BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2225

In the Matter of STAFF HB 2021 INVESTIGATION INTO CLEAN ENERGY PLANS.	JOINT ENVIRONMENTAL PARTIES' RESPONSE TO APPLICATION FOR REHEARING OR RECONSIDERATION

In accordance with OAR 860-001-0720(4), Sierra Club and the Green Energy Institute at Lewis & Clark Law School (hereinafter "Joint Environmental Parties") timely file this response to Oregon Solar and Storage Industries Association, Community Renewable Energy Association, and NewSun Energy, LCC's ("Applicants") Application for Rehearing or Reconsideration of the Public Utility Commission of Oregon's Order Nos. 22-390, 22-446, and 22-477 ("Application"). For the reasons set forth below, the Joint Environmental Parties support the Application and urge the Commission to grant rehearing or reconsideration of Order Nos. 22-390, 22-446, and 22-477.

I. Introduction

Docket UM 2225 was launched in early 2022 in recognition that "House Bill (HB) 2021 establishes an ambitious emissions-based clean energy framework for electricity providers in Oregon."[1] Indeed, within just seven years—by 2030—Oregon utilities will need to demonstrate that they have reduced greenhouse gas emissions by 80 percent below baseline emission levels, with additional reductions through 2040. Because Clean Energy Plans ("CEPs"), required under

[1] HB 2021 Investigation into Clean Energy Plans, Investigation Launch Announcement, UM 2225 (Jan. 11, 2022), *available at* https://edocs.puc.state.or.us/efdocs/HAA/um2225haa142050.pdf.

HB 2021, "are foundational to HB 2021's decarbonization framework,"[2] the investigatory docket was intended to establish "near-term OPUC guidance" on the utilities' first CEPs.

Given the extremely short timeframe to meet HB 2021's emission reduction targets, the first CEPs are critical. Either Oregon utilities will put forward meaningful, realistic plans to drastically reduce greenhouse gas emissions within the next seven years or their plans will demonstrate that the utilities are not prepared to take immediate action, thereby likely missing HB 2021's first emission reduction deadline. This is due to the simple fact that procuring the necessary renewable resources that can replace the utilities' current thermal operations will necessarily take time, and, as noted by the Applicants, there is no time to waste by delaying the necessary procurement activities over multiple Integrated Resource Plan ("IRP"), CEP, and Request for Proposal ("RFP") cycles.[3] In other words, to have any realistic chance of meeting HB 2021's emission reduction targets by 2030, the first CEPs cannot be treated merely as a "test run."

Moreover, UM 2225 provided the Commission with an opportunity to fulfill its obligations under Executive Order ("EO") 20-04, which requires the Commission to "exercise any and all authority and discretion vested in [it] by law to help facilitate Oregon's achievement of GHG emissions reduction goals[,]"[4] and to "prioritize and expedite any processes and procedures, including but not limited to rulemaking processes and agency dockets, that could accelerate reductions in GHG emissions[,]"[5] among other directives. Under EO 20-04, the

[2] *Id.*
[3] *In the Matter of Staff HB 2021 Investigation into Clean Energy Plans*, UM 2225, Appl. for Rehearing or Reconsideration of Or. Solar and Storage Indus. Ass'n, Cmty. Renewable Energy Ass'n, and NewSun Energy LLC at 22 (Dec. 27, 2022) [hereinafter "Appl. for Rehearing or Reconsideration"].
[4] Directing State Agencies to Take Actions to Reduce and Regulate Greenhouse Gas Emissions, Exec. Order No. 20-04 at Ordering Paragraph 3(A) (2020) [hereinafter "EO 20-04"].
[5] *Id.* at 3(B).

Commission was obligated to use UM 2225 to ensure that the utilities move as quickly and aggressively as possible to meet Oregon's climate goals.

The Joint Environmental Parties extensively participated in a range of comment opportunities, Staff workshops, and Commission public meetings, emphasizing the need for clear and ambitious Commission leadership.[6] While Commission Order Nos. 22-390, 22-446, and 22-447 begin to guide the utilities on the first CEPs, the utilities' obligations remain uncertain and important questions remain unanswered. The Joint Environmental Parties recommend that the Commission find that there is good cause to reconsider Order Nos. 22-390, 22-446, and 22-447 and make the following changes:

1. Amend Order No. 22-390 to state the binding nature of HB 2021;
2. Amend Order Nos. 22-390, 22-446, and 22-477 to state the binding nature of the Commission's initial expectations for the first CEPs;
3. Amend Order No. 22-446 to require the retirement of Renewable Energy Certificates ("RECs") for electricity used to comply with HB 2021 clean energy targets;
4. Amend Order No. 22-390 or No. 22-477 to direct Staff to immediately initiate a rulemaking in order to interpret ORS 469A.420(2) and establish other substantive CEP requirements; and
5. Amend Order No. 22-446 in order to direct the utilities to report both (1) prospectively on the emissions associated with their plans to sell the output of thermal resources to other entities or serve loads in other states and (2) on actual emissions from these resources.

[6] *See, e.g., In the Matter of Staff HB 2021 Investigation into Clean Energy Plans,* UM 2225, Energy Advocs. Comments on Resiliency Planning Standards and Practices at 1 (Oct. 14, 2022) (noting that "[i]t is critical for utilities to leverage this first CEP to move the needle on resiliency . . ." and that the Commission should "provide durable guidance for future CEPs.").

II. Standard of Review

Applications for rehearing or reconsideration are authorized pursuant to O.R.S. § 756.561(1), which holds that the Commission may grant rehearing or reconsideration "if sufficient reason therefor is made to appear." The Commission's regulations further explain that an application for rehearing or reconsideration may be granted if the applicant shows that there is:

(a) New evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order;

(b) A change in the law or policy since the date the order was issued relating to an issue essential to the decision;

(c) An error of law or fact in the order that is essential to the decision; or

(d) Good cause for further examination of an issue essential to the decision.[7]

III. Argument

A. Rehearing or Reconsideration is Warranted to Clarify that Both HB 2021 and the Commission's Orders Implementing HB 2021 are Binding.

Good cause exists to grant rehearing or reconsideration of Commission Order Nos. 22-390, 22-446, and 22-477 because there is ongoing confusion as to whether both HB 2021 and the Commission's written orders impose binding obligations on the regulated utilities. As the Applicants noted, statements made on the record insinuated that HB 2021's emission reduction targets may not be binding requirements on Oregon utilities.[8] Confusion regarding the utilities' obligations was then reinforced by the Commission's orders, particularly Order No. 22-390, wherein the Commission implied that the utilities' first CEPs may be acknowledged, even if the

[7] Or. Admin. R. §§ 860-001-0720(3)(a)-(d).
[8] *See* Appl. for Rehearing or Reconsideration at 7 (citing comments made by Commissioner Thompson).

CEPs "may have fallen short of" the Commission's adopted "expectations."[9] In order to ensure that there is no confusion regarding the utilities' obligations, the Commission should clarify the record prior to the submission of the first CEPs.

To begin, HB 2021's requirements are binding, as they are set forth with "shall" statements: "[a] retail electricity provider *shall* reduce greenhouse gas emissions . . . by the following targets . . .[;]"[10] "[a]n electric company *shall* develop a clean energy plan for meeting the clean energy targets[;]"[11] "[a]n electric company that files a clean energy plan . . . *shall* convene a Community Benefits and Impacts Advisory Groups . . ".[12] "It is elementary that 'shall' connotes the imperative[,]"[13] and Oregon courts have routinely found that "'[s]hall' is a command: it is 'used in laws, regulations, or directives to express what is mandatory.'"[14] While courts have interpreted "shall" as "may" in some circumstances, courts typically consider factors such as whether any party will be prejudiced by not requiring strict compliance with the law.[15] The Oregon executive and legislative branches of government have recognized the existential crisis caused by climate change and the immediate need to reduce greenhouse gas emissions rapidly.[16] Failure to meet HB 2021's emission reduction targets would undoubtedly prejudice all Oregonians.

Even if HB 2021's requirements were ambiguous, the Commission's interpretation of the law is bound by EO 20-04, which directs the Commission to "exercise any and all authority and

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[9] *In the Matter of Staff HB 2021 Investigation into Clean Energy Plans*, UM 2225, Order No. 22-390 at 1 (Oct. 25, 2022) [hereinafter "Order No. 22-390"].
[10] Or. Rev. Stat. § 469A.410(1) (emphasis added).
[11] *Id.* § 469A.415(1) (emphasis added).
[12] *Id.* § 469A.425(1) (emphasis added).
[13] Stanley v. Mueller, 211 Or. 198, 208 (Or. 1957).
[14] Preble v. Dep't of Revenue, 331 Or. 320, 324 (Or. 2000) (internal citations and quotation marks omitted).
[15] *See, e.g.*, Childs v. Marion Cnty., Or., 163 Or. 411, 415 (Or. 1940) (finding that, although the relevant statute indicated that the tax collector "shall" within a certain time period prepare a list of all real properties subject to foreclosure, that late preparation would not prejudice any taxpayer).
[16] Or. Rev. Stat. § 469A.410, *et seq.*; EO 20-04.

discretion vested in them by law to help facilitate Oregon's achievement of [its greenhouse gas] emission reduction goals."[17] An interpretation of HB 2021's emission reduction requirements as anything other than mandatory would contravene EO 20-04.[18]

Second, Commission orders typically impose requirements on regulated utilities. As the Applicants explained, the fact that Order Nos. 22-390, 22-446, and 22-477 were issued pursuant to a Commission investigation, rather than a contested case, is of no consequence.[19] While the Joint Environmental Parties are not suggesting that the Commission can *never* provide non-binding guidance to a utility, the Commission's orders in this circumstance threaten to undermine implementation of HB 2021, an ambitious (but necessary) statute that will be challenging to meet even assuming an unwavering commitment to its requirements. To meet the requirements of HB 2021, significant and meaningful changes will need to be made by the regulated utilities—changes that the utilities may not have opted to undertake but for HB 2021. Without direct and clear guidance from the Commission, it is unlikely that HB 2021 can be successful.

The Joint Environmental Parties appreciate that the utilities' CEPs will be new undertakings, that mistakes may be made, and that the Commission may wish to issue iterative orders as more is learned. However, this dynamic should not excuse the regulated utilities from meeting the bare minimum requirements that have thus far been set forth in Order Nos. 22-390, 22-446, and 22-477. Indeed, the requirements set forth in these orders should be viewed as a "floor," with any updated or new Commission directives increasing in stringency. At present, the

[17] EO 20-04 at Ordering paragraph 3(A) (emphasis added).
[18] Notably, EO 20-04 was issued prior to the passage of HB 2021. While the EO references prior, less stringent Oregon greenhouse gas reduction targets, the EO speaks in terms of meeting the "state's goals," which have now changed. Even if the EO could only be read as requiring actions to reduce Oregon's greenhouse gas emissions in line with prior targets, that does not in any way change the Commission's obligation to "exercise any and all authority and discretion" to meet those targets, which have not yet been met.
[19] Appl. for Rehearing or Reconsideration at 24.

Commission's Orders are unclear as to whether the utilities are required to meet the Commission's initial expectations or whether the utilities need only take the Commission's expectations into consideration but ultimately make their own determinations as to what is appropriate. This approach allows the utilities, which not only may be hesitant to aggressively pursue HB 2021's objectives but also do not have the same public mandate as the Commission, to usurp the Commission's leadership role in implementing the HB 2021.

In sum, due to confusion regarding the binding nature of meeting HB 2021's emission reduction targets, there is good cause to revise Order Nos. 22-390, 22-446, and 22-477. The Joint Environmental Parties specifically recommend that Order No. 22-390 be amended to state the binding nature of HB 2021 and that each of the orders be amended to direct full compliance with adopted Staff recommendations pertaining to the first CEPs.

B. The Commission Must Take More Decisive Action on RECs.

The Joint Environmental Parties support the Applicant's request that the Commission reconsider Order Nos. 22-390 and 22-446 and find that RECs be retired for generating resources used to meet HB 2021 compliance standards.[20] HB 2021 and its legislative history support a finding that RECs must be retired and the Commission has full authority, particularly under EO 20-04, to find as such. The Commission should make this finding now, before the submission of the first CEPs, in order to avoid any incorrect assumptions that may be difficult to later amend in subsequent CEP submissions.

[20] *Id.* at 16.

1. *HB 2021 established a load-based program because it provides 100% clean electricity to Oregon's retail customers and therefore requires the retirement of RECs.*

HB 2021 has often been referred to as an "emissions-based standard."[21] However, this description provides no guidance on whether REC retirement is required for compliance with HB 2021, because an "emissions-based standard" does not describe a generally accepted accounting method for measuring GHG emission reductions. Rather, to account for greenhouse emission reductions as required by HB 2021, the Commission must determine whether utilities must use a load-based accounting system or generation-based accounting program.

A load-based program measures the (direct or avoided) emissions associated with the electricity consumed by retail customers in their homes and businesses. Under a load-based program, the generation is allocated to the load, i.e., the customers, and the program accounts for contractual and market transactions of the generation and the attributes, including environmental attributes. When using load-based accounting, regulators must use a tracking mechanism, such as a REC, to account for the environmental attributes.[22] In contrast, generation-based accounting measures the (direct or avoided) emissions associated with electricity generated in a place, such as a geographic area, or by who owns or controls electricity generators. Under a generation-based accounting program, the focus is where the generation occurs, not the use or delivery of that generation.[23]

In determining utility compliance with HB 2021, the Commission must reconcile whether the RECs generated by the renewable energy resources used to comply with the zero greenhouse

[21] *See e.g.* Special Pub. Meeting UM 2225 PUC House Bill 2021, Investigation into Clean Energy Plans, Comment by Pacific Power at 1:03:25 (Oct. 4, 2022), *available at* https://oregonpuc.granicus.com/player/clip/1023?view_id=2&redirect=true.
[22] *Guide to Elec. Sector Greenhouse Gas Emission Totals*, Ctr. for Res. Sols. at 3 (Nov. 2022), *available at* https://resource-solutions.org/Guide-to-Electricity-Sector-Greenhouse-Gas-Emissions-Totals.pdf.
[23] *Id.* at 2.

gas emission targets must be retired (load-based) or whether the RECs can be unbundled and sold to buyers in Oregon or out of state (generation-based).[24]

While there is ambiguity as to whether HB 2021 requires RECs to be retired, the Joint Environmental Parties respectfully submit that EO 20-04 requires the Commission to interpret HB 2021 in a manner that provides for the greatest level of greenhouse gas emission reductions and greatest environmental justice benefits to Oregon communities, which necessarily requires the retirement of RECs. And while HB 2021 does not require "a retail electricity provider to track electricity to end use retail consumers[,]"[25] there are several sections that refer to electricity sold or delivered to retail customers.[26] Therefore, this provision cannot be read in a vacuum to mean that Oregon's retail electricity providers may sell off the environmental attributes associated with the emissions-free electricity generation used for compliance. Rather, the Commission must consider the totality of HB 2021 and its obligations under EO 20-04, which supports requiring REC retirements.

2. The Commission has the authority to require REC retirement under HB 2021.

The Commission has the authority to ground HB 2021 in a load-based accounting system and to require REC retirement because this approach aligns with the bill's intent, text, and context. Moreover, it is the only way retail electricity providers can produce robust and honest reporting. One primary policy behind HB 2021 is to ensure that PGE and Pacific Power "eliminate greenhouse gas emissions associated with serving Oregon retail electricity consumers by 2040[.]"[27] Specifically, the legislature was focused on Oregon retail electricity *customers*

[24] HB 2021 requires "nonemitting electricity" and presumably therefore does not permit a retail electricity provider to use unbundled RECs to comply with the established targets. *See* Or. Rev. Stat. §§ 469A.405; 469A.415(4)(b).
[25] Or. Rev. Stat. § 469A.410(2).
[26] *See id.* §§ 469A.400(1)(a); 469A.405(1); 469A.420(3)(a),(b); 469A.435(3).
[27] Or. Rev. Stat. § 469A.405(1).

receiving emissions-free electricity throughout the law, rather than an alternative focus, such as where generation occurs.[28] If the Commission allows the retail electricity providers to sell off the RECs associated with electricity delivered to their consumers, the Commission is effectively authorizing the purchasers of those RECs to receive the emissions-free electricity—not Oregon retail electricity consumers.

Under HB 2021, the Commission is tasked with evaluating compliance with the clean energy targets by comparing the DEQ-forecasted emissions reduction with the reductions of GHG emissions expected through the utility's CEP.[29] Importantly, it is also tasked with evaluating the plan's consistency with the "public interest." The public interest is broadly framed in the statute to include the "reduction of greenhouse gas emissions," "related environmental or health benefits," customer costs and risks, and "[a]ny other relevant factors as determined by commission."[30] Of course, the Commission remains responsible for evaluating utility implementation plans for meeting the requirements of the renewable portfolio standard, including integrating those implementation plans into IRP guidelines for purposes of achieving least-cost, least-risk resource acquisition.[31]

Accordingly, verifying emissions reductions alone is *not* the Commission's only responsibility. It is hard to imagine a more open door for the Commission to exercise its authority to protect Oregon ratepayers, ensure climate policy symmetry, and avoid double counting of renewable energy generation than language allowing the Commission to consider "any other relevant factors as determined by the commission."[32] In fact, EO 20-04 requires the

[28] *See* Or. Rev. Stat. §§ 469A.400(1)(a); 469A.405(1); 469A.420(3)(a),(b); 469A.435(3).
[29] Or. Rev. Stat. §§ 469A.420(1)(b),(2)(a).
[30] Or. Rev. Stat. §§ 469A.420(2)(a),(e),(f).
[31] Or. Rev. Stat. § 469A.075.
[32] Or. Rev. Stat. §§ 469A.420(2)(f).

Commission to walk through this door, as the executive order requires the Commission to "exercise any and all authority and discretion vested in [it] by law to help facilitate Oregon's achievement of GHG emissions reduction goals[.]"[33] HB 2021 does not limit the Commission's discretion to DEQ's accounting methodology; to the contrary, the statute anticipates Commission action in the substantive areas about which it has expertise. The Commission's acknowledgment should be based, in part, on how the utilities treat and ultimately use RECs.

The Oregon Legislature enacted HB 2021 to ensure that Oregon's electricity consumers received greenhouse gas emission-free electricity, with the accompanying environmental and health benefits.[34] During the 2021 legislative session, Representative Pham shared a floor letter asking for support of HB 2021 and demonstrating that a broad coalition supported a bill that "builds on existing energy policy to ensure Oregon's electricity is generated from clean energy and carbon-free resources like solar and wind energy by 2040."[35] Moreover, the letter stated that the bill "provides an opportunity for Oregon to attract renewable energy investments, . . . reduce air and climate pollution."[36] Representative Pham's letter reveals that renewable energy—and its environmental attributes—were key to the bill's passage. Further, as the Application for Rehearing or Reconsideration points out, PGE is currently promoting its commitment to the delivery of emissions-free electricity to its *customers* and shares that it will "add[] more renewable generating facilities through wind and solar"—which require RECs for tracking of the environmental attribute.[37]

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[33] EO 20-04 at Ordering Paragraph 3(A).
[34] *See* Or. Rev. Stat. § 469A.420(2)(a) (stating that the commission must consider "any related environmental or health benefits" when determining whether the clean energy plan is in the "public interest.").
[35] Rep. Khanh Pham, *Floor Letter: Please join us in supporting House Bill 2021C for 100% Clean Energy For All* (June 24, 2021), *available at* https://olis.oregonlegislature.gov/liz/2021R1/Downloads/FloorLetter/3263.
[36] *Id.*
[37] Appl. for Rehearing or Reconsideration at 15 (citing *Climate Goals*, Portland General Elec., *available at* https://portlandgeneral.com/about/who-we-are/climate-goals).

3. The Commission must require the retirement of RECs so that Oregon retail electricity consumers have a verification tool for the renewable energy they receive and because it is in the "public interest" of the clean energy plans.

Under HB 2021, "electricity shall have the emission attributes of the underlying generating resource."[38] As discussed in the record, RECs prevent electricity derived from renewable energy from being sold or delivered to multiple consumers.[39] RECs represent the "property rights to environmental, social, and other non-power attributes of renewable electricity generation" and are the "accepted legal instrument through which renewable energy generation and use claims are substantiated in the U.S. renewable electricity market."[40] Likewise, the Oregon Department of Energy defines a REC as "a unique representation of the environmental, economic, and social benefits associated with the generation of electricity from renewable energy sources."[41] Based on this common understanding of a REC, HB 2021's mandate that "electricity shall have the emission attributes of the underlying generating resource" means that the RECs associated with the generating resource must be retired because it is the REC that carries emission-free attributes, i.e., the environmental or social attributes.

RECs are the generally accepted tool Oregon's retail electricity consumers expect to use to confirm that the electricity they consume from renewable resources under HB 2021 is emissions-free. If Oregon retail consumers do *not* receive the RECs attributed to the renewable energy used for compliance, then retail electricity providers could sell the unbundled RECs to other buyers in Oregon or buyers outside of the state even though the renewably sourced electricity was already consumed.

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[38] Or. Rev. Stat. § 469A.430.
[39] *In the Matter of Staff HB 2021 Investigation into Clean Energy Plans*, UM 2225, Comments of Ctr. for Res. Sols. on OPUC Staff's Straw Proposals on Analytical Improvements at 3, (Sept. 30, 2022).
[40] *Renewable Energy Certificates (RECs)*, U.S. Env't Prot. Agency (Feb. 25, 2022), *available at* https://www.epa.gov/green-power-markets/renewable-energy-certificates-recs.
[41] Or. Admin. R. § 330-160-0015(16).

Double counting of RECs is not a hypothetical concern. For instance, Utah's Community Renewable Energy Act provides the legal authority to establish a program under which participating communities will become *net* 100 percent clean.[42] This means that while the communities will continue to rely, in some part, on thermal resources, enough renewable energy will be acquired to match the communities' load. The Act does not specify whether the renewable energy acquired to allow the communities to become net 100 percent clean must come from bundled RECs. As a result, the same renewable energy used to meet Oregon's HB 2021 compliance requirements could *also* be used to meet legal requirements in Utah, if the Commission fails to require the retirement of RECs for HB 2021 compliance.

Even assuming that double counting between Oregon and other state programs were not of concern, there are other good policy reasons to require REC retirement. First, allowing the regulated utilities to sell unbundled RECs on an open market will dilute that market by essentially doubling the assumed available clean energy (another form of double counting). Second, other states, such as Washington, have already set a standard for requiring REC retirement. Under Washington's Clean Energy Transformation Act ("CETA"), utilities can meet their compliance standard by using up to 20 percent bundled RECs.[43] However, utilities can only use this alternative compliance mechanism if they can demonstrate that there is "no double counting of any nonpower attribute associated with that REC" and the "associated electricity was not delivered, reported, or claimed as a zero-emission specified source … under a GHG program."[44] As such, Washington's REC market would likely be unavailable to utilities seeking

[42] *See, e.g.*, Utah Code § 54-17-903(2) (describing program requirements as adoption of a resolution stating "a goal of achieving an amount equivalent to 100% of the annual electric energy supply for participating customers").
[43] Wash. Rev. Code § 19.405.040(1)(b) (CETA permits the use of "unbundled renewable energy credits, provided that there is no double counting of any nonpower attributes associated with renewable energy credits within Washington or programs in other jurisdictions[.]").
[44] Wash. Admin. Code § 194-40-420(1) (regarding no double counting of any nonpower attribute); Wash. Admin. Code § 194-40-420(2)(b) (regarding delivery, reporting, and claiming).

to sell unbundled RECs associated with electricity from renewable resources used to comply with HB 2021. Third, retirement of RECs provides confidence to Oregon customers that their electricity was, in fact, generated by renewable resources. Without a verification tool, such as a REC, Oregon retail electricity consumers would be confused—and rightly so—as to whether their electricity actually comes from a renewable source. Moreover, Oregon's retail electricity providers would be unable to market their electricity delivered to Oregon retail electricity consumers as derived from renewable sources because they would have no verification tool to do so. Therefore, in addition to the double counting of renewable generation, failing to retire RECs associated with renewable sources would also result in a lack of transparency and inefficiency in Oregon's climate program.

Accordingly, it is clearly in the "public interest" of Oregon's retail electricity consumers to retire RECs associated with the compliance of HB 2021.[45]

C. Near Term Rulemaking is Necessary on Standards for CEP Acknowledgment.

The Joint Environmental Parties support the Applicants' request that the Commission grant rehearing or reconsideration on Order Nos. 22-390, 22-446, and 22-477 in order to direct Staff to immediately open a rulemaking proceeding to establish criteria that the Commission will consider in determining whether a CEP should be acknowledged and other substantive CEP requirements.

ORS 469A.420(2) states that the Commission "shall acknowledge" CEPs that are "in the public interest and consistent with the clean energy targets"[46] of HB 2021, while considering the following factors:

[45] Or. Rev. Stat. § 469A.420(2).
[46] Or. Rev. Stat. § 469A.420(2).

(a) Any reduction of greenhouse gas emissions that is expected through the plan, and any related environmental or health benefits;

(b) The economic and technical feasibility of the plan;

(c) The effect of the plan on the reliability and resiliency of the electric system;

(d) Availability of federal incentives;

(e) Costs and risks to the customers; and

(f) Any other relevant factors as determined by the commission.[47]

How each of these factors will be interpreted or relied upon by the Commission in acknowledging a CEP is currently largely undefined and thus unknown to both the utilities and interested stakeholders. As the Applicants pointed out, while some guidance was given on how the Commission will evaluate "technical feasibility," the guidance is limited in scope and fails to fully consider all aspects of technical feasibility, particularly "interconnection, transmission, [and] permitting processes."[48] The same is true for other aspects of ORS 469A.420(2). For instance, while the Commission adopted Staff's recommendation that CEPs should address the "effectiveness of community engagement,"[49] which was based on comments from the Energy Advocates urging community engagement and input to be treated as principal factors in determining whether a CEP is in the public interest, there is little else in the Commission's orders addressing what would constitute a CEP "in the public interest."

Moreover, the scope of rulemaking should consider other substantive CEP requirements, including requirements following a non-acknowledgment or partial acknowledgement, for which there is no current near-term guidance,[50] how the utilities will demonstrate that they are

[47] *Id.* §§ 469A.420(2)(a)-(f).
[48] Appl. for Rehearing or Reconsideration at 21-22.
[49] Order No. 22-390, App'x A at 20.
[50] Order No. 22-390, App'x A at 21.

achieving "continuous progress" of emissions reductions, and how thermal units (including retirement considerations) must be modeled and otherwise treated in a CEP.

The Joint Environmental Parties recognize the limitations of UM 2225 and the inability to address all aspects of HB 2021 in a single investigatory docket. However, given the limited time in which to meet HB 2021's emission reduction targets and the Commission's obligation to exercise all authority to facilitate achievement of Oregon's greenhouse gas reduction goals, including by "prioritiz[ing] and expedit[ing] . . . rulemaking processes . . . that could accelerate reductions in GHG emissions,"[51] immediately initiating a formal rulemaking in order to fully implement ORS 469A.420(2) and other aspects of HB 2021 is both necessary and appropriate. Accordingly, good cause exists to grant rehearing or reconsideration in order to amend either Order No. 22-390 or Order No. 22-477 to specifically direct Staff to initiate a rulemaking for the purposes of interpreting ORS 469A.420(2) and establishing other substantive CEP requirements.[52]

D. Order No. 22-446 Should be Amended in Order to Require Reporting on Oregon Thermal Plant Operations to Support Out-of-State Purposes.

Throughout UM 2225, multiple parties raised concerns that thermal plant usage for non-Oregon ratepayers could result in the continued operation of thermal plants in Oregon at unaltered levels, thereby thwarting Oregon's emission reduction targets and continuing to harm communities located near these facilities.[53] While the Commission adopted Staff's final

[51] EO 20-04 at Ordering Paragraph 3(B).
[52] The Joint Environmental Parties believe that either Order would be appropriate for revision. Order No. 22-390 provides near-term guidance on the content of CEPs and the Commission could include an additional direction to Staff to initiate rulemaking that will add additional clarification to these requirements. Order No. 22-477 adopted Staff's recommendation to initiate rulemaking on CEP procedural rules. This order could also be amended to additionally direct Staff to begin rulemaking on the CEP substantive rules.
[53] *See, e.g., In the Matter of Staff HB 2021 Investigation Into Clean Energy Plans*, UM 2225, Energy Advocs. Comments on HB 2021 Straw Proposal on Analytical Improvements (Oct. 5, 2022) [hereinafter "Energy Advoc. Comments"].

recommendation that the utilities include "[a] table that lists the cumulative forecasted GHG emissions from each existing and proxy resource in the Preferred Portfolio under the Reference Case over the entire analysis horizon (at least 20 years) and the location of each emitting resource[,]"[54] this requirement is not sufficient to understand whether the utilities will continue to rely on fossil resources for out-of-state sales or load. As the Energy Advocates pointed out, the CEP Preferred Portfolio will only include resources to achieve Oregon's clean energy targets.[55] This leaves a significant loophole for the utilities, wherein they may claim that their operations and associated emissions are in line with HB 2021 targets; yet, in practice, not alter the operations of their thermal fleet. If this occurs, not only will Oregon's greenhouse gas emission reduction targets be missed but also the equity and environmental justice promises of HB 2021 will be undermined, as communities near thermal facilities will continue to be exposed to harmful air pollution and other impacts.

It is well established that agency action is arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem,"[56] and the Joint Environmental Parties respectfully submit that failure to address how Oregon thermal plants will be used out-of-state would render any consideration of a CEP and its impact on the public interest incomplete. Accordingly, the Joint Environmental Parties support the Applicants' request that the Commission reconsider its decision not to address the problem of thermal plant use for out-of-state markets. The Commission can easily rectify this error by requiring, in Order No. 22-446, the reporting requested through UM 2225 and specifically in the Application for Rehearing or Reconsideration: utilities must "report both (1) prospectively on the emissions associated with

[54] Order No. 22-446, App'x A at 27.
[55] Energy Advocs. Comments.
[56] *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

their plans to sell the output of thermal resources to other entities or serve loads in other states, and (2) [on] actual emissions from these resources."[57]

Notably, reporting would not require any specific action by the utilities. Instead, it merely provides the Commission, and stakeholders, with the information necessary to address issues of continued thermal operations for out-of-state purposes in future CEPs. Allowing the first CEPs to avoid this basic level of disclosure will place the Commission at a disadvantage in future CEPs, when there will be even less time to ensure compliance with HB 2021.

If the Commission is not inclined to require reporting on out-of-state use by Oregon thermal plants at this time, the Commission should direct Staff to include this issue within the scope of a rulemaking on substantive CEP requirements, requested above.

IV. Conclusion

For the reasons set forth above, the Joint Environmental Parties urge the Commission to grant Oregon Solar and Storage Industries Association, Community Renewable Energy Association, and NewSun Energy, LCC's Application for Rehearing or Reconsideration.

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Respectfully submitted,

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[57] Appl. for Rehearing or Reconsideration at 19.

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