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Marion County Board of Commissioners

via
Marion County Planning Division
5155 Silverton Rd., NE
Salem, OR 97305

**Re: Comments from Friends of Marion County on AR25-015
(Jensen/Remington BESS) - Request For Denial**

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To Marion County Board of Commissioners

Please see the following comments from Friends of Marion County (FoMC) in this matter.

Please provide written notice of the decision of the Board of Commissioners in this case to:

- Friends of Marion County, P.O. Box 3274, Salem, OR 97302; **and**
- John D. Butterfield, 1000 Friends of Oregon, Counsel for Friends of Marion County in this matter, 340 SE 6th Ave., Portland, OR 97214

FoMC urges the County to deny the application to construct a battery energy storage system (BESS). The Hearing Officer's January 21, 2026 decision correctly found that the Applicant has not met its burden of demonstrating that the applicable standards and criteria for the proposed BESS were satisfied.

I. Background

FoMC is an independent 501(c)(3) farmland protection organization founded in 1998. Our mission is to protect farm and forestland, parks, and open space in Marion County. FoMC appreciates the opportunity to offer comments on this application.

FoMC opposes the application and requests a denial of the application of Neils Paul Jensen, Trustee of the Irma Jensen Irrevocable Trust (Applicant) for an administrative review to construct a battery energy storage system (BESS) as a utility facility necessary for public service on a 43.65-acre parcel located on Pearson Rd., SE, 500 ft. east of Parrish Gap Rd., SE (T9S; R2W; Section 20D; Tax Lot 100). Marion County has assigned this application Case No. AR 25-015.

Applicant is applying for a permit to construct and operate a battery energy storage system (BESS) on a 43.65-acre parcel in an EFU zone located at T9S; R2W; Section 2D tax lot 100. Marion County Tax Assessor Property Record 092W20D000100 shows the purchase and continuous ownership since August 31, 2019. (NOTE: Tax Account # 357174 was created by the sale of portions of Tax Account # 535412 to Amy & Robert Foster Tax Account # 357174). The 2024-2025 property tax statement for Tax Account # 535412 shows an assessed value of \$46,868.

FoMC has previously commented on this application before the Planning Director on July 7, 2025 and before the Hearings Officer on July 10, 2025. FoMC also submitted numerous maps and other exhibits with prior comments, all of which are incorporated here by reference.

These comments proceed in two parts. First, FoMC reiterates the findings of the Hearings Officer as to why the Application should be denied. Second, FoMC responds to the arguments raised by the Applicant in its February 4, 2026, Notice of Appeal.

II. The Standards and Criteria the Applicant Has Failed to Satisfy

A. Marion County Code (MCC) 17.110.584

MCC 17.110.584 defines utility facilities to mean “any water, gas, sanitary sewer, storm sewer, electricity, telephone and wire communication service, and CATV (cable television) service lines, mains, pumping stations, reservoirs, poles, underground transmission facilities, substations, and related physical facilities which do not include buildings regularly occupied by employees, parking areas, or vehicle, equipment and material storage areas, wireless communications facility or wireless communications facility, attached.

i. A BESS is not a utility facility

A BESS does not fall within the MCC 17.110.584 definition as it is not any of the listed facilities and is not a related physical facility, as a BESS is not necessary to the provision of electricity. A BESS is essentially a commercial storage facility, generating income by removing power from the grid at certain times, and releasing that power back to the grid at a later time. The BESS is ancillary to the grid or substation and is not a utility service itself. Therefore, a commercial BESS such as the one Applicant proposes cannot be permitted on EFU land as a utility facility.

A BESS is not a necessary component of providing electrical service to the public, and as such, a BESS is not a “utility facility” within the meaning of MCC 17.136.040. See, e.g. *Cox v. Polk County*, 174 Or App 332, 343-344 [“Utility facility” as used in ORS 215.283(1)(d) [means] equipment or apparatus, whether standing alone or as part of a

structure, that functions to perform or provide, in whole or in part, a service such as the production, transmission, delivery or furnishing of electricity...the facility must include some equipment or apparatus that itself performs the relevant production, transmission or similar function or service.” (emphasis added)]

A BESS does not produce, transmit, deliver, or furnish electricity. Storage of electricity for release back onto the electrical grid at some later point does not constitute the performance of any of the relevant functions or service encompassed by electric utility facilities. As such, the application should be denied as a non-allowable use on EFU land.

ii. The Applicant is not a public utility

The Applicant is a private company that is not a public utility. The Applicant does not provide electric service to the public. The MCC 17.110.584 definition of utility facilities only includes facilities that are part of a utility service system, operated by or on behalf of a utility serving the public. The Applicant's Project will not be owned by an electric utility. The Applicant is not subject to public utility regulation for retail electric service, including public oversight of rates and fees. As noted above, the BESS would not provide direct electric service to customers, and instead is simply a means of energy storage. The Applicant would operate the BESS in an open market for electricity, not in a regulated service market. As such, the BESS project does not have the public service character inherent in the utilities enumerated in MCC 17.110.584.

iii. A BESS is not a “related physical facility”

The Applicant's BESS is also not a related physical facility for purposes of MCC 17.110.584. The phrase “related physical facility” should be interpreted in context with the specified examples, which all involve utility service delivery infrastructure. As noted above, a BESS is not part of that infrastructure. It exists primarily for energy management or market participation. It could operate independently of transmission or distribution facilities, and it does not directly facilitate the service of electricity to the public. As such, a BESS is not sufficiently related to the utility facilities and functions outlined in MCC 17.110.584 to fall within the definition of related physical facilities.

A BESS does not fall within the MCC definition of a “utility facility” as a BESS is not any of the listed facilities and is not a related physical facility, as a BESS is not necessary to the provision of electricity. Furthermore, a BESS is squarely a storage area, occupied by storage equipment, the batteries themselves. The BESS generates income by removing power from the grid at certain times *storing* that energy, and then releasing power back to the grid at a later time. MCC 17.110.584 makes clear that equipment and material storage areas are not “utility facilities.” The BESS is ancillary to the grid or substation and is not a utility service itself.

A BESS is not a utility facility necessary for public service as defined in MCC 17.110.584.

B. ORS 215.283(1)(c)

A BESS is also not a utility facility necessary for public service as authorized in exclusive farm use zones under ORS 215.283(1)(c). The Applicant has confirmed in the record that the proposed BESS would operate by storing power at some times and releasing it at others. This “as needed” operation, characterized by the choice of the operator whether to store or release power is not “necessary for public service.”

As noted above, a BESS is not a necessary component of providing electrical service to the public. Therefore, just as with MCC 17.110.584, a BESS is not a “utility facility” within the meaning of MCC 17.136.040. *See, e.g. Cox v. Polk County*, 174 Or App 332, 343-344 [“‘Utility facility’ as used in ORS 215.283(1)(d) [means] equipment or apparatus, whether standing alone or as part of a structure, *that functions to perform or provide, in whole or in part, a service such as the production, transmission, delivery or furnishing of electricity*...the facility must include some equipment or apparatus that itself performs the relevant production, transmission or similar function or service.” (emphasis added)]

A BESS does not produce, transmit, deliver, or furnish electricity. Storage of electricity for release back onto the electrical grid at some later point does not constitute the performance of any of the relevant functions or service encompassed by electric utility facilities.

As the Hearings Officer has noted, ORS 215.283(1)(c) requires a showing that the utility facility is required to provide the service. The fact that the facility may be beneficial, important, or supportive of public policy goals is not sufficient. All of the customers of the regulated utility relevant here (PacifiCorp) will continue to receive electricity, whether or not this BESS is constructed. As such, the proposed BESS does not qualify to be sited in the EFU zone under ORS 215.283(1)(c).

C. ORS 215.275 and MCC 17.136.040(l)

Even if a BESS can be considered a utility facility, only utility facilities “necessary for public service” are permitted on EFU land under ORS 215.275 and MCC 17.136.040(l). The MCC provides that a facility is “necessary” if it must be situated in the EFU zone in order for the service to be provided. But as noted above, a BESS does not provide electrical service to any member of the public. Instead, a BESS is a commercial venture drawing power from the grid at certain times and releasing it back to the grid at a later time. This commercial activity is ancillary to grid operations and is not proposed to be constructed by a public utility provider. A BESS is not required for electrical service to be provided to any actual consumer of electrical power.

Even if the BESS were a utility facility being used for public service, it is not necessary to locate a BESS on EFU land. The Applicant claims that BESS's must be cited as close as possible to transmission resources such as substations and transmission lines. The Applicant claims the Parrish Gap Substation "would require the fewest additional network upgrades when compared to other substations in the service area." But that is not the standard under the code. A facility is only "necessary" under the Code if the facility "must be situated in the EFU zone in order for the service to be provided." The Applicant makes no claim that this is the only substation where a BESS could be installed. In fact, the 2018 map of substation locations in Marion County identifies locations within the city limits of the City of Salem which might be suitable for BESS installation without encroaching on farmland. The fact that these substations might require more "network upgrades" than the proposed BESS does not make citing the BESS on EFU land "necessary." The applicant should first consider these other locations. The County should deny this application and require a complete and thorough alternative locations analysis prior to considering any approval of this BESS. Such an alternative locations analysis would need to support a finding that this BESS "must" be situated on EFU land in order to provide the service. The Application as submitted does not support such a finding.

If a BESS were a utility facility necessary for public service, the Applicant would also be required to show that the BESS must be sited in an EFU zone to provide the service. OAR 660-033-0130(16). A utility facility can be shown to be required to be sited in an EFU zone due to one or more of the following factors:

- Technical and engineering feasibility
- The proposed facility is locationally-dependent (meaning it must cross EFU land in order to achieve a reasonably direct route of to meet unique geographical needs that cannot be satisfied on other lands)
- Lack of available urban and nonresource lands
- Availability of existing rights of way
- Public Health and Safety
- Other requirements of state and federal agencies.

The Applicant did not demonstrate that the proposed BESS must be sited on EFU land under any of the allowed factors. The Applicant only claims that the proposed BESS must be sited on EFU land as a result of the first three factors: technical and engineering feasibility; locational dependency; and lack of available urban and nonresource lands. As such, the Applicant has conceded that the remaining three factors do not apply to this application and cannot support a finding that the proposed BESS must be sited on EFU land.

i. Technical and engineering feasibility

The Applicant's only argument for the proposed location of the BESS is that the site is adjacent to a substation. But adjacency to a substation, while perhaps convenient for a project of this type, is not a necessary condition. The Applicant did not show that

connecting to the grid would be technically impossible from non-EFU land, only that it might be more expensive.

The Applicant also never addresses in detail the risk of a fire at the project. The project's batteries would contain a variety of metals and other compounds that risk environmental and health impacts if released as the result of a fire. Given that the project would be on EFU-land, potential contamination of soils and water on the site are especially problematic, and the Applicant did not demonstrate that those risks could be adequately contained or mitigated. These risks factor into whether the BESS is feasible on EFU-land. Extinguishing BESS fires can be a days or months-long process, requiring thousands of gallons of water, all of which may be contaminated by the materials used in the batteries. We cannot afford to risk the destruction and pollution of our EFU zone in the event of a BESS fire or other catastrophic failure.

The Applicant has not demonstrated that the technical and engineering feasibility of the project require it to be located on EFU-land.

ii. Locational Dependency

The Applicant has not provided any evidence that they actually studied other locations in Marion County, or nearby counties, for compatibility with the project. As noted above, the proposed location poses serious risks to the neighboring farmland due to soil contamination, groundwater contamination, and chemical leakage. FoMC previously provided maps and reviews of available urban land that could support BESS projects. While the Applicant may prefer to site this project on EFU land near a particular substation, such a preference does not establish locational dependency. A BESS at the proposed location is not necessary for electricity to be provided to any customers in Marion County, and there are numerous alternative sites that are not EFU-land where a BESS could be located.

iii. Lack of available urban and nonresource lands

The Applicant purported to conduct an alternatives analysis. But that analysis arbitrarily limited the potential sites so as to arrive at the Applicant's desired conclusion. First, Applicant required that the BESS be located near the Parrish Gap substation. While this substation may be a desirable location from the Applicant's perspective, a substation surrounded by EFU-land is not an appropriate substation for a BESS, regardless of potential capacity at the substation. There are many substations in Marion County on urban and nonresource lands or with adjacent urban or nonresource sites. The Applicant's alternative analysis should have included these substations. An alternatives analysis that limits review of locations to those adjacent to a single substation does not satisfy the criterion that there is a lack of available urban and nonresource lands.

The Applicant argues that this project can only be sited adjacent to PacifiCorp substations, the Parrish Gap substation in particular. This is business strategy preference. It is not locational necessity and it does not show that there is a lack of available urban and nonresource lands. If an Applicant picks a substation that is surrounded by EFU land and says the project must be adjacent to that particular substation, there will obviously not be urban or nonresource land available. But the Applicant would be required to demonstrate that the substation chosen was necessary not just to make the project more economical, but in order to provide a public service. ORS 215.275 requires consideration of alternative locations, not limited to alternatives that meet the Applicant's financial, contractual or scheduling preferences. Evidence that non-EFU sites are more expensive or not consistent with arbitrary constraints the Applicant has added to the project description does not demonstrate a lack of available urban and nonresource lands. The Applicant has not met this criterion.

D. OAR 660-033-0130(16)(C)

Under OAR 660-033-0130(16)(C), the Applicant is responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. The Applicant has provided no plans for decommissioning the site after the useful life of the installed batteries ends, or when the BESS is no longer needed. In fact, it is unclear whether it is even possible to restore the site to agricultural use after developing it with a BESS. Approving this project would essentially sacrifice the subject property to non-agricultural use forever. That does not comply with OAR 660-033-0130(16)(C), and the Applicant's permit application should be denied for this reason.

E. The Farm Impacts Test

For all of the reasons outlined above, the Applicant's proposed project is not a utility facility and cannot be sited in the EFU-zone. If the County nevertheless determines that the project can move forward, the project must satisfy the farm impacts test. The test, laid out in ORS 215.296, and implemented by the County in MCC 17.136.060, requires that the project will not force a significant change in, or significantly increase the cost of accepted farm or forest practices on surrounding resource land. A detailed description of the process of conducting a farm impacts test is outlined in OAR 660-033-0130(5), which is incorporated here by reference.

The Applicant does not agree that the farm impacts test applies so it did not submit adequate information to determine the impacts on accepted farm and forest practices on the surrounding farmland. The Applicant's summary conclusion claiming that the project will not result in discharges or emissions to the environment is not sufficient.

The Applicant did not provide a detailed description of the surrounding lands or agricultural activities. The Application also does not provide any information about how

the BESS might impact the surrounding agricultural activities. As such, the County should not find that the Applicant has demonstrated that the project will neither result in, or significantly increase the cost of farm activities in the area. Because the Project, if it could be approved, is not exempt from the farm impacts test, and the Applicant did not conduct a proper farm impacts test, the Application should be denied.

III. Response to Applicant's Arguments

In its appeal, the Applicant incorporates by reference a document entitled "Remington BESS, LLC Prehearing Brief." The arguments presented in that brief do not support approval of the requested permit for the following reasons.

A. Necessary Standard

The Applicant claims that the proposed BESS project is a "utility facility necessary for public service." The Applicant cites the *Cox* case discussed above, and notes that the Oregon Court of Appeals and/or LUBA have found that cell phone towers, radio transmission towers, and transmission lines qualified as "utility facilities." The Applicant goes on to claim that Legislative history (none of which actually discusses a BESS) supports the argument that utility facilities is to be interpreted broadly. The Applicant then claims that the proposed BESS "is the type of facility contemplated by the foregoing cases."

But it is not. Cell phone and radio transmission lines are necessary for users to receive the cell and radio transmissions that allow the service to be provided. Similarly, without transmission lines, users cannot receive electricity. If this BESS is not built, no user will go without power. A BESS does not allow any more electricity to be available to the public; all it does is change when that electricity is available. That function does not meet the necessary standard.

The Applicant tries to shoehorn its proposal into the necessary standard by claiming that PacifiCorp and the state of Oregon have stated that battery storage is necessary for future electricity use, grid reliability, and to meet state clean energy goals. State clean energy goals, while perhaps admirable policy, do not make battery energy storage on EFU-land necessary. And the Applicant has not provided any evidence that this project is somehow "necessary for future electricity use." To approve this project, the County would have to find that the project is a utility facility necessary for public service. The fact that the project might, at some unknown time in the future enhance the reliability of the grid, is both unsupported by evidence and not sufficient to satisfy the required legal standard.

The Hearing's Officer accurately addressed this argument by the Applicant, pointing out that case law involves facilities that *actually* perform the public service at issue. Simply because the BESS interacts with the electrical grid does not transform a storage facility

(BESS) into a utility service-delivery facility. The County should adopt the Hearing Officer's findings on this issue at page 10 and 11 of the January 21, 2026 Decision.

B. Alternative Analysis

The Applicant first argues that the County has misinterpreted ORS 215.275 as "criteria" rather than factors. This is incorrect. The Hearings Officer went through each of the factors in ORS 215.275(2) and found that the Applicant had not demonstrated that any of the factors were satisfied. As such, the Applicant failed to prove that the BESS, were it a utility facility, must be sited on EFU land. No misinterpretation or misapplication of the factors occurred in the Hearing's Officer's analysis.

Second, the Applicant claims that the proposal meets three of the ORS 215.275(2) factors, conceding that it does not meet the other three. An explanation of why the proposal does not meet any of the three factors the Applicant chose to use appears above. The Applicant again attempts to shoehorn this project into factors that do not apply. For instance, the Applicant claims that the chosen location is the only feasible location "based on [] technical and engineering considerations." But those technical and engineering considerations are actually economic cost factors like procurement lead time for utility poles. The fact that it might take extra time to buy utility poles lends no support to an argument that the project must be sited on EFU land due to technical considerations. And as noted above, the Applicant entirely eliminated siting the project near any other substation in the whole County, other than Parrish Gap. That may be the substation the Applicant prefers for economic or contractual reasons, but there is no evidence that the Parrish Gap substation is the only substation in the County where a BESS project could be installed, from a technical limitation perspective. The BESS does not meet the technical feasibility factor.

Third, the Applicant claims the BESS must be sited on EFU land to avoid "wheeling" charges from Portland General or the Bonneville Power Administration. The Applicant argues these charges make the project "locationally dependent." As the Hearing's Officer found, this argument is erroneous. The BESS is not locationally dependent. It could be located near other substations in Marion County. FoMC provided a map of the available substations inside UGB's. Or the BESS could even be located some distance from a substation. Some electricity might be lost in transmission from the substation to the BESS and back, but that would not cause the BESS to stop functioning. Incidental economic costs like "wheeling" or minor transmission losses do not transform a storage project that could be located anywhere into a "locationally dependent" project that must be sited on EFU. Costs are the only non-arbitrary evidence the Applicant points to that favor the proposed location, but costs cannot be the only factor that a County considers under ORS 215.275(3). The evidence in the record does not support a finding that the Applicant's proposal is locationally dependent.

Finally, the Applicant claims no urban or non-resource lands are available that meet the project objectives. That is true only because the Applicant narrowed the project

objectives so precisely so as to make the subject property the only land that could possibly meet those objectives. The Applicant eliminated consideration of other substations, as discussed above, and required that land be adjacent to the Parrish Gap substation in order to meet their circumscribed objectives. As such, claiming that no urban or non-resource lands are available to meet those project criteria is irrelevant. For this factor, the County should determine whether any urban or non-resource lands are available in the County for BESS projects. As noted in FoMC's exhibits, there are numerous substations near urban or non-resource lands where BESS's could be sited. The Applicant cannot demonstrate that this factor has been satisfied, and as such, the proposal does not comply with ORS 215.275, and the permit application should be denied.

C. The Farm Impacts Test

Next, the Applicant argues that the farm impacts test does not apply to this proposal. The Applicant claims that a BESS is a use "as of right" (sometimes called a sub-1 use) that does not require a farm impacts test. As discussed extensively above, a BESS is not a utility facility necessary for public service, so it is not a sub-1 use. As such, if the BESS were still going to be installed on EFU-land under some other allowable use in the EFU-zone, a farm impacts test would need to be conducted. The Applicant has not provided the necessary analysis to even determine whether farm and forest practices would be impacted. As such, failure to comply with the farm impacts test is another legal standard that the County could use to deny the application.

IV. Conclusion

For all of the reasons outlined above, and for the reasons detailed in the Hearing's Officer's decision, the County should deny the Applicant's proposal.

Thank you for the opportunity to comment on this application.

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