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June 24, 2010

Ms. Patty Evernden
Director
Coos County Planning Department
225 N. Adams Street
Coquille, OR 97423

Re: PCGP – Final Argument

Dear Patty:

This letter provides the applicant's final legal argument during the open record period that closes on June 24, 2010. Please include this letter in the record of proceedings before the hearings officer. This letter provides responses to arguments raised by project opponents during the public hearing and in writing during the subsequent open record periods. This letter also submits, as Exhibit A, a list of potential conditions of approval being proposed by the applicant.

A. Compliance With Applicable Review Criteria.

This section explains how the application complies with the applicable review criteria and responds to specific arguments raised by opponents regarding those criteria.

1. Signatures of property owners on application

Some affected property owners, as well as representatives from Friends of Living Oregon Waters (FLOW) and the Western Environmental Law Center (WELC), have argued that the application should be denied because PCGP has not provided the signatures of all affected property owners as part of the application under CCZLDO 5.0.150.

Oregon and federal statutes provide PCGP with private condemnation authority for purposes of developing a new natural gas pipeline. ORS 772.510(3); 15 USC § 717. In the county's 2002 land use decision approving the Coos Bay pipeline, the county established the precedent of treating an entity with the power of condemnation (in that instance, the county) as having sufficient authority to meet the ownership requirements for filing the land use application. In

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that decision, the county concluded that the applicant should not be required to initiate condemnation litigation against property owners in order to file a land use application, and that because the signature requirement is a *procedural* issue, it can be resolved through a combination of the power to condemn and an appropriate condition of approval. *See* Supplemental Staff Report to Hearings Officer dated June 10, 2010. In its 2002 decision, the county relied, in part, on *Schrock Farms v. Linn County*, 31 Or LUBA 57 (1996), where LUBA recognized that initiation of a condemnation proceeding was sufficient to qualify an entity as an "owner" for purposes of a local code provision requiring that a land use application must be submitted by an owner of the property. *Schrock Farms* confirms that Pacific Connector may become an "owner" for application purposes before actually taking title, and provides the hearings officer with the ability to find that it is feasible for Pacific Connector to meet the property owner signature requirement through the initiation of condemnation proceedings.

Next, the county in its 2002 decision also correctly found that the application requirements of the CCZLDO merely create *procedural* requirements for purposes of determining whether an application would be considered complete. As in the 2002 decision, the county in this case has already determined that the application was complete, having issued its completeness letter on April 19, 2010. The signature requirement goes to completeness, not approvability or jurisdiction, and the county may not deem an application complete and then subsequently deny the application based upon noncompliance with a procedural factor that goes to the completeness of the applications. In *Caster v. City of Silverton*, 54 Or LUBA 441 (2007), the applicant failed to provide information requested by the city for completeness under ORS 227.178(2). LUBA held that the city could not deem an application complete but then subsequently deny the application based on noncompliance with a factor that goes to completeness of the applications:

"Finally, even if petitioner in this case failed to provide the notice required by ORS 227.178(2)(b), the city elected to proceed with review of the permit application rather than treat the permit application as void under ORS 227.178(4). In that circumstance, the city may not thereafter simply cite an alleged failure on petitioner's part to provide requested information as a basis for denying a permit application. Having elected to proceed with the application notwithstanding petitioner's failure or refusal to provide the requested information, the city owes petitioner at least some explanation for why it believes petitioner's evidentiary submittal falls short of demonstrating the proposal complies with the relevant approval criteria." *Caster*, 54 Or LUBA at 451-52.

LUBA has recognized the significance of the distinction between a procedural requirement and a jurisdictional requirement in the context of land use application filing requirements. LUBA has repeatedly held that if a local government intends for an application requirement — such as a

signature requirement — to be a jurisdictional prerequisite it must expressly say so. In *Simonson v. Marion County*, 21 Or LUBA 313 (1991) LUBA addressed whether the county hearings officer correctly rejected an application because it had not been signed by the "legal owner" at the time it was filed. LUBA reversed the hearings officer, holding that:

"A zoning ordinance requirement may be jurisdictional, in the sense that failure to comply with the requirement may not be waived by the local government or cured by later performance of the requirement. *McKay Creek Valley Assoc. v. Washington County*, 16 Or LUBA 690, 692-93 (1988); *Beaverton v. Washington County*, 7 Or LUBA 121, 127 (1983). However, the code language must clearly express that the requirement is jurisdictional. *See Rustrum v. Clackamas County*, 16 Or LUBA 369, 372 (1988); *Beaverton v. Washington County, supra.*"

Similarly, in *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994), LUBA held that where a local code provision does not explicitly state that the elements of a complete development application are "jurisdictional" (specifically, a signature requirement), the local government's interpretation of the code provision as imposing procedural rather than jurisdictional requirements must be affirmed under ORS 197.829. *See also Womble v. Wasco County*, 54 Or LUBA 68 (2007) (petitioner failed to provide basis for reversal or remand when, although land use application was not authorized by the property owners under local code, petitioner did not establish that the code requirements in question were "jurisdictional" in nature); *Bridges v. City of Salem*, 19 Or LUBA 373 (1990) (same).

In the present case, the signature requirement under CCZLDO 5.0.150 not presented as a jurisdictional element of an application. Although it does state a requirement that the application shall be signed by all property owners, it does not expressly make such signatures a jurisdictional requirement, and therefore it must be treated as procedural under the caselaw discussed above.

This conclusion is directly support by the text and context of the code itself. Earlier in the same paragraph, CCZLDO 5.0.150 includes the following statement, which clearly creates the type of "jurisdictional" requirement contemplated in the LUBA cases cited above: "An application shall not be considered to have been filed until all application fees have been paid." Thus, the county has expressly created a jurisdictional requirement that an application cannot be considered without payment of the fee. However, there is no similar jurisdictional language associated with the property owner signature requirement. Therefore, the hearings officer may correctly conclude that under the *BCT Partnership* decision and other related LUBA cases, the signature requirement is "procedural" rather than jurisdictional.

Because the property owner signature requirement is a procedural provision, and does not create a jurisdictional requirement, LUBA will uphold a county decision allowing the application to go forward unless an opponent can demonstrate that failure to provide signed consents of all property owners prejudiced the party's substantial rights. ORS 197.835(9)(a)(B). This would effectively negate all claims on this issue by anyone who is not actually an affected property owner. *See Fraley v. Deschutes County*, 32 Or LUBA 27, 38 (1996) (opponents may not assert the rights of others as a basis to argue that a land use decision should be reversed or remanded). As stated by LUBA in *BCT Partnership*: "Because petitioner does not demonstrate how the alleged failure to comply with [the signature requirement] prejudices its substantial rights, petitioner provides no basis for reversal or remand." *BCT Partnership*, 27 Or LUBA at 283.

Here, as in the 2002 decision, the county can ensure there will be no prejudice to the rights of any affected property owner through the imposition of a simple condition of approval requiring the applicant to initiate condemnation of the property and/or to obtain signed consents from property owners prior to the actual construction of the pipeline. Because the applicant has condemnation authority, this is merely an issue of timing and the hearings officer can make any necessary finding of feasibility. It does not make practical sense for Pacific Connector to condemn the property required for construction of the pipeline until the necessary final approvals from the county and FERC have been obtained and any appeals are exhausted. More importantly, the hearings officer can ensure compliance with all applicable requirements by adopting findings and a condition of approval as discussed above.

2. Pacific Connector's condemnation authority is not affected by pending challenges to the FERC Order and FEIS.

Several opponents argue that the county should not rule on the land use application at issue because there are pending challenges to the FERC Order approving the pipeline, and that Pacific Connector's condemnation authority is not valid until challenges to the FERC Order are resolved. As correctly noted by the hearings officer, the FERC process is entirely separate from the local land use process, which must comply with Oregon land use statutes governing the time within which the county is required to act on a land use application.

Regarding condemnation authority, a pipeline company may exercise its condemnation authority under federal law once FERC has issued an Order approving the project that includes the property in question, and the company has been unable to agree with the property owner regarding the amount of compensation to be paid. 15 USC § 717f(h). FERC issued its Order authorizing construction of the pipeline on December 17, 2009, and that Order is included in the record before the hearings officer. Opponents of the pipeline project have filed a request for rehearing with FERC, which request is currently pending. Assuming that FERC ultimately denies the request for rehearing, the opponents will have the opportunity to appeal that denial to the U.S. Court of Appeals for the Ninth Circuit. 15 USC § 717r(b).

As explained in more detail in my letter submitted at the close of the second open record period on June 17, 2010, the FERC Order is still effective upon request for rehearing, and is still effective upon appeal to the Ninth Circuit Court of Appeals, unless a stay of that Order is obtained by opponents. The issuance by FERC of the "Order Granting Rehearing for Further Consideration" dated February 16, 2010 does not stay the effectiveness of the Order. In fact, as explained in the American Bar Association materials attached as Exhibit 1 to my June 17, 2010 letter, such orders are commonly issued by FERC as a "tolling" mechanism, which allows the Commission to avoid the otherwise strict deadline for ruling on rehearing requests.

The FERC Order dated December 17, 2009 is still valid – in the absence of a stay, its effectiveness is not compromised by any rehearing or appeal process. There is no legal basis on which opponents can claim that the FERC Order is invalid or that Pacific Connector does not have condemnation authority.

3. Transmission vs. distribution lines

Several opponents have argued that the PCGP is a "transmission" gas pipeline rather than a "distribution" line, and that the pipeline is therefore not allowed under the applicable Goal 4 rule, which allows the following conditional uses in forest zones:

"New electric transmission lines with right-of-way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (*e.g.*, gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width." OAR 660-006-0025(4)(q).¹

The language in this rule expressly and unambiguously defines all new utility lines as "distribution" lines, with the exception of new electric lines, which are identified as "transmission" lines. For purposes of this state rule, and the corresponding county code provision, there is no such thing as a natural gas "transmission" line. While the opponents may disagree with the appropriateness of this characterization, the text of the rule is not ambiguous and cannot be changed by the hearings officer.

The opponents' argument is based on the fact that the PCGP is described in other materials and in FERC documents as an interstate natural gas "transmission" facility. The opponents' argument assumes that the PCGP's classification by FERC must also be consistent with its classification under OAR 660-006-0025(4)(q) and CCZLDO § 4.3.800(F). Following this assumption, opponents argue that interstate natural gas pipelines are prohibited in forest zones because the rules only allow "transmission" lines for electricity. Opponents argue that the PCGP is not a

¹ Identical language is included in CCZLDO § 4.8.300(F) regarding conditional uses in the county Forest zone.