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VIA EMAIL ONLY

Energy Facility Siting Council
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Re: OAH Case No. 2019-ABC-02833 - Boardman to Hemingway Transmission Line – Protected Area Standard Rulemaking

Dear Chair Grail and Councilmembers:

Idaho Power Company is writing to express serious concern with the current direction of the rulemaking to update the standards related to Protected Areas, Scenic Resources, and Recreation Resources. Idaho Power provided comments in December 2020 expressing concern about rule changes that would move the goalposts for applicants that are in the middle of a contested case proceeding, including Idaho Power and its Boardman to Hemingway Transmission Line Project (B2H). And that is exactly what the Oregon Department of Energy (ODOE) Staff's current proposal would do.

If adopted, ODOE's proposed rule changes would introduce new Protected Area resources that have not yet been analyzed by Idaho Power and ODOE for B2H, and inject a significant amount of uncertainty into the B2H contested case process that has been in development for over 12 years and is now finally near the finish line. In addition to the potential issues for the B2H case, ODOE's proposal raises larger legal issues, as it includes a recommendation that the Energy Facility Siting Council (EFSC or Council) may delineate a cut-off date for Protected Areas that must be considered in each application, despite open questions about the Council's legal authority to do so. This approach will subject the Council to risk of appeal, and is simply untenable.

Idaho Power urges the Council to take a step back, and either pause the rulemaking entirely while the Council determines how its rules should apply to projects that are currently in the review process, direct ODOE Staff to amend its proposal in a way that will avoid prejudicing projects that are already far along in the application review process and that ensures the standards will provide the regulatory certainty future applicants need to move forward with energy facility projects, or direct ODOE Staff to host workshops with the public to collaboratively develop rule concepts and rule language to avoid prejudicing current projects and ensure regulatory certainty.

I. Background

The Protected Area Standard currently includes a May 11, 2007 cut-off date, such that the standard applies only to resources designated as of that date. The cut-off date provides certainty for developers as to which resources should be analyzed as a protected area, which is crucially important due to the avoidance requirement in OAR 345-022-0040 (the “Protected Area Standard”).¹

The B2H Project is a proposed 500-kilovolt transmission line spanning approximately 300 miles and five counties in Eastern Oregon and one county in Western Idaho. Due to the scale and complexity of the B2H Project, Idaho Power has been working through the federal and state permitting processes for approximately 12 years, including the following major milestones in the EFSC process:

- Notice of Intent (2010)
- Project Order (2012)
- Preliminary Application (2013)
- First Amended Project Order (2014)
- Amended Preliminary Application (2017)
- Second Amended Project Order (2018)
- Complete Application (2018)
- Draft Proposed Order (5/2019)
- Proposed Order (7/2020)
- Contested Case (2020-present)

As Idaho Power considered possible routes for B2H in the early stages of this process, avoidance of “protected areas” under the EFSC standard was a major factor in the Company’s siting decisions. As part of its Application for Site Certificate (ASC), Idaho Power analyzed the relevant resources under the Protected Area Standard and applied the analytical framework in the standard, and ODOE analyzed these same resources and applied the same standard in the Draft Proposed Order (DPO) and Proposed Order.

II. ODOE’s Proposed Elimination of the Cut Off Date Would Render Idaho Power’s Protected Area Analysis for B2H Obsolete and Potentially Require that the Project be Re-Routed Well into the Contested Case

If the Council were to eliminate the cut-off date for Protected Areas, any designation of a new natural area could derail a project when it is well into a contested case process. This is not just an idle concern. In fact, as Idaho Power explained in its comments filed in this rulemaking process, close to 10 years into the EFSC process for B2H, a private landowner with a parcel that will be crossed by the project sought designation of his land as a state “natural area” through the

¹ OAR 345-022-0040(1) (unless an exception applies, “the Council shall not issue a site certificate for a proposed facility located in the areas listed below”).

Oregon Parks and Recreation Department without informing Idaho Power or ODOE. The designation was effective in September 2019—after issuance of and close of public comments on the DPO. Significantly, Idaho Power did not learn of the designation until the fall of 2020, when it became clear that one of the limited parties to the B2H contested case intended to raise this issue as a contested case issue. Given how far along we are in the B2H ASC process and our timing constraints for developing B2H, Idaho Power cannot simply pause the process to try to re-route around this site—and it would be unreasonable to ask Idaho Power to do so.² In fact, the transmission line crosses this landowner’s property in part to avoid crossing two other resources that were properly raised during the siting process: Eastern Oregon University’s Rebarrow Research Forest to the west, and Oregon Department of Fish and Game’s Ladd Marsh Game Management Area to the east.

Beyond the issues created for B2H, ODOE’s proposal to eliminate the cut-off date may also be problematic for other developers as a new protected area could be brought into the process at any time up to issuance of the site certificate. While new protected area designations may be less likely to impact a “postage stamp” generating facility resource where the developer has likely either purchased or leased the land at issue, this rule change will present significant challenges for linear facilities, particularly large-scale linear facilities. Additionally, this rule change may even encourage landowners to try to game the system to introduce a siting obstacle late in the process. The rules should include a reasonable cut-off to provide certainty to developers, which could be linked with a project milestone like the submission of the preliminary ASC.

In its report, ODOE Staff has acknowledged that eliminating the cut-off date could create uncertainty for projects under review, and has suggested that the Council may have authority to exempt B2H (or other projects) or determine that an earlier version of the rules should apply. However, ODOE Staff has also acknowledged there is some ambiguity regarding the Council’s authority, and Idaho Power strongly questions whether the Council would have the authority to apply an earlier version of its rules. ORS 469.401(2) provides that the site certificate requires compliance with “the rules of the council in effect on the date the site certificate . . . is executed.” Thus even assuming the Council decides that the revised rule should not apply to B2H, given the ambiguity regarding the Council’s legal authority and whether ODOE Staff’s proposal is contrary to EFSC’s own statutes, Idaho Power believes there is a high likelihood of an appeal of the Council’s decision as to whether the revised rule should apply to B2H.

Furthermore, even assuming EFSC could legally apply an earlier version of the rules, there is no procedural avenue for the Council to make that determination for projects in the middle of the contested case, which would mean that the issue of which resources should be analyzed would not be definitively resolved until after the contested case is concluded—which would be an

² In addition, Idaho Power has not performed a comprehensive review of the different resources captured by the Protected Area Standard to analyze whether there may be additional resources that would be brought in by virtue of the rule update. While it is probably unlikely that there are additional resources that may be brought into the B2H case that we would not be aware of, it is possible that there may be other resources at issue as well.

absurd result. This approach would also put the Administrative Law Judge and parties in an impossible position during the contested case—where the applicable rules and scope of analysis is uncertain during the case—and would be incredibly inefficient and a waste of party resources.

Finally, ODOE Staff indicates that resolving the uncertainty created by eliminating the cutoff is outside the scope of this rulemaking and should instead be taken up in a separate rulemaking, the Application Process Review Rulemaking. Idaho Power strongly disagrees with this approach. The Council should not move forward with this rulemaking without first considering how this change may impact projects that are currently in the application review process (or in the case of B2H, in the contested case process) or punt the issue to the Council to resolve on an ad hoc basis under questionable legal authority. Instead, the Council should take this issue head on and determine how the rules will apply to pending projects, and then address the substantive issues in this rulemaking.

III. Other Problems with ODOE’s Proposals in this Rulemaking

Change to Alternative Route Analysis. ODOE is proposing to change the analytical framework for the alternative route analysis required where a linear facility will cross a protected area (OAR 345-022-0040(2)). Instead of requiring a conclusion that the alternative will result in greater impacts, in Staff’s proposal, the Council must conclude that the proposed route (through the protected area) will result in fewer impacts to resources protected under the Council standards. The alternative route analysis is an issue in the B2H case with respect to the Blue Mountain Forest State Scenic Corridor. Importantly, the analysis for B2H for this resource was developed based on the current rule and analytical framework (***and with the involvement and support of the relevant land-managing agency, the Oregon Parks and Recreation Department***), and Idaho Power has not developed the analysis contemplated under the revised proposal. Moreover, it is unclear what is required for the analytical framework contemplated in Staff’s proposal—for example, it is not clear which resources and standards would be analyzed (or how) to demonstrate that the proposed route would result in fewer impacts to resources protected under the Council’s standards. It would be problematic for Idaho Power to have to develop an updated analysis for this resource at this late stage in the process. Additionally, the analysis for the Blue Mountain Corridor is not an issue in the B2H contested case, though it is not clear whether it may become an issue by virtue of the need to provide an updated analysis addressing the rule change.

Methodology for Analysis of Impacts. In the Staff Report, ODOE Staff is signaling some openness to considering a stakeholder proposal that the Council adopt one or more methodologies for analyzing impacts to protected areas. This would be incredibly disruptive and problematic for B2H to potentially require a new or different methodology for analysis at this stage of our process.

Criteria for Important Recreation Resources. In the Staff Report, ODOE Staff is signaling some openness to clarifying the criteria for identifying important recreational resources. While it

is not clear precisely what is intended here, this could be problematic to the extent that it may require analysis of resources that were not previously identified in our ASC.

IV. Conclusion

When ODOE Staff proposed this rulemaking to update the standards related to Protected Areas, Scenic Resources, and Recreation Resources in October 2020, the Council explicitly stated that it would reevaluate whether to proceed with this rulemaking after hearing from stakeholders.³ Idaho Power believes there are major problems with the approach ODOE Staff is taking in this rulemaking, and accordingly, Idaho Power urges the Council to postpone further action on this rulemaking until after the Council has resolved the issue regarding how it will address pending projects and how it will incorporate a cut-off date or milestone to provide needed regulatory certainty to developers. Idaho Power recommends that ODOE include a sensible cut-off date tied to a project milestone like submission of the preliminary ASC and avoid making other substantive changes at this time that will be prejudicial to B2H or other projects that are currently under review by the Council. To the extent that the Council directs that one or more workshops should be held in this rulemaking, Idaho Power would look forward to participating and providing additional input on this matter.

Sincerely,



Jocelyn C. Pease

cc: EFSC Councilmembers
Todd Cornett
Chris Clark
Patrick Rowe

³ Energy Facility Siting Council October 22-23, 2020 Meeting Minutes at page 9 (“Chair Jenkins agreed with Vice-Chair Grail. He stated he believed Vice-Chair Grail wanted a pause after doing the preliminary assessment and request for additional information from stakeholders, then bring it back to Council to have a discussion on whether to move forward or not.”).