

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

REMINGTON BESS, LLC,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

FRIENDS OF MARION COUNTY,
Intervenor-Respondent.

LUBA No. 2026-030

FINAL OPINION
AND ORDER

Appeal from Marion County.

Ryan C. Thomas filed the petition for review and reply briefs and argued on behalf of petitioner. Also on the brief was Perkins Coie LLP.

Garrett H. Stephenson filed an amicus brief on behalf of Renewable Northwest. Also on the brief was Laura Kentnesse and Schwabe, Williamson & Wyatt, P.C.

Andrew Mittendorf filed the respondent's brief and argued on behalf of respondent.

John D. Butterfield filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent.

BASSHAM, Board Member; ZAMUDIO, Board Chair; WILSON, Board Member, participated in the decision.

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REVERSED

08/26/2026

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county decision denying its application to site a battery energy storage system (BESS) as a utility facility on land zoned for exclusive farm use (EFU).

MOTION TO INTERVENE

Friends of Marion County (intervenor) moves to intervene on the side of the county. There is no opposition to the motion and it is allowed.

MOTION TO APPEAR AS AMICUS

Renewable Northwest (RNW) moves to appear in this proceeding as amicus in support of petitioner, pursuant to OAR 661-010-0052(1).¹ RNW states that it is a public interest organization dedicated to advancing clean energy and associated infrastructure to decarbonize the electrical grid. RNW argues that LUBA's review of the issues in this appeal would be significantly aided by RNW's participation as amicus because RNW, as a policy organization focused on clean energy, can offer legislative and policy insights on the question of whether the proposed BESS facility qualifies as a utility facility.

¹ OAR 661-010-0052(1) provides that a person or organization may appear as amicus by permission of the Board, if LUBA's review of relevant issues would be significantly aided by participation of the amicus.

1 There is no opposition to the motion to appear as amicus. We agree with
2 RNW that its participation in this appeal would significantly aid our review. The
3 motion to appear as amicus is granted, and LUBA will consider the amicus brief.

4 **FACTS**

5 PacifiCorp is an electric power company that generates, transmits, and
6 distributes electricity in several regions in the Pacific Northwest, including its
7 Willamette Valley Service Area (service area). To meet statutory emission
8 reduction goals, PacifiCorp has adopted plans that identify a need to construct,
9 among other things, over 500 megawatts (MW) of storage capacity by the end of
10 2029. In 2025, PacifiCorp issued a request for proposals (RFP) for energy storage
11 systems, to store and later release electricity, primarily electricity generated by
12 renewable energy sources such as solar and wind. As discussed below, such
13 storage systems would improve and benefit PacifiCorp's services, and assist
14 PacifiCorp in complying with statutes that promote and require renewable energy
15 production and storage.

16 In response to PacifiCorp's RFP, petitioner submitted a proposal to
17 construct a BESS, providing 199 MW of storage, to connect with a PacifiCorp-
18 owned substation within the service area. PacifiCorp has a number of substations
19 within the service area. To narrow down the search for the site to construct the
20 BESS, petitioner developed a set of criteria, including (1) a site of at least 15
21 contiguous acres (2) with slopes less than 15 percent, that is (3) located within
22 one mile of a (4) PacifiCorp substation that is (5) in a 115-kilovolt (kV) or higher

1 class, with (6) transfer capacity sufficient to transfer power to and from the BESS
2 facility.² Petitioner initially identified 30 PacifiCorp substations within the
3 service area that were in a 115kV class or higher, but only six of them had the
4 requisite transfer capacity to handle connection to a BESS. Petitioner then
5 evaluated alternative non-EFU zoned sites within one mile of the six PacifiCorp
6 substations with transfer capacity. All potential non-EFU-zoned sites were
7 eliminated based on one or more of the criteria listed above.

8 The subject property is a 15-acre site zoned EFU, part of a larger,
9 approximately 133-acre parcel. Soils on the site are predominantly (63.5 percent)
10 high-value agricultural soils, and was most recently used to grow hay or grass
11 seed. The property is adjacent to PacifiCorp's existing Parrish Gap Substation.

12 As discussed below, under ORS 215.283(1)(c) utility facilities necessary
13 for public service are allowed as permitted uses in the EFU zone, subject to
14 criteria at ORS 215.275. The ORS 215.275 criteria include a demonstration that
15 "reasonable alternatives have been considered" and that the utility facility "must

² Petitioner's alternatives site analysis identified several other siting criteria, including (1) the cost and delay associated with whether the substation requires network upgrades to connect the BESS, (2) lack of wetland or other water features that would impede development, (3) sufficient access to allow construction equipment, etc., and (4) avoiding interference with existing utility easements. Record 291-92. However, as far as we can tell petitioner did not apply any of these siting criteria to disqualify any non-EFU sites that were studied.

1 be sited in an exclusive farm use zone” due to one or more of six factors set out
2 in the statute. ORS 215.275(2).

3 On June 30, 2025, petitioner filed an application with the county to
4 approve the proposed BESS as a utility facility authorized under ORS
5 215.283(1)(c).³ The proposed BESS facility would consist of battery containers,
6 transformers, inverters, transmission lines, access roads, fencing, and associated
7 infrastructure. As a simplistic explanation of its operation, we understand that the
8 facility would collect electric energy generated from various energy sources,
9 including solar and wind, at times when energy supply is higher than demand.
10 The facility would store the energy in rechargeable lithium-ion batteries for a
11 period of hours, and later when demand is higher (typically in the evening)
12 release the stored energy back to the PacifiCorp grid, via connections to
13 substation, to provide electricity to residential and commercial users. Such
14 temporary storage and timely release of electricity would improve PacifiCorp’s
15 service in various ways, improving load management and reducing risk of
16 blackouts and power shortages.⁴

³ Petitioner notes that, in 2024, the county had approved, as a “utility facility necessary for public service,” a similar BESS facility on an approximately 32-acre parcel zoned Special Agriculture. Petition for Review 15 n 4 (citing Record 1089).

⁴ Amicus describes some of the benefits of a BESS to PacifiCorp’s operations, including (1) grid balancing and peak demand support, (2) resilience during extreme weather events or other shortages, (3) fast-response grid services,

1 At the time petitioner submitted its application, the county was in the
2 process of adopting Ordinance 1480, which would, if adopted, ban BESS
3 facilities in all county zones, on the grounds that such facilities did not qualify as
4 “utility facilities” allowed in most if not all county zones. The board of
5 commissioners adopted Ordinance 1480 on July 9, 2025. Because Ordinance
6 1480 post-dated petitioner’s application, the county did not apply Ordinance
7 1480 to the application. Nonetheless, consistent with the premise for Ordinance
8 1480, the county planning director denied the application on the grounds that the
9 proposed BESS facility was not a “utility facility” authorized in the EFU zone
10 under ORS 215.283(1)(c) and implementing county code provisions. Petitioner
11 appealed the planning director’s denial to the county hearings officer who, after
12 conducting a hearing, also denied the application on the same grounds. In the
13 alternative, the hearings officer found that, if the facility is a utility facility,
14 petitioner had failed to demonstrate compliance with the ORS 215.275 criteria,
15 including the alternative sites analysis.

16 Petitioner appealed the hearings officer’s decision to the board of
17 commissioners. The commissioners conducted a hearing on March 18, 2026, at
18 the conclusion of which the commissioners closed the hearing and voted to deny

allowing instantaneous responses to fluctuations in electrical supply and demand,
(4) storage for renewable energy sources such as wind and solar, which
sometimes produce more than demand, resulting in wasted energy in the absence
of storage, and (5) reduced congestion on transmission lines, avoiding or delaying
the need to upgrade transmission facilities. Amicus Brief 17-19.

1 the appeal. The county's final decision denying the application was issued on
2 April 8, 2026. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner challenges the county's conclusion that the proposed BESS
5 facility is not a "utility facility" allowed under ORS 215.283(1)(c) in EFU zones.
6 Relatedly, petitioner also argues that the county erred in applying criteria to a
7 utility facility that are not found in state law.

8 **A. A BESS is a utility facility.**

9 As noted, ORS 215.283(1)(c) authorizes counties to approve within the
10 EFU zone "[u]tility facilities necessary for public service," including "[u]tility
11 facilities as provided in ORS 215.275[.]"⁵ Neither the statute nor any

⁵ ORS 215.283(1)(c) provides that the following uses may be established in the EFU zone:

"Utility facilities necessary for public service, not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height, but including:

"(A) Utility facilities as provided in ORS 215.275;

"(B) Utility facilities that are associated transmission lines, as defined in ORS 215.274 and 469.300;

"(C) Wetland waste treatment systems; or

"(D) Facilities and service lines needed to provide water or wastewater services allowed under ORS 215.256."

1 administrative rule defines the term “utility facility.” However, a number of
2 LUBA and appellate decisions have addressed the scope and contours of what
3 qualifies as a utility facility.

4 Both parties cite the seminal case of *Cox v. Polk County*, 174 Or App 332,
5 25 P3d 970, *rev den*, 332 Or 558 (2001). *Cox* involved a proposal to transport
6 treated effluent from an industrial facility located within an urban area to a
7 holding pond located on EFU-zoned land and to use the effluent to irrigate poplar
8 trees. LUBA concluded that the wastewater treatment facility within the urban
9 area constituted a “utility facility” and that the proposal to transfer the treated
10 effluent to a holding pond and irrigate trees constituted an extension of that utility
11 facility, providing continued treatment as the trees absorbed the wastewater, and
12 thus the proposal was required to comply with the criteria for a utility facility,
13 including an alternative sites analysis.

14 The Court of Appeals concluded that the proposed storage and application
15 of effluent did not constitute a “utility facility.” Citing to dictionary definitions,
16 the court stated:

17 “[W]e understand the phrase ‘utility facility,’ as used in ORS
18 215.283(1)(d) (1997), to mean equipment or apparatus whether
19 standing alone or as part of a structure, that functions to perform or
20 provide, in whole or in part, a service such as the production,
21 transmission, delivery or furnishing of electricity or natural gas, the
22 purification of drinking water, or the treatment of solid or liquid
23 waste. The equipment comprising the facility need not be extensive
24 or complex; in addition, the facility may include ancillary or off-site
25 equipment such as transmission lines. *See, e.g.*, ORS 215.283(1)(L)
26 (referring to the ‘placement of utility facilities overhead and in the

1 subsurface of public roads and highways’). However, at a minimum,
2 the facility must include some equipment or apparatus that itself
3 performs the relevant production, transmission or similar function
4 or service.” *Cox*, 174 Or App at 343-44.

5 The court reasoned that treatment of effluent is the relevant “service,” and that to
6 the extent some “treatment” occurred after the trees were irrigated, that treatment
7 was not the result of any equipment or apparatus. Accordingly, the court
8 concluded the proposal did not constitute a “utility facility.”

9 Citing to *Cox*, the county rejected petitioner’s arguments that the proposed
10 BESS is a “utility facility.” *See* Record 16-17. The county then determined:

11 “The proposed BESS does not transmit or distribute electricity. The
12 proposed BESS does not deliver electric service to consumers. The
13 proposed BESS functions as storage and is operated for system-
14 support purposes. Interaction with the electric grid does not convert
15 a storage facility into a utility service-delivery facility.

16 “ORS 215.283(1)(c) requires a showing that the utility facility is
17 required to provide the service, not merely beneficial, important, or
18 supportive of public policy goals. PacifiCorp will continue to
19 provide electric service regardless of whether the BESS is
20 constructed. The [b]oard [of commissioners] finds that the proposed
21 BESS does not qualify as a ‘utility facility’ for purposes of [ORS]
22 215.283(1)(c).” Record 17 (internal numbering omitted).

23 On appeal, petitioner contends that the county misunderstood *Cox* and
24 misconstrued ORS 215.283(1)(c). Petitioner argues that the county apparently
25 understood *Cox* to stand for the proposition that, to qualify as a utility facility,
26 the proposed facility must provide the service to utility customers, in this case by
27 directly transmitting or distributing electricity to PacifiCorp customers. The
28 county also applied a “but for” analysis, reasoning that to qualify as a utility

1 facility *necessary* for public service, a proposed facility must be required to
2 provide any service at all. Said differently, because PacifiCorp would continue
3 to provide electricity to customers regardless of whether the BESS facility is
4 constructed, the county concluded, the BESS facility is not “necessary” for public
5 service.

6 However, petitioner argues that that narrow view of what constitutes a
7 utility facility is inconsistent with *Cox*, which broadly defines the term to include
8 any “equipment or apparatus, whether standing alone or as part of a structure,
9 that functions to perform or provide, in whole or in part, a service such as the
10 production, transmission, delivery or furnishing of electricity[.]” 174 Or App at
11 343. Petitioner emphasizes the word “furnishing” and argues that the court used
12 that term as a broad catchall description, distinct from the production,
13 transmission or delivery of electricity. Petitioner cites to dictionary definitions
14 and a 1985 attorney general letter of advice, both indicating that “furnish” means
15 to provide or supply something that is needed. Petition for Review 25-26 (citing
16 Merriam-Webster’s Collegiate Dictionary (11th ed 2003); Attorney General
17 Letter of Advice to Rep Tom Throop (OP-5673) (Feb 7, 1985)).⁶ Petitioner
18 submits that the BESS facility, by performing the service of storage and timely

⁶ We note that the appellate courts refer to *Webster’s Third New Int’l Dictionary* (unabridged ed 2002) as the official dictionary of reference. *See Oregon Appellate Courts Style Manual* 66 (Updated 2023). The definition of “furnish” is largely the same. *See Webster’s* at 923.

1 furnishing of electricity back to the grid, at the precise moments when PacifiCorp
2 and its customers need it most, is a critical component of the electrical grid, and
3 functions to “furnish” electricity to the grid and the ultimate end consumers as
4 part of PacifiCorp’s public utility service.

5 Intervenor responds that the county correctly concluded that because the
6 proposed BESS facility does not itself transmit, distribute or deliver electricity to
7 utility customers, it is not a “utility facility.” Intervenor argues that the BESS
8 facility actually removes electricity from the grid for storage, and the fact that the
9 facility later releases the stored energy back to the grid (with minor transmission
10 losses) does not make it part of the “delivery” of electricity, or otherwise convert
11 it into a utility facility. Even if the storage and timed release of electricity furthers
12 state policy, improves PacifiCorp’s operation, and ultimately benefits its
13 customers, intervenor argues that those functions do not directly “supply” or
14 “provide” electricity, and thus do not “furnish” electricity even under the
15 definitions cited by petitioner.

16 Relatedly, intervenor and the county (together, respondents) both argue
17 that expanding the category of “utility facility” to include BESS facilities would
18 be inconsistent with the statutory scheme to protect EFU-zoned land from non-
19 farm uses. Respondents do not dispute that the undefined category of “utility
20 facility” embraces technologies that did not exist in 1963 when the legislature
21 first authorized utility facilities in agricultural areas. *See McCaw*
22 *Communications, Inc. v. Marion County*, 96 Or App 552, 773 P2d 779 (1989)

1 (proposed cellular phone tower is a “utility facility”). Nonetheless, respondents
2 argue that over the years the legislature has created separate pathways for certain
3 types of facilities that might otherwise fall within the rubric of “utility facility.”
4 Respondents note that ORS 215.283(1)(c) excludes from the scope of “utility
5 facility” “commercial facilities for the purpose of generating electrical power for
6 public use by sale” as well as “transmission towers over 200 feet in height[.]”
7 The legislature has also chosen to include within the category of “utility facility”
8 at ORS 215.283(1)(c) certain uses that might not otherwise be viewed as utility
9 facilities, including “wetland waste treatment systems[.]” The legislature also
10 separately regulates certain renewable-energy facilities, in ORS 215.283(2)(g),
11 ORS 215.446, and ORS 215.447. The county argues that this context
12 demonstrates that the legislature has carefully shaped the contours of the use
13 category “utility facility,” and it should not be understood to constitute an open-
14 ended category.

15 The county also argues that in 2024 the legislature amended ORS 469.300,
16 part of a chapter that regulates energy, to include a definition of a “Battery Energy
17 Storage System.”⁷ According to the county, the verbs used in that definition

⁷ As amended by House Bill (HB) 4015 (2024) and codified at ORS 469.300(5):

“‘Battery energy storage system’ means an energy storage system that, other than for personal, noncommercial use:

1 (collects, retains, stores, and discharges electricity) are quite different from those
2 used in *Cox* to describe utility facilities (production, transmission, delivery or
3 furnishing of, among other things, electricity). The county argues that the
4 legislature clearly knows what a BESS is and could have chosen to expressly
5 categorize a BESS as a utility facility for purposes of ORS 215.283(1)(c), as it
6 has done for a wetland waste treatment system, but chose not to do so. The county
7 contends that LUBA should not, under the guise of interpretation, insert by
8 implication a new, major non-farm use into ORS 215.283(1)(c).

9 Finally, intervenor posits a parade of horrors if a storage facility
10 associated with an electric utility facility can itself constitute a utility facility
11 allowed in the EFU zone. According to intervenor, if a BESS can constitute a
12 utility facility under ORS 215.283(1)(c), then any ancillary storage facility that
13 in any way benefits an electric utility could be located within the EFU zone. For
14 example, intervenor posits that a tree trimming company that helps prevent

“(a) Collects energy from the electric grid or an energy generation facility;

“(b) Uses rechargeable batteries to retain and store the energy for a period of time; and

“(c) Discharges the energy after storage to provide electricity when needed.” Or Laws 2024, ch 25, § 1.

ORS 469.300 was amended again in 2025, that amendment is not relevant to this appeal and does not impact our analysis. *See* Or Laws 2025, ch 162, § 1 (adding subsection (K) concerning wind power).

1 blackouts by trimming trees away from power lines could qualify as a “utility
2 facility” and hence store its vehicles and equipment in the EFU zone. Intervenor
3 argues that to prevent such horrors, ORS 215.283(1)(c) must be narrowly
4 construed to limit the category of electric utility facilities to those facilities that
5 perform the service of transmitting and delivering electricity directly to utility
6 customers.

7 We agree with petitioner and amicus that the definition articulated in *Cox*
8 is broader than what the county understood, and that the scope of an electrical
9 “utility facility” is not limited to facilities or equipment that directly transmit,
10 distribute or deliver electricity to utility customers. In *Cox*, the relevant public
11 “service” was treatment of wastewater, which was accomplished prior to
12 disposing of the treated wastewater by transferring, storing and later irrigating
13 with it. In other words, the purported “facility” was literally downstream from
14 the public service, and represented a secondary function that did not involve the
15 public service. In the present case, the proposed facility is upstream of the
16 transmittal, distribution and delivery of electrical service to customers, and
17 renders that service more efficient and effective in various ways. To analogize to
18 the circumstances in *Cox*, the equivalent facility might be a raw wastewater
19 storage pond upstream of the treatment facility that, due to its location and design,
20 functions to aid and improve the downstream treatment of wastewater.

21 Nor is the proposed BESS simply a passive energy storage system. We do
22 not understand respondents to dispute that the BESS includes equipment that

1 allows it to function as an important adjunct to PacifiCorp's grid, literally
2 changing when and how electricity flows through substations, and through
3 transmission, distribution and delivery lines, and improving in various ways both
4 the grid's overall performance and the ultimate delivery of electricity to
5 consumers. For example, respondents do not dispute testimony that the BESS, by
6 design and function, may operate to reduce the risk of power outages and
7 shortages at points of delivery.

8 We also agree with petitioner that the scope of utility facility is not limited
9 to "but for" components that are necessary to provide any level of service at all.
10 A proposed facility may be justified as an additional component to an existing
11 utility system, based on a need to improve the existing services. *See T-Mobile*
12 *USA v. Yamhill County*, 55 Or LUBA 83, 92 (2007) (county erred in rejecting as
13 a "utility facility" a proposal to add a cellular tower to an existing network system
14 in order to improve coverage and signal strength).

15 The text and context of ORS 215.283(1)(c) do not support respondents'
16 circumscribed view of "utility facility." As framed, the legislature intended ORS
17 215.283(1)(c) to function as a general and nonspecific category for utility
18 facilities, with special carve-outs and inclusions for specific types of facilities
19 that warrant special treatment. *See Save Our Rural Oregon v. Energy Facility*
20 *Siting*, 339 Or 353, 384, 121 P3d 1141 (2005) (discussing the legislative history
21 of ORS 215.283). That the legislature over the years has identified such specific
22 facilities, carve-outs and inclusions that require special treatment does not

1 undermine the nature of ORS 215.283(1)(c) as an open-ended, general use
2 category. Similarly, that the legislature in 2024 adopted a definition of BESS
3 facilities for purposes of ORS chapter 469 does not indicate a legislative intent
4 to carve out BESS facilities from the scope of “utility facilities,” as that use
5 category was defined in *Cox*. If anything, the presumption flows the other way.
6 The legislature clearly knows what a BESS is. If the legislature intended to
7 exclude BESS facilities in EFU zones from the scope of “utility facility,” and
8 thus essentially ban such facilities in EFU zones, the legislature knows how to do
9 so, and could have easily expressed that intent. In our view, the legislature’s
10 silence on this point indicates, if anything, an intent to continue employing ORS
11 215.283(1)(c) as a general use category. That general use category, as elaborated
12 on in case law, is relatively broad and open-ended, embracing new technology
13 and associated improvements to utility services.

14 As noted, *Cox* defined “utility facility” to include electrical facilities that
15 “functions to perform or provide, in whole or in part, a service such as the
16 production, transmission, delivery or furnishing of electricity.” 174 Or App at
17 343. We agree with petitioner that whatever “furnish” means, it is distinct from
18 the production, transmission and delivery of electricity, and extends to distinct
19 functions involved in the enterprise of providing electricity to utility consumers.
20 We agree with petitioner and amicus that in storing and releasing electricity back
21 to the grid, at precise times and amounts calculated to ensure reliability and

1 improve the efficiency of electrical delivery to utility customers, the proposed
2 BESS facility is fairly described as “furnishing” electrical power.

3 Finally, because the proposed BESS is, by design and function, closely
4 integrated into PacifiCorp’s facilities and the transmission, delivery and
5 furnishing of its electrical power, we disagree with respondents that treating the
6 proposed BESS as a utility facility opens the door to allow in the EFU zone a
7 host of facilities only tangentially related to the electrical grid. The hypotheticals
8 cited, a parking lot for tree-trimming equipment, and a factory that produces
9 transmission towers, are not by design and function integrated into an electric
10 utility and would not constitute utility facilities under any possible stretch of the
11 imagination.

12 For the foregoing reasons, we agree with petitioner and amicus that the
13 county erred in concluding that, as a matter of law, the proposed BESS is not a
14 utility facility within the meaning of ORS 215.283(1)(c).

15 The first subassignment of error is sustained.

16 **B. Additional Local Criteria**

17 Generally, a local government cannot apply additional standards or criteria
18 to a use allowed in EFU zones under ORS 215.283(1), beyond those authorized
19 by statute. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995).
20 Petitioner argues that the county erred by applying local definitions and
21 regulations in a manner that effectively subjected the proposed BESS, an ORS
22 215.283(1) use, to standards and criteria not imposed or authorized by statute.

1 The county concluded that the proposed BESS did not constitute a “utility
2 facility” as defined under Marion County Code (MCC) 17.110.584, which
3 defines “utility facility,” in relevant part, as

4 “any water, gas, sanitary sewer, storm sewer, electricity, telephone
5 and wire communication service, and CATV (cable television)
6 service lines, mains, pumping stations, reservoirs, police
7 underground transmission facilities, substations, and related
8 physical facilities[.]”

9 Because the code definition does not include the words “Battery Energy Storage
10 System,” the county concluded that the proposed BESS could only qualify as a
11 utility facility if it were a “related physical facility” to electrical service. The
12 county ultimately concluded that the BESS was not a “related physical facility”
13 to electrical service, in part because it is not owned or operated by a public utility,
14 or regulated as a public utility, and lacks a “public service character.”⁸ Record
15 14-15.

⁸ The county’s findings state:

“[Petitioner] is a private company that is not a public utility, and does not provide electric service to the public. The code definition of ‘utility facility’ presumes facilities that are part of a utility service system, such as electric transmission or distribution infrastructure operated by or on behalf of a utility serving the public. In this case. [petitioner’s] Project is not owned or operated by an electric utility. [Petitioner] is not subject to public utility regulation for retail electric service. The proposed BESS does not provide direct electric service to customers. [Petitioner] participates in energy storage and market operations for renewable energy. The [b]oard [of commissioners] find that the proposed BESS lacks the public

1 Neither intervenor nor the county responds to petitioner's arguments under
2 *Brentmar* or this subassignment of error. That lack of response, and our
3 conclusion above that the proposed BESS falls within the category of "utility
4 facility" allowed under ORS 215.283(1)(c) as defined in *Cox*, makes it
5 unnecessary to address petitioner's arguments in detail. We generally agree with
6 petitioner that the county erred in applying local standards and criteria, based on
7 the definition at MCC 17.110.584 rather than any statutory provenance, to deny
8 the proposed ORS 215.283(1)(c) use. No party cites any statutes to us that limit
9 a utility facility under ORS 215.283(1)(c) to those that are owned and operated
10 by a public utility, regulated as public utility, or possesses a "public service
11 character."

12 The second subassignment of error is sustained.

13 The first assignment of error is sustained.

14 **SECOND ASSIGNMENT OF ERROR**

15 As an alternative to its primary conclusion that the proposed BESS does
16 not constitute a utility facility under ORS 215.283(1)(c) and MCC 17.110.584,
17 the county adopted findings addressing the statutory criteria at ORS 215.275.⁹

service character inherent in the utilities enumerated in MCC
17.110.584." Record 15.

⁹ ORS 215.275 provides, in relevant part:

"(1) A utility facility established under ORS 215.213 (1)(c)(A) or
215.283 (1)(c)(A) is necessary for public service if the facility

1 Those statutory criteria are also implemented in MCC 17.136.040(I) and OAR
2 660-033-0130(16). The county concluded that petitioner had failed to

must be sited in an exclusive farm use zone in order to provide the service.

“(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213(1)(c)(A) or 215.283(1)(c)(A) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:

“(a) Technical and engineering feasibility;

“(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;

“(c) Lack of available urban and nonresource lands;

“(d) Availability of existing rights of way;

“(e) Public health and safety; and

“(f) Other requirements of state or federal agencies.

“(3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.”

1 demonstrate that no “reasonable alternatives” exist and that the facility must be
2 sited in an EFU zone due to one or more of the factors set out in ORS
3 215.275(2)(a) through (f). Petitioner challenges those findings, in six
4 subassignments of error.

5 **A. Ordinance 1480**

6 Petitioner first argues that, as a matter of law, no “reasonable alternative”
7 non-EFU sites for the proposed use exist anywhere in the county, because the
8 county has, via Ordinance 1480, prohibited BESS facilities in all county zones.

9 The county responds, initially, that petitioner failed to preserve this
10 argument during the proceedings below. According to the county, petitioner
11 argued below, successfully, that Ordinance 1480 post-dates the application, and
12 thus cannot be applied to approve or deny the application, pursuant to the so-
13 called “goal-post” rule at ORS 215.427(3). The county agreed with that position,
14 and expressly did not apply Ordinance 1480. The county contends that petitioner
15 never raised below on appeal to the board of commissioners the distinct issue of
16 whether Ordinance 1480 compels the conclusion that no reasonable alternative
17 sites exist for purposes of ORS 215.275(2), and thus that issue was not preserved
18 or exhausted. *Miles v. City of Florence*, 190 Or App 500, 505-10, 79 P3d 382
19 (2003).

20 Petitioner filed a reply brief, but the brief does not include a focused
21 response to the county’s waiver/exhaustion arguments under *Miles*. The reply
22 brief does point out, however, that the board of commissioners’ findings take the

1 position that Ordinance 1480 simply clarified that a BESS was “not permitted
2 under any section of code prior to July 9, 2025[,]” the date the county adopted
3 Ordinance 1480. Record 11. We understand petitioner to suggest that even if the
4 county did not directly apply Ordinance 1480, it applied a pre-existing
5 interpretation of a code ambiguity that Ordinance 1480 simply “clarified.” Under
6 that prior interpretation, petitioner argues, there are no reasonable alternative
7 non-EFU sites in the county to locate a BESS, because a BESS is not a utility
8 facility as defined in MCC 17.110.584 or a listed use allowed in any county zone.

9 We agree with the county that petitioner failed to specify, in its notice of
10 appeal to the board of commissioners, the distinct issue of whether and how
11 Ordinance 1480, or the code ambiguity and interpretation that the ordinance
12 “clarified,” impacts the alternative site analysis required by ORS 215.275(2).
13 Record 1552-53 (petitioner’s notice of appeal). Accordingly, the issue presented
14 in this subassignment of error was not preserved for our review, under the
15 reasoning in *Miles*.

16 The first subassignment of error is denied.

17 **B. Facility Features that Advance the Goal of Utility Service**

18 As noted, petitioner identified a number of facility features that it viewed
19 as essential siting criteria, which it used to evaluate whether reasonable
20 alternative non-EFU sites exist to locate the BESS. These features included (1) a
21 site of at least 15 acres (2) with slopes less than 15 percent, that is (3) located
22 within one mile of a (4) PacifiCorp substation that is (5) in a 115kV or higher

1 class, with (6) transfer capacity sufficient to transfer power from the BESS
2 facility. As noted, petitioner's alternative sites analysis initially identified 30
3 PacifiCorp substations within the service area in the 115kV class, but only six of
4 them had the requisite transfer capacity to connect to a BESS. All non-EFU-
5 zoned sites within one mile of the six substations were disqualified based on one
6 or more of the above criteria.¹⁰

7 The county concluded that three of the six identified siting criteria
8 represent desired or preferred features rather than features of the proposed use
9 necessary to provide service that can be used to disqualify alternative sites.¹¹ The
10 three disputed siting criteria are (1) connection to a PacifiCorp substation, (2)

¹⁰ Petitioner evaluated all non-EFU-zoned sites within one mile of the six substations. With respect to the Parrish Gap substation, there was only one non-EFU-zoned site that met the minimum 15-acre size, but it featured slopes greater than 15 percent, and was eliminated on that basis. With respect to the Jefferson substation, the analysis found that all non-EFU zoned sites were less than 15 acres in size, with the exception of one 20-acre parcel that was eliminated due to the presence of a creek and wetlands, with associated environmental setbacks that reduced the developable area below 15 acres. With respect to the Diamond Hill substation and the Fry substation, the analysis found no non-EFU zoned sites at all within one mile of those substations. Finally, with respect to the Calapooya and Brownsville substations, located within 1000 feet of each other, the analysis found that the only non-EFU-parcels within one mile were developed industrial-zoned sites. Record 297-98.

¹¹ The findings do not appear to dispute the siting criteria requiring connection to a substation in a 115kV or higher class, with transfer capacity sufficient to transfer power from the BESS facility, or the absence of slopes 15 percent or greater.

1 proximity within one mile of a substation, and (3) a site of at least 15 acres in
2 size. We address the parties' arguments regarding these siting criteria below.

3 **1. PacifiCorp Substation**

4 With respect to the criteria to connect to a PacifiCorp substation, the
5 county found:

6 "[Petitioner] is a separate company from PacifiCorp. Therefore,
7 while PacifiCorp is willing to partner with [petitioner] to have the
8 proposed BESS connect to their substation, this BESS does not have
9 to be connected to only a PacifiCorp substation. Technically, this
10 BESS could be sited next to any companies' substation if they were
11 willing to partner with [petitioner]. Accordingly, [petitioner's]
12 alternatives analysis' exclusion of any substation not owned by
13 PacifiCorp is an unnecessary exclusion of possible alternatives. The
14 [b]oard [of commissioners] does not find adequate information in
15 the alternatives analysis to support the assertion that 15-acres or a
16 mile radius of a Pacifi[C]orp substation are requisite criteria for
17 siting analysis." Record 20.

18 In *Sprint PCS v. Washington County*, the Court of Appeals held that a
19 "utility's decision about its service needs should be respected[,] but that "a
20 utility's objective that do not advance the goal of providing a utility service
21 should not disqualify a site from being considered a reasonable alternative." 186
22 Or App 470, 480-81, 63 P3d 1261 (2003). Further, "[w]hen a utility's defined
23 objective is inconsistent with placing a facility on an otherwise reasonable non-
24 EFU site, local governments should ask whether that objective advances the
25 statutory goal of providing the utility service." *Id.* at 481. Citing *Sprint PCS*,
26 petitioner argues that the county erred in concluding that petitioner's objective in
27 providing service to PacifiCorp as specified in its RFP is not a valid objective,

1 and that the proposed BESS could be connected to any power company's
2 substation and still provide the service.

3 At issue in *Sprint PCS* was a proposed cell tower serving several identified
4 objectives: (1) providing Sprint's cell service within a specified coverage area,
5 (2) on a Sprint-owned tower, with (3) extra antennae capacity that could be leased
6 to other cellular providers. Opponents argued that Sprint could achieve at least
7 the first objective by collocating on a tower owned by another cell provider, and
8 that the second and third objectives were unnecessary to provide Sprint's cell
9 service. The court held that the county could consider whether collocation was a
10 reasonable alternative, based on a factual determination regarding whether
11 objectives for a Sprint-owned tower with extra capacity were intended to advance
12 the statutory goal of providing utility service, as Sprint maintained, or simply to
13 maximize Sprint's income, as opponents claimed. *Sprint PCS*, 186 Or App at
14 482.

15 In the present case, because petitioner's BESS is a response to PacifiCorp's
16 RFP to serve PacifiCorp's electrical grid, and intended to further PacifiCorp's
17 utility services, we agree with petitioner that neither its objectives nor
18 PacifiCorp's could be met by the hypothetical possibility that petitioner could
19 partner with a different electrical utility, in a differently bounded service area.
20 Petitioner's objective is not to site a BESS somewhere and anywhere, but to
21 provide a BESS to assist PacifiCorp's utility service to its customers within
22 PacifiCorp's Willamette Valley service area. Just as Sprint was not required to

1 evaluate alternatives to provide services within a different coverage area or
2 different customer base than proposed, in the present case petitioner was not
3 required to explore as an alternative the possibility of contracting with a different
4 utility provider to provide services to a different electrical grid, to different end
5 customers. Accordingly, the county erred in finding that petitioner was required
6 to evaluate non-EFU sites near substations not operated as part of PacifiCorp
7 grid.

8 **2. One Mile Proximity to a Substation**

9 The county also questions the criterion of locating the BESS within one
10 mile of a substation. Petitioner submitted evidence that close proximity to a
11 substation is necessary to avoid transmission power losses, as well as to reduce
12 costs from constructing overhead power lines, acquiring easements, etc. Record
13 293, 296. The county found that petitioner's "preference for proximity to a
14 specific substation is relative to cost savings to [petitioner] and not public
15 service." Record 20. As noted, under ORS 215.275(3) cost considerations alone
16 cannot be a basis to reject an otherwise reasonable alternative.

17 Petitioner and amicus argue, and we agree, that the record does not support
18 a conclusion that locating the BESS in proximity to a substation is solely a matter
19 of avoiding the cost of constructing lengthy transmission lines, acquiring
20 easements, etc. As amicus argues, proximity to a substation reduces energy loss
21 from long-distance transmission and fosters timely interactions with the grid.
22 Amicus Brief 32-33. As we understand it, transferring electricity to and from

1 PacifiCorp's grid in a manner that increases the reliability and efficiency of the
2 electrical grid is a core function of the proposed BESS. Unnecessary power loss
3 in transferring power impacts that core function. As petitioner's analysis notes, a
4 BESS involves transfer of electricity in two directions, to and from the substation,
5 which doubles any transmission loss compared to a single-direction transmission
6 line of the same length. Record 1412. The county's suggestion that the criterion
7 of locating the BESS within one mile of a substation is driven *entirely* by cost is
8 not supported by the record. At least in part, that criterion is driven by service-
9 related considerations.

10 Nonetheless, the county faults petitioner for failing to demonstrate why
11 proximity of one mile or less is necessary as opposed to a 1.2-mile distance or
12 some larger distance. Record 38. But the point remains the same. The record is
13 clear, and no party seriously disputes, that *some* proximity to a substation is
14 necessary for a BESS to perform its core service function. Therefore, whatever
15 maximum distance is chosen as a reasonable compromise between service and
16 cost will represent a mix of cost and service-related considerations. ORS
17 215.275(3) allows consideration of costs; it prohibits only disqualification of
18 alternative sites based *solely* on costs. The county erred to the extent it found that
19 the one-mile proximity siting criterion is based solely on cost considerations.

20 **3. Minimum 15-Acre Size**

21 The county also faulted petitioner for specifying a minimum 15-acre site,
22 suggesting that a smaller site might accommodate the proposed BESS:

1 “The alternatives analysis from [petitioner] indicates that they * * *
2 require a ‘minimum of 15 contiguous acres of available land in order
3 to site at least 199 MW of storage capacity (1 acre per 20 MW), plus
4 2 acres for a project substation and 3 acres to account for access
5 roads, zoning-related setback requirements, environmental buffers,
6 and the ability to increase project capacity by up to 40 additional
7 megawatts.’ First, the substation already exists at this planned
8 location (and the alternative locations), and [petitioner] failed to
9 provide sufficient evidence that additional acreage of the BESS
10 facility needs to be dedicated to a substation. [Petitioner] does not
11 explain why they would need these 2-acres for an already existing
12 substation. Second, [petitioner] failed to provide sufficient evidence
13 that planning for additional expansion is necessary for the proposed
14 BESS. While it is reasonable to plan for expansion, that is not a
15 factor that can be considered in determining feasible alternatives –
16 at least without robust evidence in the record. Additionally,
17 [petitioner’s] alternatives analysis states, ‘[s]etting aside land for
18 future expansion is an industry-standard practice where feasible due
19 to the favorable economies of scale for increasing capacity.’
20 Accordingly, this is a cost benefit and pursuant to ORS 215.275(3)
21 ‘cost alone may not be the only consideration in determining that a
22 utility facility is necessary for public service.’” Record 37 (fourth
23 brackets in original).

24 However, these critiques are not well-taken. As the site plan shows, the
25 two-acre “project substation” referred to is part of the BESS, not the adjoining
26 PacifiCorp substation. Record 142. And, as *Sprint PCS* suggests, providing
27 capacity for future expansion of services is a potentially valid basis for a siting
28 criterion. 186 Or App at 481-82 (remanding to require the county to consider
29 arguments that Sprint must build a new tower, rather than collocate its antennas
30 on an existing tower, in order to provide additional capacity for later expanding
31 its services). If, as petitioner testified, setting aside land for future expansion of
32 utility services is an industry-standard practice, and there is no evidence to the

1 contrary, the county has no factual basis to reject a minimum acreage siting
2 criterion informed by that industry standard. And, because the express purpose
3 of setting aside land is to allow for expansion of utility services, the county erred
4 in suggesting that it is merely a “cost benefit,” and that cost is the “only” basis
5 for that criterion.

6 The second subassignment of error is sustained.

7 **C. ORS 215.275(2) Factors are Independent**

8 As noted, ORS 215.275(2) requires the applicant for a utility facility to
9 show that “reasonable alternatives have been considered and that the facility must
10 be sited in an exclusive farm use zone due to one or more of the following
11 factors[,]” and then sets out six factors. Petitioner took the position below that
12 any single factor can suffice to show that no reasonable non-EFU sites exist and
13 the facility therefore must be sited in the EFU zone. Petitioner submitted evidence
14 and argument that consideration of the first three factors, independently and
15 cumulatively, demonstrate that no reasonable alternatives exist. The first three
16 factors are (a) technical and engineering feasibility, (b) locational dependence,
17 and (c) lack of available urban and nonresource lands. Petitioner submitted no
18 evidence or argument regarding the last three factors: (d) availability of existing
19 rights-of-way, (e) public health and safety, and (f) other requirements of state or
20 federal agencies.

21 The county, however, interpreted ORS 215.725(2) to require a “balancing”
22 or “weighing” of all relevant factors:

1 “At the public hearing before the [b]oard of [c]ommissioners on
2 March 18, 2026, [petitioner’s] representative asserted that only one
3 of the factors must be met. The Planning Director later explained
4 that County considers these factors on balance. Some of the factors
5 such as technical and engineering feasibility, and availability of
6 existing rights of way are so vague that when considered out of
7 context these could be used to ubiquitously approve any facility
8 anywhere. Clearly these are factors to be weighed out. The language
9 of ORS 215.275(2) plainly supports the County implementation as
10 well when it says ‘one or more of the following factors’ *a, b, c, d, e*
11 **“and”** *f.*’ (emphasis added). Clearly no one factor triggers
12 approval.” Record 35-36 (emphasis and boldface in original).

13 As discussed below, the county faulted petitioner for failing to demonstrate that
14 the “public health and safety” factor supported the EFU location, and concluded
15 that this factor weighs against locating the proposed BESS on EFU-zoned lands.

16 On appeal, petitioner argues that the county misconstrued ORS 215.275(2)
17 to require a “balancing” or “weighing” of all relevant factors, ignoring the plain
18 language of the statute, which states that a demonstration that locating the facility
19 in the EFU zone may be based upon “one or more” of the six factors, clearly
20 implying that consideration of a single factor could, theoretically, disqualify all
21 alternative non-EFU sites and hence justify location on EFU-zoned land.

22 Intervenor responds that ORS 215.275(2) allows the county to consider
23 evidence regarding all relevant factors, including the public health and safety
24 factor, even if the applicant does not rely on that factor. According to intervenor,
25 the county properly considered evidence demonstrating that siting the facility
26 within the EFU zone would present a greater public health and safety risk,
27 compared to siting the facility on non-EFU zoned lands, and properly concluded

1 that consideration of this factor weighed against locating the facility in the EFU
2 zone.

3 We agree with petitioner that the factors set out ORS 215.275(2) are used
4 to evaluate whether reasonable non-EFU locations exist for the proposed facility,
5 not whether the proposed EFU location itself is appropriate or reasonable. As
6 discussed below, the county has statutory tools, under ORS 215.275(5), to impose
7 conditions to mitigate impacts on surrounding farm uses of siting the facility in
8 the EFU zone. But the text of ORS 215.275(2) does not support the county's
9 apparent view that even if the applicant demonstrates that no reasonable non-
10 EFU alternatives exist under one or more factors, the county can apply a different
11 factor to conclude that the proposed facility cannot be located on EFU lands. The
12 plain text of the "one or more" language clearly contemplates that a single factor
13 could, theoretically, disqualify all non-EFU sites. The conjunctive listing of the
14 six factors cannot plausibly, in that context, be understood to authorize a
15 "balancing" or "weighing" of all factors, or to allow a county to apply a factor to
16 essentially disqualify the proposed EFU site.

17 The third subassignment of error is sustained.

18 **D. ORS 215.275(2) Factors (a), (b) and (c)**

19 **1. Technological and Engineering Feasibility**

20 Petitioner's analysis cited several technological and engineering
21 considerations to disqualify a number of non-EFU sites, for example, locations
22 near substations that lack the 115kV class or transfer capacity needed to connect

1 to the proposed BESS. The findings do not dispute those technological and
2 engineering considerations, but fault petitioner's analysis for including
3 considerations that, in the county's view, relate to cost, project efficiency and
4 commercial feasibility, such as whether a substation required network upgrades,
5 and whether alternative locations would minimize construction timelines, and
6 allow petitioner to meet PacifiCorp's RFP deadlines.¹² Record 18.

7 The problem with the findings on this point is that, while petitioner's
8 analysis identified considerations such as network upgrades, minimizing
9 construction costs, and meeting PacifiCorp's deadlines, the analysis did not
10 disqualify any potential non-EFU sites based on those considerations. The
11 analysis first disqualified locations near all PacifiCorp substations in the service
12 area that lacked the 115kV class, leaving 30 substations, and then disqualified

¹² The findings state with respect to the technological and engineering feasibility factor:

“[Petitioner] did not provide any evidence to suggest that the proposed location is related to the technical or engineering feasibility of the proposal beyond being adjacent to a substation. [Petitioner] emphasizes avoiding network upgrades, minimizing construction timelines, and meeting RFP deadlines.

“These considerations reflect project efficiency and commercial feasibility, not technical infeasibility of non-EFU sites. The [b]oard [of commissioners] finds that [petitioner] does not demonstrate that interconnection to the grid is technically impossible from non-EFU land, only that it may be more expensive or less desirable.” Record 18.

1 locations near 24 of those substations for lacking transfer capacity. Record 296.
2 Of the six remaining substations, no non-EFU sites within one mile of the
3 substation were disqualified based on network upgrades, construction costs, or
4 deadlines. Record 297-98.

5 The findings also fault petitioner for failing to address the technical and
6 engineering feasibility of mitigating risk of a fire involving the proposed BESS.
7 Record 18-19. However, the purpose of evaluating technical and engineering
8 feasibility under ORS 215.275(2)(a) is not to evaluate the technical suitability of
9 the proposed EFU location, but to determine whether non-EFU sites are
10 reasonable alternatives, that is whether as a technical and engineering matter it is
11 feasible to operate the proposed facility, with its essential technical attributes
12 (*e.g.*, location near a substation in a 115kV class with transfer capacity), at a non-
13 EFU site. Evidence regarding the technical or engineering means to mitigate fire
14 risk at the proposed EFU site is irrelevant to that inquiry. We agree with petitioner
15 that the county's findings under the technological and engineering feasibility
16 factor misconstrue and misapply that factor.

17 **2. Locational Dependence**

18 Petitioner argued below that the proposed BESS is locationally dependent
19 on proximity to a substation with the requisite capabilities, which is a
20 geographical need that the submitted siting criteria and alternative analysis
21 demonstrated could not be satisfied on any non-EFU sites. The county disagreed,
22 first restating the locational dependence factor to provide that "[a] facility is

1 locationally dependent only if it cannot reasonably operate unless it is located in
2 EFU land.” Record 19. The county faulted the alternatives analysis for relying on
3 siting criteria of (1) a minimum 15-acre site located within (2) one mile of a
4 substation with the requisite capabilities. Record 19-20. The county also faulted
5 petitioner for failing to provide any information regarding emergency response
6 at the selected EFU site, to potential chemical leakage and soil and groundwater
7 contamination. Record 20. Finally, the county concluded:

8 “[Petitioner’s] evidence demonstrates a preference for proximity to
9 a specific substation, not a requirement that the facility occupy EFU
10 land. The evidence on the record suggests the preference for
11 proximity to a specific substation is relative to cost savings to
12 [petitioner] and not public service. The [b]oard [of commissioners]
13 finds no credible evidence in the record to support [petitioner’s]
14 assertion that the facility must be sited on EFU zoned land in order
15 to achieve a reasonably direct route, or to meet unique geographical
16 needs that cannot be satisfied on other lands. Therefore, locational
17 dependency under ORS 215.275 is not established.” *Id.*

18 On appeal, petitioner argues, and we agree, that the findings on the
19 locational dependence factor misconstrue and misapply that factor. Like the other
20 factors, the locational dependence factor is focused on whether the proposed use,
21 given its pertinent attributes that advance the provision of utility services, can be
22 reasonably located on alternative non-EFU sites. The focus is not on the
23 suitability of the preferred EFU site, for emergency response or any other similar
24 consideration. We held, above, that the county erred in rejecting as valid siting
25 criteria the necessity of a 15-acre site, located within one mile of a substation that
26 meets specified technical capabilities. Under those siting criteria, petitioner’s

1 analysis disqualified a number of alternative sites, in part due to the lack of
2 identified locational attributes. The county's findings at Record 19 through 20 do
3 not identify any basis to reject disqualifications of alternative sites based on
4 locational considerations.

5 **3. Lack of Available Urban and Nonresource Lands**

6 The focus of this factor is whether otherwise suitable alternative sites are
7 "available." Petitioner's alternatives analysis disqualified a few sites that
8 otherwise met the size and locational criteria, but which were already developed
9 with public or industrial uses and hence deemed not "available." Record 297-98.

10 The analysis states petitioner's understanding of "available" as:

11 "Available' land is defined as land that could feasibly be leased or
12 purchased for use as a BESS facility. Available land does not strictly
13 need to be unoccupied; however, a parcel would not be considered
14 available if it is already developed with uses that cannot reasonably
15 be moved, removed, or repurposed, or if a landowner is unwilling to
16 lease or sell the property. As an example, a BESS could not be
17 reasonably sited by purchasing and removing numerous homes from
18 a residential neighborhood or by demolishing an existing
19 commercial or industrial facility that is not already at or near end-
20 of-life." Record 294.

21 The findings under this factor do not address the sites disqualified for lack
22 of "availability," but largely rehash the county's critiques of the size, locational,
23 and other siting criteria discussed above. Record 21-23. We reject those critiques
24 for the same reasons set out earlier in this opinion.

25 The remaining findings are nonresponsive to the question of availability.
26 The findings under this factor fault petitioner for failing to address a map

1 submitted by intervenor, which graphically depicts a number of substations in the
2 county owned by utilities other than PacifiCorp. Record 21, 2757, 2765.
3 However, we held above that the county erred in rejecting connection to a
4 PacifiCorp substation as a valid siting criteria for the proposed BESS. The
5 findings also state, in two places, that “there is evidence in [petitioner’s] own
6 alternatives analysis appearing to show at least two other possible BESS sites that
7 meet [petitioner’s] chosen criteria and are not in EFU.” Record 20, 38. However,
8 neither finding identifies the two alternative sites referred to, and the record does
9 not appear to support that assertion. The alternatives analysis at Record 291
10 through 298 does not identify *any* alternative sites that meet all the siting criteria.
11 Neither the county nor intervenor cite to these findings or explain what alternative
12 sites are referred to.

13 In sum, the findings addressing the availability factor misconstrue and
14 misapply that factor, failing to demonstrate any error in petitioner’s reliance on
15 that factor to show that none of the few alternative sites that meet the size,
16 locational, and other siting criteria are “available.”

17 The fourth subassignment of error is sustained.

18 **E. Consideration of Cost**

19 As noted, under ORS 215.275(3) “[c]osts associated with any of the factors
20 listed in subsection (2) of this section may be considered, but cost alone may not
21 be the only consideration in determining that a utility facility is necessary for
22 public service.” In other words, an alternative site that meets all other valid siting

1 criteria cannot be eliminated based solely on the cost of acquiring or developing
2 that alternative site. Petitioner developed at least one siting criterion that is, by
3 any measure, primarily or exclusively concerned with cost (costs of substation
4 network upgrades no greater than \$20 million). As explained above, other siting
5 criteria, such as one-mile proximity to a substation, involve a mix of cost and
6 service-related considerations, or were based solely on service considerations,
7 such as transfer capacity.

8 Throughout its decision, the county repeatedly characterizes the siting
9 criteria and the alternative site analysis as representing an attempt to justify
10 locating the BESS at the preferred EFU-zoned site based largely if not entirely
11 on cost and economic considerations. Under the finding addressing ORS
12 215.275(3), the county concluded:

13 “[Petitioner] states that cost was only one of the factors analyzed
14 when selecting this location. The evidence on the record suggests
15 that cost is the primary deciding factor for proposing this location.
16 This location has existing overhead transmission lines. [Petitioner]
17 states that they analyzed other locations near substations in the
18 surrounding area, but all those stations would require upgrades such
19 as installation of overhead transmission lines. The upgrades to a
20 location are costs associated with that location.” Record 25.

21 However, critically, the alternative sites analysis did not *disqualify* any non-EFU
22 alternative sites based on the cost of substation network upgrades. All alternative
23 sites were eliminated based on other site criteria, including proximity to a
24 PacifiCorp substation with the requisite 115kV class and transfer capability,
25 minimum 15-acre size, proximity, availability, etc., all of which are, as discussed

1 above, valid site criteria that are driven, at least in part, by service considerations.
2 The decision does not identify any site criteria that were actually employed to
3 disqualify any non-EFU alternative sites based solely on cost. Accordingly, we
4 agree with petitioner that the county misconstrued and misapplied ORS
5 215.275(3). The fifth subassignment of error is sustained.

6 **F. Health and Safety Factor**

7 One of the six ORS 215.275(2) factors that can be used to evaluate
8 alternative sites is “[p]ublic health and safety[.]” ORS 215.275(2)(e). Petitioner
9 did not address this factor, or attempt to disqualify any alternative sites based on
10 health and safety considerations. Nonetheless, the county adopted extensive
11 findings to the general effect that developing a BESS on the subject property
12 would present risks of fire and contamination that would be more readily
13 prevented or mitigated if the BESS were located within an urban or developed
14 area. Petitioner disputes that those are valid concerns.

15 We need not address that dispute but we agree with petitioner that the
16 county misconstrued and misapplied the health and safety factor, which like all
17 the factors is focused on evaluating alternative sites. Under the health and safety
18 factor, an alternative non-EFU site could be disqualified, for example, if
19 development of the proposed utility facility at that site would presents health or
20 safety issues. However, the health and safety factor at ORS 215.275(2)(e) is not
21 a basis to reject a proposed utility facility based on concerns about the adverse
22 impacts of locating the utility on the EFU-zoned site. As discussed below, ORS

1 215.275(5) provides a means to address potential adverse impacts of a proposed
2 utility facility on surrounding farm operations. But the health and safety factor at
3 ORS 215.275(2)(e) is not one of those means. The sixth subassignment of error
4 is sustained.

5 The second assignment of error is sustained, in part.

6 **THIRD ASSIGNMENT OF ERROR**

7 ORS 215.296 provides approval standards for uses conditionally permitted
8 in the EFU zone under ORS 215.283(2), and sets out what is often called the
9 “farm impacts” test.¹³ ORS 215.296 does not apply to uses allowed by right under
10 ORS 215.283(1), including utility facilities allowed under ORS 215.283(1)(c).

¹³ ORS 215.296 provides in relevant part:

“(1) A use allowed under ORS 215.213 (2) or (11) or 215.283 (2) or (4) may be approved only where the local governing body or its designee finds that the use will not:

“(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or

“(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

“(2) An applicant for a use allowed under ORS 215.213 (2) or (11) or 215.283 (2) or (4) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective.”

1 Instead, utility facilities are subject to ORS 215.275(5), which is not an approval
2 standard or basis for denial, but which requires the county to impose clear and
3 objective conditions on a utility facility “to mitigate and minimize the impacts of
4 the proposed facility, if any, on surrounding lands devoted to farm use in order
5 to prevent a significant change in accepted farm practices or a significant increase
6 in the cost of farm practices on the surrounding farmlands.” *See also* OAR 660-
7 033-0130(16)(a)(D) (implementing ORS 215.275(5)).

8 Despite the inapplicability of ORS 215.296(1) to a utility facility, the
9 county adopted four pages of findings addressing the farm impacts test. Record
10 26-30. The findings generally fault petitioner for failing to submit evidence
11 addressing the farm impacts test, evidence that the county explains would be
12 necessary for the county to craft conditions of approval mitigating and
13 minimizing farm impacts, for purposes of ORS 215.275(5).¹⁴ The county

¹⁴ The county’s findings state:

“[Petitioner] did not provide a detailed description of the surrounding lands or agricultural activities. [Petitioner] did not provide any information about how the BESS might impact the surrounding agricultural activities. The limited evidence on the record, which is the result of [petitioner’s] position that the farm impacts test does not apply, does not support the claim that the project will neither result in a change in, or significantly increase the cost of, farm activities in the area. Although it may be possible for a project similar to the one proposed by [petitioner] to get past the farm impacts test, the County currently lacks the required information to determine what clear and objective conditions would be required to mitigate potential change in, or increased cost of, farm

1 concludes that petitioner “must address whether the Project will have an impact
2 on surrounding lands in order for the County to apply conditions of approval to
3 mitigate and minimize the impacts of the facility.” Record 30.

4 Petitioner argues, and we agree, that the county erred in requiring
5 petitioner to submit evidence to address the farm impacts test at ORS 215.296(1),
6 even if only to provide an evidentiary basis for the county to craft and apply
7 conditions of approval under ORS 215.275(5). The latter statute imposes no
8 evidentiary burden whatsoever on the utility applicant. If the record includes
9 evidence regarding farm impacts (presumably submitted by project opponents),
10 then the applicant might choose to submit responsive evidence disputing the
11 evidence regarding farm impacts, or propose conditions of approval to address
12 the identified impacts.¹⁵ But the county cannot *require* the utility applicant to

activities in the area as a result of the application being approved, if
it were a utility facility necessary for public service. There is
insufficient evidence in the record on this.” Record 29-30.

¹⁵ Petitioner argues that the record includes no evidence regarding farm impacts from any surrounding farmers, other than a letter from an adjoining farmer stating that the facility would not adversely impact the farming operation in any way. Record 1726. The only putative “farm impacts” identified by the county stem from comments raised by the local water district, arguing in part that the BESS would remove the subject property from agricultural use, which could result in transfer of the water right for the property and eventual loss of that water right to the district. Petitioner responded to the water district’s concerns, and offered suggested conditions of approval under ORS 215.275(5) to address those concerns, at Record 1722 through 1724, and 1707 through 1711, but the county did not address those responses or consider the suggested conditions. Petition for Review 47-48.

1 submit evidence regarding the farm impacts test, and certainly cannot deny the
2 utility application based upon the applicant's failure to submit evidence regarding
3 the farm impacts test. The county erred in effectively requiring petitioner to
4 submit such evidence.

5 The third assignment of error is sustained.

6 **DISPOSITION**

7 OAR 661-010-0071(1)(c) provides that LUBA shall reverse a land use
8 decision when the decision violates a provision of applicable law and is
9 prohibited as a matter of law. OAR 661-010-0071(2) provides that LUBA shall
10 remand a land use decision for further proceedings when, *inter alia*, the decision
11 improperly construes the applicable law but is not prohibited as a matter of law.

12 Petitioner argues that the county's denial decision violates the applicable
13 law and is prohibited as a matter of law, and therefore reversal is the appropriate
14 disposition.

15 Neither the county nor intervenor provides any argument for remand as the
16 appropriate disposition; both ask only that the decision be affirmed. The county
17 notes, however, that reversal of a denial decision is warranted only if LUBA finds
18 that all bases for denial are invalid. Respondent's Brief 1 (citing *Hood River*
19 *Valley PRD v. Hood River County*, 67 Or LUBA 314, 328 (2013); *Wilson v.*
20 *Washington County*, 63 Or LUBA 314 (2011)).

21 Our decision sustains all assignments of error and subassignments that
22 challenge, as far as we can determine, each basis in the county's decision for

1 denial, concluding for each that the county misconstrued and misapplied the
2 applicable law. As the decision and record stands, the county has no basis to deny
3 the application. Accordingly, denial of the application is prohibited as a matter
4 of law, and reversal is the appropriate disposition.

5 The county's decision is reversed.