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VIA EMAIL

Boardman Planning Commission
c/o Carla McLane
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RE: File LU 22-001/ZP21-066 – Olson Road Transmission Line
Applicant's Final Legal Argument

Dear Planning Commissioners:

Introduction

This firm represents Umatilla Electric Cooperative ("UEC" or "Applicant") in this matter. This letter and its attachment serve as Applicant's Final Legal Argument and should be included in the record.

Argument

UEC's Application relates to a new electrical line (the "transmission line") UEC is constructing as part of an upgrade to the portion of its electrical system that serves the areas in and around the City of Boardman ("City") and the Port of Morrow.

Only a small portion of the transmission line will be located within the City's boundaries, with the remainder lying in unincorporated areas of Morrow County. Of note, the present Application and appeal that are before the Planning Commission relate to only two tax lots – Tax Lots 3205 and 3302 (4N25E10) ("Subject Properties"), both of which are in the SC Zone. For the other seven tax lots in the City where the line will be located, UEC submitted, and the City has already approved, zoning permit requests.

This background is important because the Planning Commission has already addressed and resolved all but one of the issues raised in this proceeding. The appellants have made no effort to explain to the Planning Commission why it should deny the current Application for the Subject Properties when it just approved an identical application on five other properties in the

SC Zone. When confronted with that fact during the Planning Commission hearing, the appellants responded only that "nothing prohibits" the Planning Commission from re-interpreting the applicable Boardman Development Code ("BDC" or "Code") provisions. That is a non-answer. The appellants owed it to the Planning Commission to explain what is different about this Application that warrants different treatment. They did not, because there is no difference. Appellants therefore know that they presented the same losing arguments to the Planning Commission, which should not be tolerated.

In its Pre-Hearing Submittal dated February 1, 2022, UEC demonstrated how each of the issues Appellants cut-and-pasted from the last proceeding to this proceeding were resolved by the Planning Commission and the City Council. The Planning Commission can resolve each of those issues based on the identical reasoning it used last time. Nonetheless, because the Appellants continue to push those issues in this proceeding, UEC responds again to each of those issues below. UEC also addresses the "ownership" issue Appellants have raised, which is the only issue unique to this proceeding.

1. The transmission line is allowed in the SC Zone.

There is no dispute in this proceeding that the only zoning designation relevant to the Planning Commission's decision is the SC Zone.

Contrary to the Appellants' assertions, the Code expressly allows utilities like the transmission line as an allowed use in the SC Zone. BDC 2.2.200(B) states that "the land uses listed in Table 2.2.200B are permitted in the Service Center Sub District, subject to the provisions of this Chapter." Section 2.b of that table, in turn, lists the following as an outright permitted use: "Private utilities (e.g. natural gas, electricity, telephone, cable and similar facilities)." Where a use listed in Table 2.2.200B is subject to any additional standards beyond those in BDC Chapter 2.2.200, the table notes which additional standards apply. For private utilities, no additional standards are listed. It should be noted that <u>most</u> uses allowed by right in the SC Zone are allowed without the imposition of additional standards. This is in line with the purpose of the SC Zone, as set forth in BDC 2.2.200(A), which states that "The Service Center Sub District is designed to accommodate heavy commercial uses and light industrial uses along portions of the I-84 corridor."

Opponents to the transmission line have argued that UEC is not the right kind of "private utility" and, therefore, its transmission line does not qualify as an outright permitted use. Appellants assert that only "small, individual distribution lines" qualify as "private utilities." The problem with this argument is that the Code does not say that only small distribution lines are allowed in the SC Zone. Indeed, the Code makes no such distinction based on the size of a utility, and the Code expressly allows <u>all</u> private utilities, including those for electricity, in the SC Zone.

The Appellants' argument makes no practical sense, because it would allow small service lines in the SC Zone but not the larger facilities those lines rely on. For example, under their reading, a natural gas company could construct small service lines to a property, but could not also have a gas main connected to those lines, thereby making the service lines useless. The same

goes for electric lines – it would be absurd to allow service drops to a commercial building but prohibit the electric lines that feed those service drops.

Appellants point to the City's underground wiring requirements as evidence that the Code allows only small utility distribution lines. First, as explained in more detail below, the Underground Wiring Control District requirements that Appellants refer to are not applicable to the transmission line components that are subject to this Application. Even assuming they are, the Underground Wiring Control District applies to all utilities, but it makes a distinction between small service lines and other types of utilities. Specifically, BMC 13.12.130(E) states that the Underground Wiring Control District requirements do not apply to "feeder lines" which are defined as a line "that serves the system but not a specific customer." Thus, where the City has intended to treat small utility lines differently than large utility lines, it knows how to draw a distinction between the two. The City has not made that distinction in the provisions applicable to the SC Zone, and therefore, there is no basis to conclude that such a distinction exists.

Appellants also argue that the City's BPA subdistrict zone is where the transmission line "must and should go." That argument is a misstatement of how zoning works. Just because one zone allows a certain use does not mean that use can only be located in that zone. Further, this argument ignores the fact that the Code authorizes the same use in multiple sub districts. Single family housing, for example, is allowed in multiple residential subdistricts, including the multifamily subdistrict, which is designed to have more intensive housing. Either way, the transmission line is not slated to be in the BPA subdistrict zone. The regulations of that district are therefore wholly irrelevant to the Application.

As a final argument, Appellants urge the Planning Commission to adopt a strict interpretation of the Code because, according to them, BDC 1.1.200(C) requires the most restrictive regulation to apply. There are two flaws with this argument. First, BDC 1.1.200(C) tells the City how to choose among conflicting regulations when two or more regulations apply; it does not tell the City how to interpret Code provisions. Appellants have not identified a conflicting regulation that applies to this situation and, therefore, there is not a more restrictive Code provision to choose. Second, the express language of BDC 1.1.200(C) relates to conflicts between the Code and "other rules or regulations" rather than conflicts between two Code provisions. Appellants have not identified which non-Code rule or regulation they believe is in conflict with the allowed uses in the SC Zone. BDC 1.1.200(C) is therefore of no use here.

The bottom line is that UEC's position in this case, unlike Appellants' position, is grounded in the actual text of the Code. Appellants' argument that this decision will somehow result in endless large transmission lines throughout the entire City is simply a scare tactic. As reflected in the Application materials, the ability to site a transmission line in this area is actually quite limited and UEC has pursued one of the only viable routes that are available. In doing so, UEC has sited the line in an area the City has expressly designated as being appropriate for heavy commercial and light industrial uses.

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2. The City's undergrounding requirements do not apply.

Appellants again conclude wrongly that the transmission line is prohibited by Boardman Municipal Code ("BMC") chapter 13.12, which is referred to as the Underground Wiring Control District. Under that chapter, many electrical wires must be placed underground. There are several exceptions to that requirement, however, and UEC's transmission line is not required to be placed underground.

First, the Underground Wiring Control District governs only those wires that are in public rights of way. BMC 13.12.030, the provision that prohibits overhead wires, expressly states: "It is unlawful for any person to erect, construct or maintain on or over the surface of any of the streets in the underground wiring control district any wires . . . on, through, or by means of which electric current is transmitted or used. . . ." Appellants attempt to apply this language, which regulates only utility lines in streets, as a means of controlling development on private property away from streets. The Application before the Planning Commission relates only to the portion of the transmission line that crosses two privately-owned parcels.

Second, as noted above, there is an express exemption that allows UEC's transmission line to be constructed above ground in the Underground Wiring Control District. BMC 13.12.130(E) states that these requirements do not apply to "feeder lines" which are defined as a line "that serves the system but not a specific customer." The transmission line is part of UEC's system and is a feeder line under that definition. The Underground Wiring Control District simply does not prohibit the transmission line on private property in the SC Zone.

3. The transmission line complies with all applicable development standards.

Appellants further assert that UEC's transmission line does not meet all of the City's development standards. The Planning Commission can reject those arguments.

With few exceptions, Appellants do not claim that the transmission line does not meet development standards; rather they assert that the Application does not address those standards. This is not correct. The Application expressly identifies which development standards apply to the transmission line. Admittedly, this section of the Application is short, but that is because so few development standards actually apply to a transmission line.

As noted above, BDC 2.2.200(B) allows the transmission line subject only "to the provisions of this Chapter." BDC 2.2.200(A), in turn, states that "The base standards of the Commercial District apply, except as modified by the standards of this Sub District." BDC Chapter 2.2 and the base standards of the Commercial District contain very few development standards that apply to transmission lines.

One development standard Appellants claim is not met is the height standard set forth in BDC 2.2.140. The problem with this argument, of course, is that the height standard applies to buildings, and UEC is not proposing any buildings as part of the transmission line in the City. Appellants nevertheless assert that the transmission line poles constitute "buildings." The Planning Commission should once again reject this clearly illogical interpretation of the Code.

Although the Code does not define "building", the Code's requirement for how to measure building height clearly indicates that a pole for an electric line is not a building. Specifically, BDC 2.2.140 states "Building height is measured as the vertical distance above a reference datum measured to the highest point of the coping of a flat roof or to the deck line of a mansard roof or to the average height of the highest gable of a pitched or hipped roof." Utility line poles do not contain a flat roof, mansard roof, or hipped roof. There is therefore no "building height" that can be measured in this context.

Appellants also claim the transmission line does not comply with BDC 2.2.150(B)(1). But the only standard in that Code provision is that "Buildings shall be appealing and compatible with balance of the Commercial District and Sub Districts." BDC 2.2.150(A), however, limits the scope of BDC 2.2.150(B)(1) to certain "building" types. This argument fails for the same reason that no buildings are included in UEC's proposal. This is reinforced by other language in this Code section, which refers to the "enclosed floor area" of a building, a quality that does not describe a utility pole.

The only other development standards that are potentially applicable to the transmission line are those found in BDC Chapter 3.4. Appellants argue that the transmission line does not meet BDC 3.4.100(A), which requires a development to have frontage or approved access to a public street. Applicant's development is a utility use that does not involve a transportation component. The Planning Commission can find that the Applicant's development has approved access to a street. The Applicant submitted easement documents demonstrating its right to access each easement area from the underlying parcel, each of which has access to a street. Further, the transmission line will result in a continuous corridor that can be accessed from multiple streets. This Code provision has therefore been satisfied.

Under BDC Chapter 3.4, there is a specific subsection applicable to utilities – BDC 3.4.500 – the only requirement of which is that some utilities must be located underground. Unlike the provisions of the Underground Wiring Control District, that Code provision does apply to private property, but it applies only to a subdivision, which is not part of UEC's proposal. Further, that Code section expressly exempts any electric lines that operate at 50 kV or greater. UEC's transmission line, which will operate at 230 kV, qualifies for that exemption whether or not a subdivision is involved.

As a final point on development standards, Appellants argue that the Application is insufficient with respect to the Site Design Review criteria of BDC Chapter 4.2. First, it is questionable whether Site Design Review even applies in this situation. No provision in the SC Zone requires Site Design Review for utilities. Where commercial zones Site Design Review, the Code expressly lists that as a requirement.

Appellants argue that Site Design Review applies anyway, because the transmission line is an "improvement" to property. Yet, only those improvements such as "building and other structures, parking and loading areas, landscaping, paved or graveled areas, grading, and areas devoted to exterior display, storage, or activities" require review. UEC's proposal does not include any of these activities. As described above, the transmission towers are not buildings. The Code does not define "structure," but almost every use of that term in the Code relates to

building-like structures that house activities (e.g. manufactured structure is a specific kind of building). Where the Code intends to describe a tower, it does so. The definition of "wireless communications equipment", for example, includes "towers" used for signal transmission and receiving. There is therefore no basis to conclude that transmission line towers are structures for purposes of the Code generally or for Site Design Review specifically.

The good news is that the Planning Commission does not have to determine if Site Design Review is required, because the Application meets the Site Design Review standards. As stated in BDC 4.2.200(A), "Site Design Review ensures compliance with the basic development standards of the land use district (e.g., building setbacks, lot coverage, maximum building height), as well as the more detailed design standards and public improvement requirements in Chapters 2 and 3." As noted above and in Staff's original approval, the transmission line complies with the basic design standards applicable in the SC Zone. Staff clearly had sufficient information in the record to make that determination and, therefore, the Site Design Review process was satisfied.

Appellants argue in part that the Application was deficient because it did not include certain elements they say are required for Site Design Review by BDC 4.2.500(B). However, Application requirements are not approval standards. The Site Design Review Standards are satisfied, as long as the development standards of the underlying zone are reviewed and determined to be satisfied. Even so, the list of items in BDC 4.2.500(B) are not mandatory. That Code provision expressly states that the information in that section is required "as deemed applicable by the City Manager." Here, the City planning Staff made no determination that the information was applicable to its decision, presumably because the information in the record was sufficient to demonstrate compliance with development standards. The absence of additional information in the Application was therefore not detrimental to the City's review and is not a basis for denying the Application.

4. Property Ownership Issue

The only new argument Appellants advance in this proceeding is their assertion that the City cannot even look at UEC's Application because UEC is not the owner of the Subject Properties. Appellants' argument is based on BDC 4.1.700(D), which provides that a land use application may be initiated only by certain individuals, including a record owner of the property, or someone else that has authorization from the property owner.

UEC has explained in other submittals why the express terms of these Code provisions do not apply to the Application. The most important point that Appellants ignore is that the language of these Code provisions apply only to applications for the "approval" of any use. UEC's Zoning Permit involves a use that has *already been approved* as an outright use in the SC Zone. That explanation aside, the question for the Planning Commission is one of interpretation, and UEC offers the following arguments for why the most reasonable interpretation of the City's Code is that UEC is allowed to submit a Zoning Permit application.

First, even accepting Appellants' argument that only Appellants may "authorize" the Application, UEC has obtained their authorization through a binding court order. Although UEC

has attempted to negotiate the terms of an easement on the Subject Properties (just as it has done successfully on every other property where the transmission line will be constructed), it has unfortunately had to pursue its option of last resort, which is to use its statutory authority to acquire the property through the courts. As part of that process, the Morrow County Circuit Court entered an order that expressly provides UEC with authority to enter onto and to use the Subject Properties for the limited purpose of constructing the transmission line. As set forth in that Order, which is included with UEC's Application, neither the owner of the Subject Properties "nor its contractors, employees, invitees, licensees, guests, agents, or representatives, shall interfere with [UEC's] occupancy and use of the Easement."

UEC's power of eminent domain, by definition, is the taking of a property interest. In exercising that power, however, UEC can take only those property interests which are "necessary." As confirmed by the Public Utility Commission of Oregon and the Morrow County Circuit Court, UEC has established that it needs only an easement interest on the Subject Properties, and it would likely have been unlawful, in this situation, for UEC to attempt to acquire the full fee interest of the Subject Properties. Moreover, UEC would not have attempted such an unnecessary taking because, as just noted, any taking is an option of last resort.

The corollary to the limits placed on UEC is the fact that the scope of the property interest being taken must be that which is necessary to put the property to public use. Thus, when UEC obtained court approval to acquire and to use an easement on the Subject Properties, it obtained all property interests necessary for that use – including the ability to apply for land use approval. It would make no sense to go through the statutory process of condemnation only to be denied the ability to submit a land use application. This is not to say that the City is deprived of its authority to decide whether to approve the Zoning Permit; it is UEC's burden to show that the applicable land use standards are satisfied and that the Zoning Permit should be approved. But the City must allow UEC the chance to at least apply for the Zoning Permit and to make its case that the standards are satisfied. Otherwise, the Court's order is meaningless.

Based on the evidence in the record, the Planning Commission should find that UEC has the authorization required by the Code for making land use applications. UEC obtained this authorization from the underlying owners of the Subject Properties – 1st John 2:17 LLC. This authorization was provided over the objection of 1st John 2:17 LLC, but the matter was resolved in litigation, which led to the Court's order. It is critical to note that after the Court issued its order, Appellants accepted money from UEC for its use of the easement. UEC raised this issue during the Planning Commission Hearing, but Appellants have conveniently ignored the question – how can Appellants ask for and accept payment from UEC for the use of an easement, but then attempt to say that they do not authorize the use of the easement? Appellants cannot have it both ways.

Second, Appellants attempt to read the Code language too narrowly. BDC 4.1.700(D)(1)(a)(4) states that an application may be initiated by "a record owner of property." The Code does not define "record owner", "owner", or "property." The Planning Commission must therefore determine how to interpret this language.

One conclusion the Planning Commission can come to that should not be in dispute is

that the Code contemplates there may be more than one owner of property. Contrary to Appellants' assertion, the Code allows applications from "a record owner of property" rather than from "the record owner of property." Another conclusion the Planning Commission can come to is that there are different types of ways to own property. The owner listed on a deed is certainly an example of a property owner. But the Code also acknowledges the existence of easements, which are property interests owned by someone other than the person on the deed.

In that context, UEC is a record owner of property, because it is an owner of the property interest that is the subject of the land use application, and that ownership is a matter of record. Indeed, UEC is the sole holder of the property interest for the purposes of the easement, which is the development of the transmission line in that easement.

Appellants' narrow reading of the Code would undermine other provisions in BDC 4.1.700. Just as the Code allows an owner of property to initiate an application, it also allows the City Council, the Planning Commission, or the City Manager to initiate an application. The City Council and City Manager may wish to initiate an application in furtherance of constructing a public project that requires easements from private property owners. It would make little sense if the City Council, Planning Commission, or City Manager also had to obtain the authorization of each property owner prior to even considering a land use application for a public project. Their authorization to proceed with those projects simply comes from a different source. In other words, the Code's requirement to obtain authorization from the property owner applies only where the applicant cannot demonstrate some independent source of authority for making a land use application. In this case, UEC has demonstrated that it has such authority through a court order.

Any doubt about the correct interpretation in this case has already been resolved by the Oregon Court of Appeals. The Court has unambiguously ruled that, even if the Code can be interpreted as prohibiting UEC from filing a land use application, such an interpretation is unreasonable in these circumstances. In the case *Schrock Farms, Inc. v. Linn County*, 142 Or.App. 1 (1996), the Oregon Department of Transportation ("ODOT") submitted a land use action after obtaining immediate possession of property but prior to completing the condemnation process that would transfer ownership of the property right to ODOT. Linn County had a provision similar to the City's Code, and land use applications required the signature of the property owner. The property owner in that case, similar to Appellants here, asserted that ODOT could not submit the land use application because the property owner had not consented to it. After reviewing that county's code, the Court of Appeals concluded:

> even if the local provisions by their terms could be read to prevent ODOT from making the applications as petitioners assert, the effect would be that ODOT could not gain the necessary approvals to put the property to a public use until it had already acquired the property through a judgment in the condemnation proceeding. ODOT argues that the resulting Catch-22 situation would effectively nullify significant aspects of the state condemnation statutes, e.g., ORS 35.265, and a "county ordinance should not be read to repeal a state law." We agree.

The factual situation here is identical to that in *Schrock Farms, Inc. v. Linn County*. UEC, like ODOT, has a statutory right to possess and use Appellants' property. That right is not only in statue, it has been confirmed by a court order (included in the Application) that also states neither the Appellant nor anyone else can interfere with that use. If Appellants' reading of the Code were allowed to prevail, UEC could not obtain the necessary approvals to put the property to a public use, resulting in the Catch-22 situation noted by the Court – and it would effectively nullify significant aspects of the state condemnation statutes. Because a local ordinance cannot be read to repeal a state law, the Code simply cannot be read in the manner Appellants propose.

UEC has independent authority to proceed with the transmission line, granted by statute, confirmed by judicial order, and accepted by Appellants when they accepted money from UEC as compensation for UEC's use of the easement. UEC therefore has all the authority it needs from the underlying landowner to have the City process its Application.

5. There are no procedural errors in this matter.

The Planning Commission received testimony from Appellants asserting that the Staff's original decision made several procedural errors. There is no longer any basis to deny the Zoning Permit based on any procedural errors or particular review process. Appellants, by appealing this matter to the Planning Commission, have had a full and fair opportunity to present their case. There has now been an evidentiary hearing, and the Planning Commission left the record open for all participants for an extended period. There has therefore been no impact to any party's substantial rights regarding the review and approval of the Application.

Conclusion

UEC's transmission line is an outright permitted use that complies with all development standards. The Planning Commission can therefore deny the appeal and approve the Zoning Permits as requested. For the convenience of the Planning Commission, we have included as Exhibit A proposed findings that address the criteria in the Code and the arguments that have been set forth by all participants. The Applicant respectfully requests that the Planning Commission adopt those findings in support of its decision.

Sincerely,

Tommy A. Brooks