petitioner's Oregon customers and customers of other Oregon utilities and to Oregonians in general;

(n) An evaluation of available alternatives to construction of the transmission line, including but not limited to conservation measures, non-wires alternatives, and construction of one or more lower-voltage single or multi-circuit lines. The petitioner may make reference to relevant sections of its most recent integrated resource plan (IRP) filed under OAR 860-027-0400, local transmission plans, or a planning document substantially equivalent to an IRP;

(3) A petition may not be filed under this rule unless the petitioner includes with the petition all necessary documentation to support a finding under OAR 860-025-0040(2) or (7), or files a request for a waiver as described in OAR 860-025-0030(4).

OAR 860-025-0030 requires an understanding of public convenience, necessity and justification in the public interest and the benefits from it as well as determining public safety and land to be condemned, costs direct and indirect relating to the project.

OAR 860-025-0035

CPCN Review Criteria

(1) The Commission may approve a petition filed under OAR 860-025-0030 by **determining the necessity, safety, practicability and justification in the public interest of the proposed transmission line** upon consideration of the following:

(a) Whether the transmission line will meet a demonstrated need for transmission of additional capacity or improved system reliability that enables the petitioner to provide or continue to provide adequate and reliable electricity service;

(b) Whether the petitioner has demonstrated that it will ensure the transmission line is constructed, operated, and maintained in a manner that protects the public from danger and conforms with applicable Commission rules, and other applicable safety standards and best industry practices;

(c) Whether the transmission line using petitioner's **proposed route is practicable and feasible, whether it will be effectively and efficiently constructed in a commercially reasonable manner;**

(d) Whether petitioner has justified construction of the proposed transmission line as in the **public interest, as compared with feasible alternatives for meeting the identified need, considering the public benefits and costs of the project, as they relate to the interests in land proposed to be condemned, petitioner's existing facilities and equipment, petitioner's Oregon customers, and other considerations that may be relevant to the public interest.** Other such

considerations include, but are not limited to, the benefits and costs to other Oregon utilities, their customers, and all Oregonians, the value of connections to regional and inter-regional electricity grids and to a petitioner's non-Oregon service territories, and all Oregonians;

(e) The Commission may also consider other factors it deems relevant to the statutory criteria.

(2) In evaluating a petition under this rule, the Commission will give due consideration to related regulatory reviews and permitting approvals as pertinent to the proposed transmission line, if the transmission line has already been acknowledged or approved by regulatory or permitting authorities.

OAR 860-025-0040 Compliance with Land Use laws,

CASE LAW

1. *Rogue Advocates v. Josephine County*, 66, Or LUBA 45 (2012) “Because OAR 660-006-0010 provides a set of prioritized, mandatory sources of data and a prescribed alternative method that must be used to determine whether land is forest land subject to Goal 4, the applicability of OAR 660-006-0010 cannot be avoided by concluding, based on different data or different methodology, that land is not forest land subject to Goal 4” this case decision also states “Because the Goal 4 rule was amended in 2008 and 2011 to provide a 8)(scforest land subject to

Goal 4, the county cannot simply apply its acknowledged comprehensive plan standards for identifying forest land-----”

2. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005) “Goal 4 does not permit local governments to determine whether land is “forest land” subject to the goal based on the absence of timber productivity ratings for soils or the assumption that unrated soils cannot produce timber.”

3. *Potts v Clackamas cannot County* 142) Or LUBA 1 “Whether property is forest land under Goal 4 definition depends upon the properties capacity for production of timber”

4. Scott v City o Jacksonvill OR LBA (Jn 2010, 2009-107 Mitigation measures were not related to the adverse impact criterion and there is no indication that Idaho Power intends to provide mitigation outside the home where the exceedances are documented to occurl

EXHIBITS USED

*GL 1101, Page 90 Kellen Tardaewether confirmation email: IP billed \$4.14 million since 2013.

*IP 1102 deq imd aq.00.000 ODEQ staff guidance on noise control issues

.GL/1102 Kate Brown Private Forest Accord SB 1501, 1502, and HB 40545 requires larger steam buffers, forest road, unstable slopes, aquatic resource habitat protection, compliancr monitoring

Page 2 first paragraph states “the noise statutes and administrative rules remain in force. Regulated noise sources are legally responsible for complying with the state noise laws. Third bullet states that a private citizen or local government may bring a nuisance suit through private legal counsel or local district attorney’s office. Last bullet states that EFSC staff review applications to **ensure that proposed facilities meet the State Noise regulations**

ISSUE ONE: STATUTES ESTABLISH THE ROLE OF THE OREGON DEPARTMENT OF ENERGY (ODOE) AND THE ENERGY FACILITY SITING COUNCIL (EFSC) ARE DIFFERENT THAN THE ROLE OF THE PUBLIC UTILITIES COMMISSION. THIS DIFFERENCE REQUIRES THE PUC TO INDEPENDENTLY DETERMINE COMPLIANCE WITH PUC STATUTES AND RULES AND CANNOT RELY UPON DECISIONS OF ODOE AND EFSC TO DETERMINE WHETHER OR NOT ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY CAN BE ISSUED. THEY CANNOT RELY UPON DECISIONS REGARDING THE ISSUANCE OF A SITE CERTIFICATE FOR THE B2H TRANSMISSION LINE.

The following statutes and narrative describe, define and document the differences in roles, authority and objectives of ODOE, the EFSC compared to the Oregon Public Utilities Commission. They establish the fact that ODOE and EFSC decisions are likely to fail to comply with the PUC requirements. They further establish that the PUC must

give equal or greater weight to concerns of the public as they do to decisions of EFSC and the Oregon Department of Energy.

(A-1) STATUTES REQUIRE THE FOLLOWING OF THE PUC:

ORS 758.015 requires the PUC to independently evaluate the costs, safety and interests of the public as well as the developer in determining whether or not to issue a Certificate of Public Convenience and Necessity (CPCN).

ORS 756.040(1) Requires the PUC to represent the customers and the public at large in all controversies such as those forming the basis of the contested cases before the Council. It requires the PUC to use their powers to protect the customers and the public. This statute requires assuring the developer provides mitigation to protect individual residents ns from safety damage by implementing effective mitigation measures at residences based upon those present at the residence and including areas inside as well as outside the home.

This role is supported by the actions of the hearings officer in the PUC contested case hearings by allowing petitioners to use most exhibits requested by petitioners for inclusion in this contested case and refusing to sustain many of the objections to exhibits filed by Idaho Power and PacifiCorp.

(A-2) STATUTES REQUIRE THE FOLLOWING OF EFSC/ODOE:

EFSC/ODOE have the role of supporting the developer over the public.

ORS 469.010 states that ODOE is to develop energy resources using to the greatest extent possible private resources.

ORS 469.421 provides that ODOE Siting Actions are funded entirely by directly billing developers rather than in the manner required of any other state agencies who may benefit from fees for services, but have budgets determined by the legislature. This funding method establishes ODOE as being dependent upon siting developments in order to fund their entire siting budget. This statute creates a defacto contractor role for EFSC in relation to the developer where they make decisions to support the developer over the public. ODOE is being paid a partial payment for the B2H site certificate of over \$4 million dollars (Exhibit 1101, Page 3 & Page 51) (Exhibit 1101 includes a copy of an E-mail from Kellen Tardaewether of ODOE confirming that as of the Aug. 4, 2022 date of the email, Idaho Power's Cost Reimbursement Agreement payments totaled \$4.14 million, Page 90, Exhibit 4)

The statutes including the financial arrangement documented above have resulted in ODOE functioning as an advocate for the developer and an adversary against the public interest. Examples documenting this role include:

1. ODOE argued against full party standing for all public petitioners limiting their ability to respond to any issue they did not specifically raise in their public

comments. This included STOP B2H which is a non-profit representing the public.

(GL Exhibit 1101, Page 53 – 54, 59)

2. ODOE provided 52 arguments asking that petitioners be denied standing and not allowed to have their contested cases heard (GL Exhibit 1101, Pages 55-56.)
3. ODOE argued against petitioners' requests for contested cases on issues 190 times based upon the issue not being within EFSC jurisdiction, the issue was not raised on the record or that petitioners did not include adequate specificity in their comments. (GL Exhibit 1101, Page 59)
4. ODOE requested Summary Determination against petitioners and supported or did not oppose Idaho Power's motions for Summary Determinations. All requests against petitioners were granted. (GL Exhibit 1101, Page 61-63)
5. ODOE advised EFSC to uphold the ALJ rulings denying party status, allowing all public petitioners only Limited Party Status, to uphold all decisions granting Summary Determination requests against the public and asked EFSC to rule against the remaining petitioners based upon the merits. All these decisions document the fact that ODOE is in effect working for the developer and against the public. (GL Exhibit 1101, Pages 65-66)

GL Exhibit 1101 referenced above is an amicus brief submitted to the Oregon Supreme Court on December 20, 2020 by retired attorney, Ann Morrison. It included her declaration under threat of perjury that it is accurate. (GL Exhibit 1101, Page 77)

The brief makes statements and includes specific references in the Amicus Brief showing they are factual.

Items and impacts being evaluated are different for PUC and EFSC/ODOE;

(B-1) PUC evaluation is to do the following:

The PUC is to represent the electricity customers and the public in a broad sense and protect the public from safety hazards resulting from the development, being treated fairly in terms of costs, and assuring that the public interest is being met. It encompasses making sure that public concerns are addressed, and costs are reasonable and accurately projected. EFSC does not establish increased costs to Oregon customers and citizens as a result of the development. PUC is to establish increased costs for electricity as well as other costs created due to the project. One of these costs is the loss of value of land and what it produces when the right of way payment is less than the lost value.

(B-2) ODOE/EFSC evaluation is to do the following:

EFSC/ODOE are in the business of issuing Site Certificates which defines the site and requirements the council places on the **developer**. The definitions in statute which define a site certificate supports this. ORS 469.300(25) defining the site as the location of the facility and related or supporting facilities and ORS 469.300(26) which defines the site certificate as an **agreement between the State of Oregon and the applicant, authorizing the applicant to construct and operate a facility on an approved site.** In fact, site certificates do not address such things as requiring reasonable payment to property owners due to private land impacts at the location of developments.

Requirements to apply the plain language of the statutes and rules:

(C-1) PUC

The PUC is restricted by court decisions from interpretations that fail to comply with the plain language of Oregon Statutes and Rules

(Gonzales v Oregon 546 U.S. 243 (2006))

An agencies interpretation of their own rules is only supported when they are ambiguous as noted in Auer v Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L Ed. 2nd 79 (1997))’

In Christopher v. SmithKline Beecham Corp., the Supreme Court stated that deference is unavailable in the case of an interpretation that is “plainly erroneous or inconsistent with the regulation,” or if the agency’s interpretation ‘does not reflect [its] fair and considered judgment on the matter in question.’” Fair and considered judgment may be absent where the interpretation at issue is contrary to an earlier construction, or if the interpretation merely seems to represent a “convenient litigating position”

The Justices unanimously rejected the contention that the justices should give deference to the agencies interpretation. They stated that deferring to the recently announced interpretation “would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires,” “[l]t is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.” *Id.* at 1

The US Supreme Court decision in *Kisor v Wilkie*, 139 S. Ct. 2400, 2413 (2019) further limit the agency authority to interpret their own rules even further by requiring a determination that:

- 1. The regulation must be genuinely ambiguous.**
- 2. The agencies reading of the regulation falls within the bounds of a reasonable interpretation.**
- 3. The interpretation comes from someone who can make authoritative policy.**

4. **The agency's interpretation implicate its substantive expertise in interpreting their rules.** It is not allowed if the agency has no comparative expertise in resolving the regulatory ambiguity.

5. **The agencies interpretation of the rule must reflect fair and considered judgment.** Auer must not represent merely a “convenient litigation position” or a new interpretation that creates “unfair surprise” .

In addition, neither Oregon or US Courts provide authority for any agency other than ODOE to interpret rules of another agency.

(C-1)ODOE/EFSC

Statutes, rules and court decisions provided multiple opportunities for exceptions and new interpretations of rules. The Courts have provided EFSC with a level of power in terms of rule interpretation for this transmission line which is not consistent with that allowed other state and federal agencies regarding the use of Aeur.

Examples:

1. Statutes allow ODOE to provide exceptions or overrule statutes and rules of other agencies. For example:

OAR 469.504(2) allows ODOE to approve a site certificate which fails to comply with LCDC rules.

The Oregon Supreme Court determined that ODOE/EFSC can allow Idaho Power to avoid complying with the Oregon Statutes regarding the safety impacts of noise and provide their own interpretations of how the DEQ noise rules mean even when the plain language of the rules is clear. This decision ignores US Supreme Court decisions limiting the use of Aeur.

THE ISSUE OF COST

(D-1) PUC

Requires developers to disclose and they must consider costs that the project will create for Oregon Utility users, property owners and citizens due to direct and indirect effects of the development. The PUC must consider costs to ratepayers assuming the costs of the development through their electric rates as well as to Oregon citizens associated with lost or damaged resources and how that impacts costs to property owners and the economy of the state. The PUC is required to determine the amount of compensation the developer plans to provide and has the authority to require reasonable compensation since this is not addressed in the site certificate. ORS 772.210 (4) states the minimum value that should be provided landowners of forest land and requires this in the event that the developer files for condemnation. EFSC identified the lost value of timber production in Union County and Umatilla County. The PUC has the authority to require the developer to provide fair compensation to the landowners since ODOE does not do so and does not include this in their site certificate.

(D-2) EFSC/ODOE:

1. EFSC does not require the developer to disclose how much the development will cost utility customers or the public.
 - a. For example, EFSC did not require the developer to compensate landowners for payments for the right of way an amount equal to the loss ODOE determined landowners would experience.

INFORMATION REQUIRED TO MAKE A DECISION

(E-1) PUC

ORS 758.015 (1)

Requires the DEVELOPERS to petition the Public Utilities Commission for a certificate of public convenience and necessity. This statute does not allow the PUC to issue a Certificate of Public Convenience and Necessity until both Idaho Power and PacifiCorp have petitioned the PUC for a certificate, the required information has been provided and the PUC process has determined that the CPN should be approved. To issue a CPN, the PUC must document what the actual need is, whether there are other resources that could address the need at less cost, risk and impact to resources and the public based on the documentation provided by both Idaho Power and PacifiCorp. They cannot issue a CPN absent information from both developers. The current Petition is limited to Idaho Power and cannot justify the issuance of a Certificate of Public Convenience and Necessity absent a similar request from PacifiCorp providing required information to

justify issuing the CPN. Lacking information documenting there is an unmet need for both PacifiCorp and Idaho Power to meet the electricity needs of Oregon customers, the need established for Idaho Power could be met by portfolios which do not include the costs and damages that the Boardman to Hemingway Transmission Line will cause. In SG 319, Page 4 & 5 regarding the 2017 IRP, the PUC states that “We agree with Staff that a host of changed circumstances could require Idaho Power to reevaluate its course, including but not limited to significant changes in co-participant shares and commitments, project costs, load needs, power market liquidity and depth, and capability costs of alternative technologies. Idaho Power should be prepared for such reevaluation and to change course should such information or circumstances emerge.” They concluded with stating, “we note that our acknowledgement is limited to our interpretation of IRP standards specific to the Public Utility Commission and does not interpret or apply the standards of other state or federal agencies.”

(E-2) EFSC

EFSC was provided authority to interpret their rules to allow them to make decisions based upon information regarding 21% of Idaho Power’s interest in the development.

EVALUATION OF ALTERNATE ROUTES AND RESOURCES

F-1 PUC is to determine if there are alternate routes or other resources that could meet the need in a less costly, safer way or in a manner more in line with the public interests.

F-2 EFSC/ODOE only consider the route(s) that the applicant includes in their application for a site certificate and give no consideration of alternatives to provide the stated need.

SUMMARY: The above identification of roles, focus and charge of EFSC/EFSC compared to the Oregon Public Utility Commission is necessitated due to the multiple references of the developer to the decisions of ODOE and the EFSC as if their decisions should provide documentation that PUC rules are complied with. It is clear from the statutes, rules and court decisions that EFSC and ODOE are required by statute to perform entirely different functions than the Oregon Public Utility Commission. The symbiotic relationship between ODOE/EFSC and developers and the authority provided ODOE in rule interpretation allow approval of Site Certificates which do not comply with the plain language of the requirements of the statutes and rules. Because of this, using their decisions to support and justify the issuance of a Certificate of Public Convenience and Necessity is inappropriate. Using EFSC/ODOE determinations regarding the issuance of a Site Certificate to support the issuance of a Certificate of Public Convenience and Necessity must include an independent evaluation by the PUC regarding whether they provide protection to the public from costs and support the public interest.

The PUC decision must comply with the plain language of their rules and statutes unless the rules are ambiguous. The PUC ruled are not ambiguous in requiring the PUC to

apply their rules to emphasize protection of the public rather than in support of the developer.

The PUC documents an understanding of the independent nature of their decisions in the 2017 IRP LC 68, Order No. 18-176. It states, “We clarify that this determination is limited to our IRP standards and that, in acknowledging these action items, we do not interpret or apply the standards of any other state or federal agency.” Their decision is based upon the information available to them at the time. It states that “There may be other ways of meeting the capacity needs identified in this IRP that may not have the same impacts to eastern Oregon as B2H. They further state that acknowledgement of Action Item 6 is not a final determination of prudence and does not guarantee favorable ratemaking treatment. Their decision is based upon the utilities submitted plan and could change based upon material changes in facts. The IRP acknowledges that state law regarding the IRP decision requires them to exclude many of the public concerns. Concerns regarding Costs to ratepayers and the citizens of Oregon and Eastern Oregon are among the items not considered. The PUC must now address issues of safety and costs to the public that were previously excluded from their decision making.

ISSUE TWO: NOISE IS A SAFETY HAZARD TO CITIZENS WHICH REQUIRES THE PUC INDEPENDENT EVALUATION AND DECISION TO ASSURE THE PUBLIC IS PROTECTED

NOISE RULES, STATUTES AND EXHIBITS SUPPORTING THE BRIEF ON THIS ISSUE

OAR 869-025-0035 requires the PUC to identify and mitigate safety impacts of the development on the public.

Supporting Statutes and Rules

ORS 467.010 Legislative findings and policy. The Legislative Assembly finds that the increasing incidence of **noise emissions in this state at unreasonable levels is as much a threat to the environmental quality of life in this state and the health, safety and welfare of the people of this state as is pollution of the air and waters of this state.**

To provide protection of the health, safety and welfare of Oregon citizens from the hazards and **deterioration of the quality of life** imposed by excessive noise emissions, it is hereby declared that the State of Oregon has an interest in the control of such pollution, and that a program of protection should be initiated. To carry out this purpose, it is desirable to centralize in the Environmental Quality Commission the authority to adopt reasonable statewide standards for noise emissions permitted within this state and to implement and enforce compliance with such standards. [1971 c.452 §1]

ORS 758.015(2) requires the commission to make it's own investigation to determine the safety issue of noise created by the transmission line and include this in their order.

ORS 467.020 Prohibition on emission of noise in excess of prescribed levels. Except as provided in ORS 467.131 and 467.133, no person may emit, cause the emission of, or permit the emission of noise in excess of the levels fixed therefor by the Environmental

Quality Commission pursuant to ORS 467.030. The PUC is not required to assess the amount of noise generated by the developer at the site. They are, however, required to determine the noise which will exist at residences not part of the development which are emitted into the environment of the state.

ORS 467.030 Adoption of noise control rules, levels and standards. (1) In accordance with the applicable provisions of ORS chapter 183, the Environmental Quality Commission shall adopt rules relating to the control of levels of noise emitted into the environment of this state and including the following:

(a) Categories of noise emission sources, including the categories of motor vehicles and aircraft.

(b) Requirements and specifications for equipment to be used in the monitoring of noise emissions.

(c) Procedures for the collection, reporting, interpretations and use of data obtained from noise monitoring activities.

(2) The Environmental Quality Commission shall investigate and, after appropriate public notice and hearing, shall establish maximum permissible levels of noise emission for each category established, as well as the method of measurement of the levels of noise emission.

Rules:

OAR 340-035-0015 Definitions

(5) “Ambient Noise” means the all encompassing noise associated with a given environment being usually a composite of sounds from many sources near and far.

(7) “Any One Hour” means any period of 60 consecutive minutes during the 24-hour day.

(59) “Statistical Noise Level” means the noise level which is equaled or exceeded a stated percentage of the time. An L10 = 65 dBA implies that in any hour of the day 65 dBA can be equaled or exceeded only 10% of the time, or for 6 minutes.

OAR 340-035-0035 (1)(B)(b)(i) and (ii)

(A) Identifies the maximum allowable noise level which is not applicable to this contested case.

(B) Establishes the Ambient Degradation Standard which states that the maximum amount that the existing Ambient Noise Level can increase due to a new development and comply with the Ambient Degradation Noise Standard is 10 decibels in any one hour

OAR 340-035-0035(1)(B)(b)(i) “**No person** owning or controlling a new industrial or commercial noise source located on a previously unused industrial or commercial site **shall cause or permit the operation of that noise source if the noise levels generated or indirectly caused by that noise source increase the ambient statistical noise levels, L10 or L50, by more than 10 dBA in any one hour, or** exceed the levels specified in Table 8, as measured at an appropriate measurement point, as specified in subsection (3)(b) of this rule, except as specified in subparagraph (1)(b)(B)(iii).

(ii) **The ambient statistical noise level of a new industrial or commercial noise source** on a previously unused industrial or commercial site shall include all noises generated or indirectly caused by or attributable to that source including all of its related activities. Sources exempted from the requirements of section (1) of this rule, which are identified in subsections (5)(b)–(f), (j), and (k) of this rule, shall not be excluded from this ambient measurement.

OAR 860-025-0030 requires an evaluation of the costs and benefits to Oregonians and must consider the safety impacts of the development on Oregon citizens.

Exhibits:

--Oregon Health Department Wind Farm Noise Study

--DEQ memo Regarding the end of funding Oregon DEQ activities regarding the noise rules.

INTRODUCTION TO ISSUE:

ORS 467.010 established that exceedances of the Noise Standards are by definition a Safety hazard.

IP 1220 WHO Guidelines for Community noise.

Bottom of Page 10 and Page 11

State the difference between background sound and increased sound level is important, for sleep, sound levels should not exceed 45 dBA for noise events and intermittent character needs to be taken into account. WHO indicates that susceptible individuals may have permanent effects including hypersension and ischaemic heart disease. WHO identifies sleep disturbance as a major environmental noise effect and lists increased blood pressure, increased heart rate, increased finger pulse amplitude, vasoconstriction, changes in respiration, cardiac arrhythmia as primary effects.

The Oregon Health Division performed an extensive evaluation of noise and also determined that Noise is a Safety hazard to citizens as documented in their report regarding general effects of noise exceedances.

ORS 467.030 required the Environmental Quality Commission to define by rule specific requirements in order to comply with the statute including procedures to be used and the noise limits that are acceptable at residences surrounding the noise source. It required the formal processes required under ORS 183 to establish and define the noise requirements and limits in order to comply with the statute.

OAR 340-035 including the Sound Measurement Procedures Manual (NPCS-1) are the resulting rules which define the requirements of the Oregon Statutes regarding noise.

(Exhibit NPCS-1: The introduction to this manual states that following the procedures in the manual will fulfill the legislatures requirements under ORS Chapter 467. It also states that the manual procedures fulfill statute requirements under ORS 467.010, 467.030, 467.040, 467.050 and 467.090. In other words, the DEQ noise rules have the force of law and a failure to follow them would require an evaluation regarding whether the alternatives comply with the Oregon law.

OAR 340-035-0035 establishes Two different noise limits that a development must comply with.

First: A maximum allowable noise limit requiring developments to not exceed the noise levels in Table 8 of the rules.

Second: An Ambient Degradation Standard which limits the amount a developer can increase the existing noise level at a residence or other specific locations more than 10 decibels above the pre-development noise level.

The recent decision of the Oregon Supreme Court allowing the Oregon Department of Energy to authorize an Exception and Variance to the Oregon Noise Statute and rules at the site of the transmission line does not allow the Oregon Public Utility Commission to avoid requiring compliance with the standards, rules and statutes at residences where noise will create a safety hazard. The PUC is required to assure the safety of citizens exposed to the noise effects of this transmission line. Failure to do so leaves the public in the position of being required to assume significant costs to obtain legitimate relief from the safety damages being done to them through noise exceedances.

Not only have citizens received substantial financial compensation as a result of noise from energy developments, but the courts have established that the approval of a site certificate or authorization to construct such a facility does not negate the public opportunity to file civil action as a result of noise as well as health effects. (*Williams v. Invenergy, LLC*, 2016 /qk 1725990 at 18 (USDC, Oregon, Portland Div. April 28, 2016 citing *Seagraved v Portland City Temple*, 269 Or. 18, 32 (1974) support the fact that objective measurements or expert opinions are not necessary to prove many nuisance claims including the statement “the cases are legion in which the extent of the interference with reasonable use and enjoyment attributable to noise has been established by the evidence of witnesses describing the character and effect of the noise”. Damages can be large due to jury consideration of the impact on a plaintiff’s quality of life. Noise from this transmission line can be litigated not only under trespass, but also under a “private nuisance” since it represents an interference with a private

parties use and enjoyment of their land which is more than a slight inconvenience, and (Restatement (Second) of Torts 821D (1979, 821F(c) , 822, 825) is intentional since the developer is aware of the results of their actions. The importance of this issue is in relation to the fact that any budget figures which Idaho Power provides that have not addressed the potential and planned future litigation by citizens exposed to noise are clearly not considering predictable costs the developers will be assuming. Further, decisions of a public authority (EFSC/ODOE) generally does not preclude a claim for private nuisance. (Burch v NedPower Mount Storm, LLC, 647 SE 2d 879 (W. Va 2007)

In order for the PUC to make the determination regarding the safety issues posed by noise, the developer must provide documentation that they have determined what the impacts will be and how they plan to provide mitigation to address the impacts.

TESTIMONY ATTACKING THE LEGITIMACY OF PRE-EXISTING CONDITIONS OF MYSELF, IN SPITE OF THE HUGE EMPHASIS PLACED ON IT BY THE DEVELOPER FAILS TO ADD SUPPORT FOR THE CONTESTED CASE ISSUE.

The arguments regarding my health condition and impacts are only relevant at the point the developer uses a Certificate of Public Convenience and Necessity to Condemn my property. The issue is relevant to the amount of compensation that a jury should issue me due to the consequences of the developer's actions.

This contested case is regarding the need for Idaho Power to provide the PUC with information regarding all the people exposed to noise beyond the state safety standards

and document that the exceedances will be mitigated for. Idaho Power failed to establish the pre-existing conditions exposed citizens currently have that may be exacerbated by the transmission line noise, how much the exceedance will be, how many days during the year the noise standard will be exceeded and how the company plans to mitigate the effects to provide a safe environment for citizens. Arguments suggesting that noise does not constitute a safety hazard are without merit given that the Oregon Legislature has decided and enacted a statute which states they find it to be a safety hazard and have gone so far as to implement rules which identify it as a hazard and the amount of noise and changes in noise level that are unacceptable if they are exceeded. (ORS 467.010, ORS 367.030, 347-035 including the Sound Measurement Procedures Manual.)

SUMMARY NOISE SAFETY IMPACTS AND MITIGATION HAS NOT BEEN DOCUMENTED

THIS CONTESTED CASE HAS NEVER BEEN ABOUT THE FOLLOWING:

1. Whether or not EFSC should have allowed an Exception or variance to allow Idaho Power to exceed the noise standards at the location of the transmission line or whether or not the Oregon Supreme Court Erred in their decision.
2. Whether or not there is a failure to comply with the maximum allowable noise limit standards listed in Table 8 of the Noise Rules.

3. Whether any single individual will have significant, and/or potentially fatal health and safety issues due to the direct and indirect impacts of noise from the transmission line.

THIS CASE IS REGARDING THE REQUIREMENT OF THE PUBLIC UTILITY COMMISSION TO DOCUMENT THAT THE DEVELOPMENT WILL NOT BE A SAFETY HAZARD TO CITIZENS EXPOSED TO THE NOISE IT CREATES

OSR 860-025-0035

ORS 467.010 states that in order to provide for the health, safety and welfare of Oregon citizens from the hazards and deterioration of quality of life imposed by excessive noise emissions a noise program will be initiated.

IN ORDER TO EVALUATE THE SAFETY RISK, THE PUC MUST REQUIRE THE DEVELOPER TO PROVIDE THE FOLLOWING:

1. Current Ambient Noise level at residences where citizens are predicted to be exposed to noise from the transmission line using the procedures required by Oregon Noise Statutes and rules.
2. Information regarding the pre-existing conditions which will make the noise from the transmission line more damaging than it typically is.
3. Identify and disclose the mitigation that will be provided at the locations to address the noise impacts.

4. Determine that mitigation will address the noise exceedances where they are occurring outside the residences.
5. Idaho Power failed to include in their budget the costs of providing mitigation for the exceedances they will create.

Accurate and complete information has not been provided to the PUC regarding citizens who's residences exceed the Ambient Degradation Standard nor has the developer produced information regarding existing noise consistent with the procedures outlined in the Oregon Noise Rules to predict the number of days when the increased noise generated by the transmission line will cause the Ambient Degradation Standard to be exceeded for any one hr. or more during the each of the 24 hr. days in a year. OAR 340-035-0015 provides the definitions for establishing this number:

OAR 340-035-0015

(7) "Any One Hour" means any period of 60 consecutive minutes during the 24-hour day.'

(59) "Statistical Noise Level" means the noise level which is equaled or exceeded a stated percentage of the time. An L10 = 65 dBA implies that in any hr. of the day 65 dBA can be equaled or exceeded only 10% of the time, or for 6 minutes.

The Ambient Degradation Standard is exceeded if either the L10 or L50 noise levels increase more than 10 decibels. This contested case results from the fact that the developer has determined that the L50 baseline noise at residences will increase more than 10 decibels for multiple residences on multiple days of the year.

Once the information is provided, the PUC needs to consider court decisions regarding noise mitigation (Scott v City of Jacksonville OR LUBA (Jan. 2010, 2009-107) Requires mitigation measures to be related to the adverse impact criterion. There is no indication that Idaho Power intends to provide mitigation for impacts outside the home where the exceedances are documented to occur in compliance with Oregon Noise rules) (Idaho Power response to Greg Larkin Data Request No. 83 documents that Corona Noise will not be addressed through mitigation,

B. Idaho Power presented the Public Utility Commission with Portfolios which provided the necessary additional energy without building the B2H transmission line. Choosing one including B2H places responsibility for identifying and providing mitigation for the impacts on the developer, not the impacted citizens. The B2H line creates unique safety impacts and limits available options for addressing those impacts, but does not allow the developer to fail to mitigate for the impacts. This should have been a consideration in choosing the portfolio they did. Some of the options remaining to address the noise impacts on citizen safety include: (a) burying the line; (b) moving the line to areas where the noise impacts are removed; (c) utilizing other portfolio

options to address their need (d) purchasing noise exemptions from impacted property owners as is done for wind developments. There is not an option to obtain a Certificate of Public Convenience allowing the developer to put citizens health, safety and in some instances, lives in danger due to the direct and indirect impacts of noise created stress, insomnia, exacerbation of existing disabilities and other issues resulting from a failure to control noise exceeding Ambient Noise limitations. OAR 860-025-0035

SUMMARY:

The issuance of a Certificate of Public Convenience and Necessity requires the developer to identify and disclose safety impacts and provide mitigation to address them. The information has not been provided which would allow the PUC to do this. Issuing a Certificate of CPN without requiring this allows the developer to put citizens health, safety and in some instances, lives in danger due to the impacts of noise created stress, insomnia, pain and resulting exacerbation of existing disabilities or medical conditions. DEQ Noise Rule would transfer the responsibility and costs for addressing safety impacts to Oregon citizens and away from the developer who created the hazard. conflicts with the charge of the Public Utility Commission in determining whether or not to issue a CPN.

Idaho Power has provided misleading and false information regarding the noise impacts of the development which must not be relied upon in evaluating the extent of the safety risk to citizens. For example,

--Proposed Order on Page 681 indicates that based upon the exceedances between 12:00 a.m. and 5:00 a.m. the exceedances are "infrequent" and -----Page 683, Lines 10-14 states: "**Potential impacts from the ambient degradation standard exceedance along the proposed transmission line and at 41 NSR locations would be infrequent estimated under worst-case conditions anticipated to occur two to seven percent of the time.**"

The Ambient Degradation Standard applies to 24 hr. days. Referring to the exceedances during the period of 12:00 till 5:00 a.m. significantly understates the risk, significance and consequences of impacts to citizens.

ISSUE THREE NOTICE

2. Notice was not provided to citizens impacted by noise as is required by ORS 183.415. Citizens must be notified when the actions of a state agency affects the public. ORS 183.415 requires the following actions:

1. A notice be sent to all people affected by agency actions served "personally or by registered or certified mail."
2. The above notice must include:
 - a. The right to a hearing
 - b. What authority and jurisdiction the hearing will be held under
 - c. The actual sections of the statutes and rules involved.

d. A short and plain statement about what will change. (In this case, it will be the additional noise that will occur at the residence.)

e. What would allow a default against the person to be entered and

No such information was provided to the impacted people in person, by registered or certified mail even though residences within over one half mile of the transmission line will be affected noise resulting from the issuance of a CPN allowing condemnation of land and the construction of the transmission line. EFSC failed to meet their obligation due to providing only generic public notices which were not provided in the manner required, failed to provide the specificity necessary for citizens to be informed that they would be effected, how they would be effected and the opportunity for a hearing regarding the impacts. EFSC was aware of the requirements of ORS 183.415 as noted in the Second Amended Project Order stating the obligation under ORS 183.415 is to provide notice to impacted persons of their right to a hearing. In spite of this, ODOE failed to provide the required notice. IP 701 Second Amended Project order 201807-26, Page 95 footnote says "Department's obligation under ORS 183.415 to provide notice to impacted persons of their right to a hearing, rather than the particular recommendation in the Proposed Order to allow for a variance/exception to the noise regulations.

The PUC also failed to provide notice regarding the impacts of the potential Issuanc4 of a Certificate of Public Convenience and Necessity to either landowners or those exposed to

the impacts of the transmission line by allowing condemnation of private property to build the line.

ISSUE FOUR: PACIFICORP MUST REQUEST A CPN IN ORDER FOR PUC TO ISSUE ONE

THE PUC LACKS INFORMATION FROM PACIFICORP WHICH IS REQUIRED BY ORS 758.015(I) IN ORDER TO ISSUE A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

PacifiCorp is being presented as having a 51% interest in the development of the Boardman to Hemingway Transmission line. Ownership has been a moving target for this development.

What is certain is that EFSC and ODOE issued a site certificate based upon Idaho Power's then 21% interest in the project information. This also was presented to the PUC through the 2019 IRP. Then in the 2021 IRP Idaho Power claims owning 45% of the project. I can find no document that indicates that PacifiCorp will own an amount greater than 51%, however, the attached exhibit makes it appear that they must intend to own 55%. Whatever the exact figure, what is clear is that the the public entities have not been addressing the entire project in their decision making as they have not been receiving complete information. It is disturbing to say the least that any agency would approve such a project absent 100% of the required data. While there is no clear statute that requires ODOE/EFSC to include 100% of the project, the PUC statutes do indicate that developer(s) must both process a request for a

CPN prior to the issuance of one. The PUC does not currently have the request from PacifiCorp for over 50% ownership of the development and cannot issue the CPN until that is processed. (Exhibit SG 306, Page 8 Page 8 of the 2021 Integrated Resource Plan, Page 8)

The PUC lacks the information required for the issuance of a Certificate of Public Convenience and Necessity

There is no documentation that they have provided the required request or submitted the necessary information to the PUC.

This is of significant concern in a number of areas. Including:

MITIGATION FOR WILDFIRE RISK

1. Concerns regarding wildfire mitigation:
 - A. PacifiCorp is the utility with the largest financial and ownership interest in the project.
 - B. There has not been provided a final wildfire management plan.
 - C. The responsibility this company will have on providing effective mitigation to address the increased fire risk has not been established or evaluated.
 - D. The developer claims there are no high risk fire areas along the entire transmission line. This is not consistent with the evaluations of specific areas along the transmission line including the Morgan Lake area in Union County. Understating

the risk means that the developer will not be required to provide the highest level of protection that should be required.

--GL/405: Union County Community Wildfire Protection Plan; Larkin/

--GL 1109 – NWS 2020 Annual Fire Weather;

2. Pacificorp has a questionable history on effective mitigation and management of wildfires along their existing transmission lines. There have been a number of wildfires along their transmission lines. They have been involved and continue to be involved with litigation regarding fires. They have agreed to payments for several events. While not admitting to causing the fires, these payments leave responsibility undetermined. The following Exhibits indicate they are likely responsible and document the ongoing financial risk to the developer for payments in compensation and the public in the event that the developer fails to restore the site in the event that fires cause the company to become bankrupt.

1105: Congressional Research Service—Wildfire Statistics (Mr. 1, 2023;

--(Exhibit GL 1117 “Statesman Journal News Article dated March 1, 2023, “As Labor Day fires exploded, Pacific Power employees worried power lines were at fault”)

--(IP 1306 US Attorney’s Office Dist of Or., Pacificorp to pay \$3.4 Million in Civil Settlement for Ramsey Canyon Fire (June 9, 2020))

--Larkin 1117—PAC Labor Day Fires article;

-- Larkin 1112 – FERC Orders PAC to Respond to Allegations of Reliability Violations”;

-- GL-1110 – OPB Pacificorp Liability for Labor Day Fires”;

-- GL-1106: Article – “Electric Utility Pacificorp sued, accused of causing deadly Mckinney Fire in Siskiyou County”

(Regardless, the numbers and costs of these events pose a significant financial risk to the public and the company and indicate an increased risk of financial problems in the future.

ttGL 1104 documents that Pacificorp has been approved to add \$3 billion in securities to their existing debt of \$8.449 billion. The authorization assumed a consistent low rate of inflation to carry the debt. The interest rate that will be paid will be greater than that projected due to the increasing interest rates for the entire country.

Further, the bond was issued absent the requirement that Applicant show it will result in outcomes that are fair, reasonable and not contrary to the public interest. The public interest will certainly be impacted if this company places themselves at risk of insolvency.

COSTS OF THE PROJECT TO THE DEVELOPERS AND THE PUBLIC:

While this issue is difficult for petitioners to provide documentation due to the fact that Idaho Power would not provide detailed costs and estimates that allow a thorough review of

where the cost figures are understated. There are some items which can be addressed due to the limited information made available which bring the projected costs into question . This document provides just a sampling of the fact that there is a significant shift in cost to Oregon landowners and the public both through direct loss of income and also the value of lost resources resulting from unmitigated impacts of the development:

A. The project developers are only being required to keep a \$1.00 bond amount to restore the site should the developer fail to do so and it is abandoned due to unforeseen events such as wildfire, natural disaster, bankruptcy of the company or other reasons. This is inconsistent with the requirements for any other energy development in the state and represents a new interpretation of the rules regarding a bond being required in an amount adequate to restore the site. Failing to maintain a bond transfers the responsibility for site restoration if not completed by the company to ratepayers, landowners and the State of Oregon residents. I provide documentation of the illegitimate use of a bond amount that is not consistent with Council decisions before or after the allowance of a \$1 bond for Idaho Power. Pages 17-23 of my Amended Appellate Brief which the Oregon Supreme Court failed to accept describes the fact that failing to require a bond means that the risk and cost of site resoration must be considered a cost to the public.

The developers projected budget indicates that the cost of this project remains virtually the same in 2022 as the figures provided in 2016. This is not reasonable given the inflation rate and increasing costs of all materials and labor. In testimony of

COSTS AND INCREASED COSTS TO THE PUBLIC

Oregon's electricity users and citizens are being told they must pay for a high voltage line which does not serve Oregonians, but rather is for the primary purposes of moving electricity out of the state and into another market. The official addition of PacifiCorp as the main developer adds substantial additional risk to the public.

1. PacifiCorp already had over 8 billion in debt. They have now been approved to assume an additional \$3 billion dollar debt. (GL 1104, Page 4. The interest rate increases which PacifiCorp will be paying for the amount of the \$3 billion dollar debt which PacifiCorp credits to the B2H project will be paid by utility customers and will increase the costs of the project. Because the public is denied access to the breakdown of what the developer is projecting costs to be of actual items, the petitioners must identify the concern and rely upon PUC staff to document the validity of the concern. These figures are no doubt missing from the projected project costs.
2. The projected costs of purchasing a right of way are significantly less than the value of the land and crops which will be lost to landowners and the state.

a. Example: Idaho Power projects that the total cost to purchase right of ways for the B2h Project will be millions of dollars less than the actual loss to landowners and the state. This is a value that will be assumed by the property owners who do not receive just compensation for the taking of their land.

For Union County alone, the value of the forest land that will be incorporated into the transmission line right of way is, according to EFSC figures \$21.3 million dollars. This figure is a portion of the amount that forest landowners must be awarded in the event that Idaho Power condemns forest land to build the transmission line according to ORS 772.210(4)

The actions of the developer in terms of payments to landowners fails to comply with the requirements of the Oregon Constitution Art. I & 18 requiring that Private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation. While this taking is being done by a private party, the issuance of a CPN moves the rights of the state to condemn land to the developer. Just compensation must be required due to the ideas of justice and fairness when some private property owners are being required to provide an unfair share of providing for the public use of their property. The requirement that Just Compensation is an amount of money necessary to make the property owner whole for the taking of their property is not being used in the negotiations between Idaho Power and landowners. Idaho Power is offering amounts that are not

consistent with the highest and best use of the property. It is also not including the lost value of timber production during the life of the project as is required by 772.210(**4**).

Unknowing landowners are being convinced that they need to accept the offers of Idaho Power which fail to provide just compensation. Given that the Public Utilities Commission is mandated to protect the interests of the public and costs being assumed by the public, the Certificate of Need must not be issued absent assuring that the payments to be made to property owners comply with the Oregon Constitution and court decisions regarding what constitutes 'just compensation .

772.210(**4**) The proceedings for the condemnation of such lands shall be the same as that provided in ORS chapter 35, provided that any award shall include, but shall not be limited to, damages for destruction of forest growth, premature cutting of timber and diminution in value to remaining timber caused by increased harvesting costs.

ORS 772.210

Forest growth is used to determine what is "forest land" and is defined by Statute to be the amount of timber that can be produced given the soil classification in terms of "cubic feet of timber per acre per year", as supported by the Court cases previously referenced.

The fact that the transmission line will pass within 127 feet of the boarder of the National Historic Trails Interpretive Center in Baker County will cause a reduction in tourism to the area and resulting negative economic impact for the county.

--GL/501 – National Historic Oregon Trail Information Center (NHOTIC) Visitation Numbers, 1992-2015)

There is a significant loss of value for those residing in Union County due to placing the transmission line in close proximity to homes and the town of La Grande. The Union County Commissioners submitted a letter to Don Gonzalez outlining the level of concern and supporting not building the line and stating “in the strongest terms possible, opposes adopting as absolutely final any mapping that considers these intrusions on landowners as “acceptable” simply because of inadequate time or resources to identify alternatives to such encroachments.” (Exhibit SG 304, Chapter 1, Pages 3 and 4)

Local communities will be assuming the costs of fire protection and the loss of life and resources in the event of a wildland fire as a result of activities and the existence of the transmission line creating opportunities for wildfires to start. Local counties have made requests for additional specialized wildfire equipment and personnel to help provide mitigation for the increased risk of wirlfires along the transmission line. Those requests have not been honored by Idaho Power. In spite of that, they intend to rely upon local

firefighting resources to address wildfires caused either directly by their transmission lines or by people having access to locations along the transmission lines through use of the transmission line corridor. (SG 316, Page 75) This creates several areas of concern:

1. Reliance on local, typically volunteer, firefighters takes the resources away from the local people paying for equipment and supporting the departments.
 2. Most of these firefighters are volunteers which take significant time to organize and leave for the fire location.
 3. The developer states that they are relying on mutual aid agreements between City and rural fire departments. They provide no documentation that there are mutual aid agreements in place.
 4. Rural Fire protection districts only fight wildfires in areas adjacent to and City fire departments are only certified to fight structural fires and rural fire departments only include forestland in districts adjacent to an existing district which contain structures.
- ORS 478.120 Wildland firefighters typically work for the Forest service and receive special training but lack training in areas such as ladder escape and methods that are available to structural firefighters.

In addition, the areas that wildland firefighters are authorized to work in are limited to forestland . The authority to include forestland within a rural fire protection district pursuant to ORS 478.010 (Formation) (2)(c) only applies to forestland within the exterior boundaries of an existing district and to forestland

on which structures subject to damage by fire have been added after July 20, 1973. [1973 c.337 §3]

The note at the bottom of Table 2-6, SG 316, Page 75 indicate the potential for the State Fire Marshal to mobilize and dispatch structural firefighting personnel and equipment, however, this still is only providing firefighters trained to fight structural fires.

ORS 478.120 Inclusion of forestland in District requires the area to be adjacent to an existing rural fire department district and it must contain a structure.

Relying on resources from BLM or the US Forest Service will undoubtedly increase the response time and resulting damages from fires. The developer has relied on response times from local and rural fire districts to support the fact that they are not providing their own firefighting resources. This means that the response times being claimed cannot support the fact that requests for the developer to provide resources including staff and equipment have not been honored.

The authority to include forestland within a rural fire protection district pursuant to ORS 478.010 (Formation) (2)(c) applies to forestland within the exterior boundaries of an existing district and to forestland on which structures subject to damage by fire have been added after July 20, 1973. [1973 c.337 §3]

Value of riparian area damaged and destroyed:

When riparian areas are damaged, it directly impacts the economy of an area such as eastern Oregon which is dependent upon natural resources as a source of income. SG 316, Page 81 Table 2-7 states that the developer will comply with BLM land USFS riparian management policies regarding surface-disturbing activities which require protection and approval of measures to avoid or minimize stormwater runoff, sedimentation, and disturbance of riparian vegetation habitats, and wildlife species. The table on page 88 of Exhibit 316 states that the distances represent default Riparian Conservation area widths recommended in PACFISH and are consistent with PACFISH (USFS and BLM 1995) and INFISH (USFS 1995) strategies, and the Updated Interior Columbia Basin Strategy – Memorandum # 1920 (BLM, USFS, USFWS, EPA and NOAA Fisheries 2014) This same standard is not being applied on private land. There is no general statement of avoidance and mitigation, and the Order specifically states that there are counties where a 25 foot setback from water sources is all that is required. Irene Gilbert was denied a contested case regarding the need for Idaho Power to provide migration for impacts within the riparian area due to construction being allowed within the riparian zone..

Loss of T & E fish and fish as an economic resource in Oregon must be included in costs being assumed by the Oregon public due to this construction.

Costs to Oregon due to lost forest and farmland habitat for use by wildlife. The rules regarding Habitat impacts are located in OAR 635-425-0025 which rates habitat based on the perceived value to wildlife and then assigns a value to it. It is important to note that no mitigation is required for Category 6 habitat which is agricultural land not considered to have value as habitat, so the figures provided which occur in agricultural land receive no value in terms of habitat damages.

(Exhibit SG 316 page 98 Table Notes.) The Table Notes state that the largest area of disturbance associated with the work area for construction of transmission structures is 250 by 250 feet each. It states the area of permanent disturbance by structures to be 0.06 acres per structure and the remaining to be "temporary impacts with the primary means of mitigation being the requirement that the developer reseed the area of habitat damage. In plain language, in the event that mitigation is being required, which is not always the case, the developer must restore the damaged habitat by reseeded 1.43 acres for each transmission

line structure and provide mitigation of some sort for .06 of an acre or 2,614 square feet.

They only consider vegetation clearing in areas where vegetation can grow more than 5 feet tall. The standard for damage to elk summer and winter range requires more mitigation as it and the Sage Grouse standards are the only ones to require some mitigation for impacts not occurring directly at the location of the transmission structure. **To put this into perspective, the developer is currently expected to provide compensation for a total of direct and indirect impacts to Oregon Elk Summer and Winter Range for the entire route through Oregon a total of 433.6 acres.** Property owners who own this land and rely upon it's use to obtain income from hunting to offset property taxes they pay will receive nothing for their loss of habitat and it's value. The citizens of Oregon who rely upon hunting and fishing licenses purchased to hunt in Oregon will receive nothing to compensate for the lost revenue.

The IRP's acknowledged by the PUC do not address the loss of value of environmental damages to Oregon, however, they suggested in the 2009 IRP that they should determine how these impacts may affect Idaho Power's

generation portfolio. The PUC in determining whether to issue a Certificate of Public Convenience and Necessity is required to consider costs in their evaluation. While I do not have access to the cost figures reflected in the data the public is being denied access to, I encourage the PUC to include this information in any decision regarding the CPN.

The citizens are supposed to believe that the developer will restrict the use of cranes and other heavy equipment to construct structures that are going to be hundreds of feet tall to an area 250 feet by 250 feet and that when done, the structures will permanently impact an area that is 51 feet by 51 feet. (Exhibit SG 316, Table 2-10 Table Notes) There will be no graveled area or fire breaks around the structures? No rational human being can believe that this developer can build any 230 kV transmission line for just under a mile in length and only disturb a total of temporary and permanent habitat amounting to 1 acre. (Exhibit SG 316 Page 98, Table 2-11) The Disturbance areas determine the amount of mitigation that the company must provide for habitat damages. For farmland, there is no requirement for mitigation of habitat damages.

Project Cost Figures Must be Questioned.

Lacking the actual figures for the different items making up the budget, it is difficult for the public to argue this issue, however, there are multiple reasons why the total amounts do not make sense. There was an objection to my questioning J. Ellsworth regarding budget stating he did not participate in developing the budget, but simply received the figures from Idaho Power and used them in analyzing for the IRP. The questions which I am including as documentation regard the figures he received and whether or not the costs of items in the figures he received had changed. These questions are well within the scope of Mr. Ellsworth's knowledge.

The testimony in cross examination from J. Ellsworth to my questions indicate that there can simply not be a legitimate basis for believing that the B2H project costs which were not significantly greater than the costs of alternative portfolios in 2016 could continue to be greater in 2022. I asked what issues have increased and what have decreased between 2016 and 2022, specifically things like labor or materials.' On Page 64 and 65 I asked what costs went down between the previous estimates and the current ones. The response was that the contingency (which addresses cost overruns) was not included in the 21 IRP.

In response to the question regarding whether or not there was an increase in the costs of materials between 2016 and 2021, The response was "yes". In response to my question regarding whether the costs of alternatives such as solar declined between 2019 and 2021, the response on pages 66 and 67 was, "I would say in general we saw cost declines, I think fairly substantial cost declines for solar resources between the 2019 and 2021 IRP, as well as for battery storage and for wind. And so we did see a lot—very—very large cost drop-off, I believe between those two IRP's.

When the costs of alternative energy sources like the use of solar, batteries and wind have gone down, and the costs of materials and labor have gone up between 2016 and 2022, the only way the budget could not have shown a significant change in the cost of alternative resources compared to the costs of constructing the B2H line would be through creative budgeting which would include items such as removing the 20% contingency for cost overruns.

The commission states in SG 319, Page 6 response to Staff Information Request information that "First, cost overruns are a matter of significant concern as they often are with large, complex resource solutions. Idaho power must continue to stress test this project aggressively as a part of the preferred portfolio. Idaho

Power must build in potential costs and cost contingencies that arise with concerns on the landscape, wildfire, and property risks.”

The content of this and other contested cases attest to the fact that there are significantly increased risks of cost overruns for this project given the level of resistance to it’s development, There is an intent for citizens to aggressively pursue all options available to them in limiting the costs that are passed on to the ratepayers, through increased energy costs, requiring the developer fully comply with Oregon OSHA, ODFW, Federal Wildlife laws, mitigation requirements and all other requirements related to the construction of this project.

NOTICE NOT PROVIDED PER ORS 183.415

This statute requires specific actions when “actions taken by state agencies” affects the public. The statute requires:

3. A notice sent to all people affected by agency actions served “personally or by registered or certified mail.”
4. The above notice must include:
 - a. The right to a hearing
 - b. What authority and jurisdiction the hearing will be held under

- c. The actual sections of the statutes and rules involved.
- d. A short and plain statement about what you plan to change.
- e. What would allow a default against the person to be entered and
- f. Accommodations that will be made for Active Duty Servicemen.

No such information was provided to the impacted people in person, by registered or certified mail even though every residence within at least one half mile of the transmission line will be affected by the EFSC process as well as issuance of a Certificate of Public Convenience and Necessity allowing for condemnation of property to allow the transmission line to be built over private property in spite of the objections of the property owners. Both the EFSC process and the PUC process will allow citizens to have their property taken over their objections and the development of a transmission line which will expose citizens to exceedances of the Oregon Noise Degradation Standard. EFSC failed to meet their obligation due to providing only generic public notices which was not provided in the manner required, failed to provide the specificity necessary for citizens to be informed that they would be effected, how they would be effected and the opportunity for a hearing regarding the impacts. EFSC was aware of the requirements of ORS 183.415 as noted in the Second Amended Project Order stating the obligation under ORS 183.415 is to provide notice to impacted persons of their right to a hearing, however, failed to provide the required notice.

ODOE provided no notice prior to issuing a site certificate, and to date the PUC provided no notice regarding the impacts of the issuance of a Certificate of Public Convenience and Necessity to either landowners or those exposed to the impacts of the transmission line or their rights to a hearing. This notice needs to be provided prior to issuing a CPN which will allow condemnation of private property to build the line.

FAILURE OF CITICORP TO PROVIDE MANADATORY INFORMATION IN ORDER TO ISSUE A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

PacifiCorp is the primary developer of the Boardman to Hemingway transmission line given their 51% interest in the project.

They have not provided the PUC with the required information to make a determination regarding the issuance of a Certicate of Public Convenience and Necessity.

Requests for Data made by Greg Larkin resulted in responses that deferred to Idaho Power.

There is no indication that there are any details regarding the responsibility for addressing different requirements of either EFSC or the PUC. This is of significant importance in a number of areas. One is the impact that including PacifiCorp as a major partner will have on mitigating for increased fire risk. PacifiCorp has a poor record in terms of avoiding fires located along their transmission lines and have been cited or agreed to financial compensation in several different transmission line fires.

EFSC decisions regarding addressing wildfire risk as well as the decision to allow only a \$1.00 bond to restore the site in the event an unplanned event such as a catastrophic fire or bankruptcy due to impacts of such an event was based upon their decision that there was no possibility that such an event would occur. Now the PUC is considering issuing a Certificate of Public Convenience and Necessity where the costs of restoration of the site in the event of a fire caused failure to do so would fall onto either electricity users, private property owners or citizens at large.

FAILURE TO PROVIDE MITIGATION TO ADDRESS THE INCREASED FIRE RISK AS A RESULT OF THE TRANSMISSION LINE.

Idaho Power was asked in Data Request No. 72 whether the draft Wildfire Mitigation Plan proposed by IP would assure that ongoing monitoring and mitigation would occur to avoid the increased risk of wildfires either caused by the transmission line or by human access opportunities provided by the transmission line. The Developer Referred me to the Fire Prevention and Suppression Plan, Section 3.0

530 Acres of Forest land \$97,000 Page 232 Proposed Order Value of \$401 per acre per year for 530 acres. Total lost value \$21.3 million.

PO Page 235 credited IP \$40,100 per acre.

ORS 469.504 requires compliance with statewide land use goals,

Idaho Power Response to Greg Larkin Data Request No. 83.

I, Greg Larkin, submit this document is true and correct to the best of my knowledge under the threat of perjury.

/s/ Greg Larkin

Greg Larkin

DOCKET PCN 5 – CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2023 Greg Larkin submitted the above Opening Brief was served in person to the following person:

John C. Williams

PO Box 1384

La Grande, Oregon 97850

(s) Greg Larkin

Greg Larkin, Petitioner

