

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2273

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Investigation Into House Bill 2021
Implementation Issues.

MOTION FOR CLARIFICATION OF
NEWSUN ENERGY OF ORDER NO.
23-194

*EXPEDITED CONSIDERATION
REQUESTED*

I. INTRODUCTION

Pursuant to OAR 860-002-0420, NewSun Energy LLC (“NewSun”) hereby submits this Motion for Clarification of Oregon Public Utility Commission (the “Commission”) Order No. 23-194 dated June 5, 2023. In that order, the Commission sets forth a selection of issues that the Commission believes near-term guidance will aid in the implementation of House Bill 2021 (2021 session) and also offers its preliminary inclinations on some of those issues. As discussed below, key foundations of the Commission’s reasoning and putative legal precedent are left unexplained. Other parts of Order No. 23-194 appear to be inconsistent with applicable legal precedent, the clear language of HB 2021, *and* the expressly stated legislative intent of HB 2021. The Commission also appears to either misunderstand or simply misstate the position of parties such as NewSun, the Oregon Solar+Storage Industries Association (“OSSIA”), the Community Renewable Energy Association (“CREA”), and the Energy Advocates on certain issues in this or prior dockets.

NewSun therefore submits this Motion for Clarification so that all stakeholders in this docket will have a better understanding of the factual basis and legal reasoning underlying the Commission’s discussion of issues I(a)(1) and I(a)(3) in Order No. 23-194. NewSun asks for an Order on Clarification that includes specific citations to the clear statutory language and legal precedents mentioned and relied upon in Order No. 23-194, to the extent they exist, and a more complete explanation of the legal analysis supporting key aspects of the Commission’s preliminary legal conclusions. Clarification is necessary so that parties can respond to the Commission’s requests for party reactions to its preliminary inclinations.

NewSun makes this request for clarification because time is of the essence in the implementation of HB 2021. Both Portland General Electric Company (“PGE”) and PacifiCorp are currently undertaking requests for proposals (“RFPs”) (in Docket Nos UM 2193 and UM 2274) for the procurement of significant quantities of renewable and non-emitting resources to meet a huge portion of their 2030 greenhouse gas reduction targets. PGE must reduce emissions from its 8.1 million metric ton CO₂ equivalent (“MMTCO₂e”) baseline to only 1.62 by 2030.¹ PacifiCorp must reduce its emissions from its 8.99 MMTCO₂e baseline to only 1.79 by 2030.² It will require heroic efforts over the next seven years to meet that first target. There is an opportunity for Oregon communities

¹ *In re Portland Gen. Elec. Co. 2023 Integrated Resource Plan and Clean Energy Plan*, Docket No. LC 80, Clean Energy Plan and Integrated Resource Plan 2023 at 17 (Mar. 31, 2023).

² *In re PacifiCorp 2023 Integrated Resource Plan and Clean Energy Plan*, Docket No. LC 82, Oregon 2023 Clean Energy Plan at 1 (May 31, 2023).

to capture the benefits of the jobs, economic development, energy security and resiliency, and environmental benefits that may flow from those new developments. It is crucial that the Commission gives full effect to the Section 2 policy goals.

Given the stakes, the Commission should issue a clear and concise, but also a complete, explanation of the rationale in Order No. 23-194 *before* the Commission makes any further decisions in this docket that will affect climate action success and grid resiliency outcomes for decades to come. These Commission decisions will directly affect where *billions of dollars of generators and back-up batteries* will be located. Will they be *in or near Oregon*, creating “living wage” jobs and demonstrable environmental benefits for “communities in this state?” Will such resources be available to keep the lights on, heaters and A/C units running—and Oregonians alive—in the case of future extreme fire and weather events or other emergencies? Or will the Commission simply disregard those express requirements and policy goals of HB 2021?

II. REQUEST FOR EXPEDITED TREATMENT

Given the impending July 11, 2023 due date for Opening Testimony, NewSun requests expedited consideration of this motion. While conferral is not generally required for substantive motions, NewSun attempted to contact the parties to confer pursuant to its expedited request under OAR 860-001-0420(6)(a), and in an effort to not delay this proceeding. At the time of filing, OSSIA and Pine Gate Renewables³ support the request, and no other parties opposed the motion for expedited treatment or the substantive

³ Pine Gate Renewables supports the need for a short clarification from the Commission without undue delay.

motion.⁴ Given that no party has indicated a desire to oppose the substantive motion, NewSun believes that a briefing schedule is unnecessary, but should the ALJ decide to schedule one, NewSun proposes that responses be due by June 30, replies be due by July 5, and Commission resolution targeted by July 7.⁵

III. MOTIONS

1. NewSun seeks clarification of the legal basis, aside from the direct citations to HB 2021 itself, for the Commission’s conclusion that it “do[es] not see that [it] ha[s] discretion to interpret HB 2021 to allow [it] to insert a requirement that RECs be retired to demonstrate compliance” in its initial inclination on Issue I(a)(1).
2. NewSun seeks clarification on whether there is an “clear language” in HB 2021 that precludes the Commission from requiring utilities to provide and show measurable in-state benefits in its implementation of the statute.
3. NewSun seeks clarification regarding what specific legal authority the Commission is referring to when it says in its preliminary inclinations on Issue I(a)(3) that:

⁴ The Green Energy Institute does not oppose the motions; CUB does not oppose expedited treatment and takes no position on the substantive motion, raising only a concern that it could delay the proceeding; Rogue Climate takes no position on the substantive motion and does not object to expedited treatment; Northwest & Intermountain Power Producers Coalition takes no position; PacifiCorp neither opposes nor supports; Portland General Electric Company “does not oppose NewSun’s motion but in so doing also does not impliedly agree that the Commission’s order 23-194 needs clarification”; other parties had not indicated any opposition as of the time of filing.

⁵ NewSun understands that there is also a request from other parties to move the deadline for the Opening Brief to July 24. Should that be granted, NewSun recommends the following expedited briefing schedule: responses due July 5, replies due July 7, and Commission resolution targeted by July 12.

- a. “HB 2021 does not assert a requirement or preference for in-state resources”;⁶ and
- b. “There is ample legal precedent to support the legislature’s decision not to include an in-state preference, and to prevent us from creating one by implication.”⁷

IV. DISCUSSION

A. Issue I(a)(1) Clarify Legal Precedent for the Commission’s Initial Inclination on the Treatment of RECs

In its April 11, 2023 comments, NewSun recommended core scoping issues and questions for UM 2273 related to how the Commission would address the documentation and reporting of emissions, renewable attributes, and other resource attributes. As the primary regulator of the utilities subject to HB 2021, the Commission must ensure that *lack of transparency, lack of reporting, and lack of requirements to properly address these issues* do not frustrate HB 2021’s express purpose—which is the successful and swift decarbonization of Oregon electricity—through end-runs, workarounds, self-benefiting profiteering for unreported attributes, and/or lack of 360-degree accounting (avoidance of which is necessary for proper regulatory oversight, and accountability for stakeholders, to successfully achieve the intended decarbonization). Specifically, NewSun asked the Commission to address the following questions:

1. How should renewable attributes or RECs be treated?
2. How should emissions associated with ratepayer funded assets and purchases be treated?

⁶ Order No. 23-194 at 5 (Jun 5, 2023).

⁷ *Id.*

3. How should the attributes (emissions, renewable, capacity) of ratepayer-funded resources be tracked?
4. Should there be visibility into how the utilities are using the attributes (emissions, renewable, capacity) associated with ratepayer-funded resources?
5. What are the implications of regional emissions accounting activities and their timelines?
6. What are the roles of DEQ and the Commission as relates to emissions and achieving the goals of HB 2021?⁸

In Order No. 23-194, however, the Commission’s initial conclusion is it does not have the legal discretion to require retirement of RECs associated with generation used for HB 2021 compliance. In reaching this conclusion, the Commission has set itself down a path that threatens to gut the primary goals of HB 2021. Non-retired, non-reported RECs present a potential Portland-sized hole in electric decarbonization, if they are permitted to be sold by utilities for other parties to use to demonstrate being “clean.” One must consider: *Why any other party would purchase RECs from an Oregon regulated utility, besides to claim clean-ness?* Which certainly should not be purchasable (i.e., a REC certifying “cleanness”) if an Oregon utility is also claiming such cleanness for itself to comply with this Commission and HB 2021’s express decarbonization, i.e., clean energy mandates. This is surely not something that the legislators intended to result from HB 2021. It thus seems particularly important that RECs used to comply with HB 2021 be accounted for—and prevented from transactability in a marketplace in which they solely exist as expressions and quantifications of “cleanness.”

Similarly, it is possible that Oregon ratepayer funded fossil generation assets might actually *produce and emit more CO2* (and other pollutants) after HB 2021’s passage—an

⁸ NewSun Comments at 3 (Apr. 11, 2023).

outcome clearly perverse and antithetical to the core purpose of HB 2021 to “reduce greenhouse gas emissions” (as is stated repeatedly in the bill). The Commission should explain to stakeholders why it would refuse to even require the utilities it regulates to at least *report and quantify* the emissions coming from the facilities Oregon’s ratepayers helped pay for, and fund utility profits from. Similarly, given that these fossil generation assets could provide material beneficial use to Oregon ratepayers, *by being available for dispatch in emergencies and to more reliably and cost-effectively integrate renewable energy and “non-emitting electricity,”* the Commission should explain why it believes that it: (a) can not; or (b) should not use its authority to facilitate these outcomes.

The Commission appears to believe that it lacks the discretion to craft reasonable mechanisms for ensuring utility compliance with the primary objectives and obligations under HB 2021. This decision could ultimately render the emissions tracking and reduction provisions of HB 2021 either completely voluntary or completely unenforceable. If the Commission believes that it is precluded by law from requiring full accountability and transparency on RECs and emissions derived from transactions and assets enacted at the ratepayers’ expense, then additional clarity and further explanation is very important. NewSun therefore seeks clarification about whether there is specific legal precedent about agency discretion or other legal authority that the Commission is concerned about violating. If so, the Commission should identify the relevant precedent so parties may better provide the Commission with the analysis requested in their opening briefs.

B. Issue I(a)(3) – Clarify How the Policy Goals of HB 2021 might Conflict with the Clear Language of the Statute

In its April 11, 2023, comments, NewSun recommended, among other things, that the Commission prioritize issues related to implementation of the HB 2021 Section 2 policy statements for near term resolution. Notably, NewSun recommended addressing the following questions:

1. What rules will the Commission adopt pursuant to Section 14 of the bill to implement the policy statements in Section 2(2) that “electricity generated in a manner that produces zero greenhouse gas emissions also be generated, to the maximum extent practicable, in a manner that provides additional direct benefits to communities in this state in the forms of creating and sustaining meaningful living wage jobs, promoting workforce equity and increasing energy security and resiliency”?
2. How should the Commission define “maximum extent practicable”?
3. How should the Commission define and measure “direct benefits to communities in this state”?
4. What reporting should the Commission require related to the Section 2(2) policy?⁹

NewSun’s emphasis on Section 2(2) is informed by the legislative intent. Upon the enactment of HB 2021, for example, Representative Ken Helm stated that “I understand this language to mean that the renewable energy generation will be built where Oregon workers would get the jobs associated with the construction and operation of those facilities.”¹⁰ And in a letter written by Representative Ken Helm to the Commission dated October 4, 2022, Representative Helm expressed his understanding and intent that the Commission would be responsible for implementing the policy goals set forth in Section 2(2) (the “Helm Letter.”) For your convenience, a copy of the Helm Letter is enclosed

⁹ NewSun Comments at 2 (Apr. 11, 2023).

¹⁰ House Committee on Revenue at 15:46 (May 13, 2021) <https://olis.oregonlegislature.gov/liz/mediaplayer?clientID=4879615486&eventID=2021051192 &startStreamAt=946&stopStreamAt=970>.

with this Motion. In other words, the Representative Helm did not intend for Section 2(2) to be mere precatory language. The Helm Letter specifically anticipated that HB 2021 would confer the in-state and local benefits described in Section 2(2), and that this Commission would be responsible for taking specific and direct action to implement Section 2(2).

In Order 23-194, the Commission frames its discussion of Section 2(2) by drawing a false dichotomy between so-called “operative” provisions of the statute and policy statements. “We have noted previously, in a related context, that policy statements generally will not lead us to alter our interpretation of clear language used in the operative sections of the law.”¹¹ In fact, multiple “operative sections” of HB 2021 incorporate by reference the policy objectives set forth in Section 2 as compliance obligations of the utilities to be enforced by the Commission. For example:

- Section 3 sets for emissions compliance targets “to the extent that compliance is consistent *with sections 1 to 15* of this this 2021 Act.”
- Section 4 requires utilities to submit clean energy plans to the Commission that comply with Section 3—which in turn requires compliance with sections 1-15.
- Section 7 states “For the purposes of determining *compliance with sections 1 to 15* of this 2021 Act, electricity shall have the emission attributes of the underlying generating resource.”
- Section 8 requires the Commission to update the utilities’ avoided costs to ensure that they “accurately reflect the characteristics of generators that contribute to *compliance with section 1 to 15* of this 2021 act.”
- Section 9 allows the Commission to open an investigation to determine whether it is appropriate to grant a temporary exception to compliance

¹¹ Order No. 23-194 at 5 (Jun 5, 2023).

with “a clean energy plan adopted pursuant to sections 1 to 15 of this 2021 Act.”

- Section 10 authorizes the Commission to investigate the costs incurred by a utility for compliance with sections 1 to 15.
- Section 14 expressly authorizes the Commission to “adopt rules as necessary to implement sections 1 to 15 of this 2021 Act.”

When read in its entirety, therefore, the text and context of HB 2021 clearly contemplates that Section 2(2) *is* one of the “operative sections” of the law that the Commission is tasked with implementing and enforcing.

The Commission further implies that the policy objectives stated in Section 2(2) are somehow in conflict with other “clear language” of the statute. The Commission’s statement appears to suggest that it will not give effect to the policy goals of Section 2(2) because doing so would require it to “alter its interpretation of clear language” of the statute.¹² The Commission does not, however, identify either the “clear language” of the statute would be altered, or how it would be altered. To the contrary, as noted above, the clear language of the statute expressly incorporates Section 2(2) as a compliance obligation.

In light of the forgoing, please clarify whether the Commission’s initial inclination on this issue is that Section 2(2) is not an “operative section” of the HB 2021. If that is the case, please clarify the basis of this statutory interpretation in light of the text and context of the HB 2021 as a whole, as well as the legislative intent. Please also specifically

¹²

Id.

identify any “clear language” of the HB 2021 that the Commission believes would have to be “altered” in order for the Commission to give effect to Section 2(2).

C. Issue I(a)(3) – Clarify the Commission’s Statements and Legal Authority regarding In-State Preference

In its discussion of Section 2(2), Order No. 23-194 also dismisses the policy goals set forth in Section 2(2) as a mandate for an “in-state preference,” rather than addressing the actual language of the law. “Here, parties and interested persons have asked specifically whether, on the authority of Section 2, we will require utilities to prefer in-state resources.”¹³ The Commission then concludes in broad-brush that there is “ample legal precedent” to reject any such in-state preference.¹⁴ But neither NewSun, nor any other party that NewSun is aware of, has specifically asked the Commission to require an in-state preference for resource. The Commission appears to be responding only to its own strawman argument.

The appropriate question before the Commission is not whether HB 2021 requires the Commission to adopt an “in-state preference.” Instead, the appropriate question is whether and how the Commission plans to implement the express policy of the Oregon legislature—to *the maximum extent practicable*—by: (a) providing additional direct benefits to the communities in this State; (b) creating and sustaining meaningful living wage jobs; (c) promoting workforce equity; and (d) increasing energy security and resiliency for communities in Oregon, not to mention the other policy statements contained

¹³ *Id.*

¹⁴ *Id.*

within Section 2. It is worth noting that this provision does not mandate a specific action or outcome, but it compels the Commission to figure out how far it can go to achieve these policy goals “to the maximum extent practicable,” while staying within the bounds of the law. The Commission’s answer to this question seems to be that it can do nothing at all.

Even assuming, for the sake of argument, that Section 2(2) did contemplate the implementation of an in-state preference for resources, the Commission’s legal analysis on this issue is wanting. Please clarify exactly what legal precedent the Commission is referring to when the Order declares, without citation or attribution, that there is “ample legal precedent to support the legislature’s decision not to include an in-state preference, and to prevent the Commission from creating one by implication.”¹⁵ Is the Commission concerned that *any* agency action to provide direct benefits to the people of the State of Oregon would violate the U.S. Constitution’s Commerce Clause? If this is indeed its concern, then the Commission has simply glossed-over a robust body of caselaw concerning the application of the Commerce Clause in similar situations. A more fulsome legal analysis would show that Courts have actually upheld many state laws intended to provide or create local or in-state environmental and economic benefits based upon factors unique to each situation. The Commission should therefore identify on clarification the *specific* legal precedents, if any, that the Commission is concerned about violating. If the Commission is not concerned about the Commerce Clause, please identify what other legal precedent the Commission is concerned about violating.

¹⁵

Id.

V. CONCLUSION

For the reasons stated herein, NewSun requests expedited clarification of Order No. 23-194. NewSun seeks clarification regarding the Commission initial conclusions that:

- (1) it does not have discretion to require that renewable energy certificates (“RECs”) be retired or to require regulated utilities to report emissions; and
- (2) Section 2(2) is not an “operative section” of HB 2021 and otherwise conflicts with the “clear language” of the statute.
- (3) HB 2021 does not assert a preference for in-state resources, and that there is ample legal precedent that the legislature did not intend to create such a preference and to prevent the Commission from creating one by implication.

Dated this 28th day of June 2023.

Respectfully submitted,

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Attachment A

In re Pub. Util. Comm'n of Or., House Bill 2021 Investigation into Clean Energy Plans,

Docket No. UM 2225,

Letter From Representative Helm

(Oct. 4, 2022)



HOUSE OF REPRESENTATIVES

Via Electronic Mail

October 4, 2022

Oregon Public Utility Commission
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**Re: HB 2021 (2021 Session) Implementation Plan
OPUC October 4, 2022, Special Public Meeting – Agenda Item 1 – UM 2225**

Chair Decker and members of the Commission:

Thank you for your service. I write to request that the Public Utility Commission (“Commission”) address several questions relating to its implementation, policies, plans, and role relative to House Bill 2021 (“HB 2021”), which took effect on September 25, 2021.¹ As a sponsor of HB 2021 with great interest in both Oregon’s energy sector and the impacts of climate change on Oregon’s infrastructure, economy, and way of life, I am committed to successful implementation of HB 2021 and the policies woven throughout.

However, it is important to note that there are only eight years left to meet HB 2021’s first hard mandate of 80% emissions reduction below baseline emissions by 2030. Recognizing the scale of action required, I am concerned that Oregon faces significant risk of not meeting HB 2021’s requirements, both in terms of the initial 2030 emissions reduction mandate and other requirements, such as “continual progress” compliance obligations.

Significant new generation resources are required to achieve the specified reductions in emissions. For example, Portland General Electric (“PGE”) recently estimated that it alone needs 3-4 thousand megawatts (MW) by 2030,² around 5 times Oregon’s existing solar generation.³

¹ Among other obligations, I understand that utilities were also required to immediately begin planning for HB 2021 compliance upon its passage, and that utility procurement to meet HB 2021 requirements would continue under existing Commission processes. *See* Public Utility Commission of Oregon, Comments to House Committee on Energy and Environment, HB 2021-1 Implementation at page 1 (March 26, 2021) available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/236918>

² Portland General Electric September 2022 IRP Roundtable Presentation Slide 13 available at https://assets.ctfassets.net/416ywc11aqmd/70ZtUZu614Muls6lKSpNm0/72d85334b7e9f4152a169c230393970e/IRP_Roundtable_September_22-8_92822.pdf (“PGE is forecasting 3-4 GW of new resource need to meet the HB 2021 decarbonization target.”) PGE clarified on the call that this is to meet the 2030 target. Call recording at 1:07:30, available at <https://www.youtube.com/watch?v=mU9MMUa54G8>.

³ The increase is even greater when accounting for additional generation required by Pacific Power.

Such an undertaking is even more challenging given that Oregon’s procurement cycles are not annual, but are staggered behind other Commission process, and power projects themselves can take several years to develop and construct, even without interconnection timelines delays. Regarding transmission, which is a critical constraint to successful decarbonization, it will likely take 10-15 years to develop any new major lines, as evidenced by the recent Boardman to Hemingway permit issuance.

The Commission has a critical role in ensuring the realization of actions and outcomes directed under HB 2021 and, with little room for deferral, success or failure in electric decarbonization efforts will depend greatly on the Commission’s use of its powers and authority to implement and bring about the outcomes required by HB 2021.

As I understand it, the Commission’s implementation efforts for HB 2021 are primarily occurring through its docket no. UM 2225, with a particular emphasis on the Clean Energy Plans (“CEPs”) component of HB 2021; and that a Special Public Meeting will be held on October 4, 2022 to weigh in on staff proposals and the overall direction and implementation plan for HB 2021, including follow-up on the Commission’s public meeting related to an initial HB 2021 plan and roadmap on May 31, 2022 (“May UM 2225 Public Meeting”), and its related Order 22-206 dated June 3, 2022 (“First PUC HB 2021 Order”).

In the legislative context, I am seeking to better understand the Commission’s role and obligations in the implementation of HB 2021 and its plans for engagement in that work. It is not my intention to interfere with any open docket, but rather to ensure I have the information needed to inform my legislative work and any legislative concepts that may follow on HB 2021 for the 2023 Legislative Session. With this context, I respectfully request that the Commission address the questions below.

1. THRESHOLD ISSUES

- a. Has the Commission determined how many MW will be required of new renewables to meet the 2030, 2035, and 2040 mandates? How many MW per year, and per RFP cycle, will be required to be constructed to meet these milestones?**

The timescale of the challenge in front of us amplifies the importance of data-driven projections. I realize that the Commission will ultimately look to each electric company’s eventual CEP for some of the details on these questions, but I also assume the Commission has completed some of its own preliminarily estimates to inform the scale, nature, and required trajectory of successful compliance with HB 2021’s primary objectives. I would appreciate the opportunity to review those estimates to better understand the pathway ahead.

- b. What actions, analysis, or determinations has the Commission undertaken to resolve questions about the “binding nature” of HB 2021, and how will those inform further rulemaking priorities, decisions, roadmaps, and implementation?**

During relevant public process, I understand that Commissioners have engaged in some debate about whether HB 2021 is binding or not.⁴ As Commissioner Thompson noted in various ways, this is important given the Commission’s critical role in regulating utilities, which may “need some pretty heroic and innovative actions” to comply with HB 2021’s emission reduction targets.

A clear understanding of the binding nature of HB 2021 and the legal criteria established is foundational to all implementation and roadmap decisions. As a legislator who helped craft the bill, I will note that aspirational language proposed during the process that would have required electricity providers to “seek to provide” 100% non-emitting electricity,⁵ was explicitly not adopted. Instead, the law directs that the electricity provider “shall” reduce greenhouse gas emissions and establishes numerous compliance obligations.

If determinations have been made regarding the binding nature of HB 2021, please explain the basis and process for those determinations, and whether associated with any public meeting after May 31, 2022. For example, is this determination based solely on Renewable Northwest’s assertions in comments as cited by Staff in the May 23, 2022 Staff Report that – notwithstanding the use of the term “compliance” over a dozen times in Sections 1 to 15 – the bill “does not include a compliance mechanism”?⁶ Based on the

⁴ Public Utility Commission of Oregon Public Meeting, at 1:00:09 (May 31, 2022) available at https://oregonpuc.granicus.com/player/clip/956?view_id=2&redirect=true&h=1fd948a67a879edf0c14baa20e261c6 (Commissioner Thompson: “*On the topic of compliance and penalties, I agree that . . . starting a big contentious docket right now or effort right now to figure out what the penalties will be for non-compliance doesn’t feel right to me, doesn’t feel constructive or needful thing to do right now. That said, I do think it’s a little bit . . . strange to be in the situation that I find myself in a little bit, which is seeing that there is maybe different points of view about how binding HB 2021’s targets are. Are they targets? Are they requirements? Are they goals? Is this statute aspirational? Or is it binding? And I guess I’m just starting to feel like wow we only have 18 years before we’re at that, you know under the bill, we’re at the level that is 100% non-emissions, so I feel like **we better figure it out really quickly if this is binding or not** because honestly, I think, you know, we talk about Oregon’s standard now . . . leading the country or tied with the leading standard in the country for decarbonization. And I think we owe it to everybody to figure out, are we really going to get there, and if we are I think we’re going to need some pretty heroic and innovative actions to get there. I get concerned when we talk about HB 2021 and it kind of has this asterisk like there’s still some components of it that are aspirational. And if that’s true, whose job is it to figure that out? It’s ours and it’s the utilities. And, I think, in the fairly near term, so all that is to say that I definitely am in favor of trying to figure out the binding nature of HB 2021, what it really means, what does non-compliance look like, and what should we do about that. And I think some of that is just some internal work that . . . we can do or have done and then there’s also some external work of engaging with people so we can understand their points of view and come to some resolution on that.”)*)

⁵ See e.g., HB 2021-1 Amendment available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/ProposedAmendment/18839>.

⁶ Public Utility Commission of Oregon Order No. 22-206, Appendix A at 3 available at <https://apps.puc.state.or.us/orders/2022ords/22-206.pdf>. “*The statute intentionally does not include a compliance mechanism. Instead, the statutory framework builds on the existing regulatory structure whereby a utility develops an IRP subject to Commission acknowledgement, [footnote omitted] followed by an RFP to acquire resources aligned with needs identified in the*

public record, Commissioner Thompson’s comments (and surrounding discussion with Chair Decker and Commissioner Tawney), and Order 22-205, it appears, that the Commission did not yet believe it knew the answer to this question on the date of the May 31, 2022 public meeting.

As the Commission responds to this question, please include due consideration of the specific elements and language of HB 2021, including the following among others:

- Section 2: “*be* generated” and “*be* done”;
- Section 3: “a retail electricity provider *shall* reduce”;
- Section 4: “*shall* develop a clean energy plan”, which “*must... include annual goals... [and] demonstrate continual progress...*”
- Section 4: “The commission *shall ensure* that an electric company *demonstrates continual progress and is taking actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions...*”
- Section 5: “For the purpose of verifying... *compliance* with the clean energy targets...”
- Section 5: “In evaluating whether a plan is in the public interest, the commission *shall consider...*[t]he economic and technical feasibility of the plan...[t]he effect of the plan on the reliability and resiliency of the electric system,” among others.
- Section 9: discussion of process to “grant a temporary exemption to *compliance..*” and “the obligation to comply with the requirements of ...Sections 1 to 15 of this 2021 Act”.
- Section 10: over a half-dozen references to “compliance with section 1 to 15 of this 2021 Act”.

If concluding that “compliance” with state statutes does not create a binding obligation, please explain the detailed legal basis for that conclusion. Similarly, if the agency does not believe it has an obligation to see specific parts, or any, of the statute implemented by the retail electricity providers, please provide a detailed explanation and legal basis for the conclusion, as well as the Commission’s position on which state agency should oversee, regulate, and ensure effective implementation for entities that the Commission would otherwise oversee and regulate.

2. OVERSIGHT AND RULEMAKING

- a. **Please describe the Commission’s view on its responsibility to implement the provisions of HB 2021, including whether the responsibility is mandatory or permissive and whether applicable to all or only portions of the bill.**

To the extent that the Commission believes it only has a responsibility to implement certain portions of HB 2021, please enumerate which portions of the bill (Sections 1 to 15) that it does and does not believe it has an obligation to implement. Please pay

IRP subject to Commission acknowledgement, [footnote omitted] all of which ultimately informs a rate case whereby the Commission determines what expenses undertaken by a utility are recoverable in rates.”

particular attention to the Commission’s role as the regulator of applicable retail electricity providers, as related to the implementation of Section 3. To the extent the Commission believes another agency shall bear responsibility for regulation and implementation of Section 3 and imposing any consequences for retail electricity providers for failures to achieve those standards, please explain in detail.

b. What is the Commission’s plan or process for determining which issues related to HB 2021 will have formal rulemakings for implementation, and when will those rulemakings occur?

Please address how the Commission plans to prioritize and decide which rules it should consider adopting and when to engage in such processes relative to the emissions reduction objectives of HB 2021. Should these be prioritized by likelihood to facilitate and contribute to state policy and statutory requirements, or some other standard? In what order does the Commission foresee its implementation actions occurring as relates to its existing processes for IRPs, CEPs, RFPs, and rate cases? Specifically, it would be helpful to understand the general timeline the Commission foresees from now until 2030 regarding each of the steps necessary to reach the 2030 target, including for example, the time to conduct rulemakings, when IRP, CEPs, and RFPs will likely be conducted and concluded, and when the resulting projects from those processes will ultimately be constructed and in service.

c. When does the Commission expect to issue new final rules governing CEP requirements?

I understand that the first CEPs are expected as early as March 2023,⁷ and that Commission Staff has proposed interim guidance for these first CEPs, but not for prospective CEPs.⁸ Based on the Commission’s estimation in testimony on HB 2021,⁹ I had anticipated that the rulemaking would be completed within 9-12 months of the bill’s enactment. Given the substantial planning, stakeholder involvement, and other requirements necessary for the CEPs, in addition to procedural rulemaking requirements, please comment on the Commission’s plans to ensure relevant processes are completed within the remaining 6-month window before the first CEP plans must be complete and filed.

3. COMPLIANCE CONSIDERATIONS

As I understand it, the Commission declined to take action on compliance penalties at the May UM 2225 Public Meeting earlier this year.¹⁰ As backdrop for the questions below, I note

⁷ Public Utility Commission of Oregon Order No. 22-206, Appendix A at 3 available at <https://apps.puc.state.or.us/orders/2022ords/22-206.pdf>.

⁸ UM 2225 Staff Report (Sept. 28, 2022) available at <https://edocs.puc.state.or.us/efdocs/HAU/um2225hau15478.pdf>

⁹ See Public Utility Commission of Oregon, Comments to House Committee on Energy and Environment, HB 2021-1 Implementation at page 2 (March 26, 2021) available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/236918>

¹⁰ Public Utility Commission of Oregon Order No. 22-206, Appendix A at 1 available at <https://apps.puc.state.or.us/orders/2022ords/22-206.pdf>.

the major challenges discussed above (among others) and Commissioner Thompson’s comments about the “pretty heroic and innovative actions” needed.

I highlight my concern about adequacy of enforcement mechanisms and approaches to compliance, as the Commission appears poised to shoehorn the CEP into the same process it uses for integrated resource plans (“IRPs”),¹¹ a process that the Commission has recently argued in court is not binding on the utility and unreviewable by a court until some future rate case or unknown future order.¹²

- a. How does the Commission plan to enforce the 2030, 2035 and 2040 emissions reductions mandates and other bill elements, and when does the Commission plan to have final rules in place governing the enforcement mechanism and remedies for non-compliance?**
- b. Does the Commission believe it is prevented from imposing financial or other penalties for a utility’s failure to comply under HB 2021?**
- c. Will there be consequences, risks, or financial penalties for electric companies for failing to meet emission standards in Section 3 of HB 2021 and, if so, what is the timeline for identification of those elements?**

Is it a correct interpretation of the Commission’s position, per Order 22-205 and the May 31 Public Meeting, that there will not be any penalties or other consequences for electric companies for failure to meet the emission standards in Section 3 of HB 2021? If so, I am concerned that could significantly undermine compliance with the law and the success of state action on climate. What is the Commission’s view on how a lack of consequences could affect the likelihood of compliance by regulated entities as well as realizing the emissions reduction target in Section 3 of HB 2021?

If a compliance or penalties structure is still under consideration, what is the Commission’s view on when an electric company needs to understand the scale, nature, and mechanisms for such penalties?

Should Oregon wait until 2030 to communicate this, for example, after a compliance failure? If not, what timing is necessary to beneficially influence compliance and successful outcomes? Please bear in mind and comment on project development and procurement timelines, including as related the Commission’s own current and proposed processes.

¹¹ UM 2225 Staff Report at 3, 6 (Sept. 28, 2022) available at <https://edocs.puc.state.or.us/efdocs/HAU/um2225hau15478.pdf>.

¹² In re the Petition of NewSun Energy LLC, v. Or. Pub. Util. Comm’n, Marion Co. Cir. Court Case No. 22CV05442, Oregon Court of Appeals Case No. A178808, Transcript of Proceedings Volume III of III at 58; *see also* pages 55-56 (analogizing the Commission’s regulatory scheme to a professor’s assignment of a term paper and stating that IRPs, RFPs and the like are akin to a professor “critique [of] a draft or outline” of the paper mid term. “[It] is not what is graded at the end of the semester . . . [but] is merely a check-in and a utility as described by ALJ Moser may ignore the recommendations and preferences of the PUC in such an order.”)

4. CONTINUAL PROGRESS

- a. **Please explain how the Commission plans to implement or is implementing the requirement for continual progress and, if so, when the Commission plans to have rules in place enforcing this continual progress requirement.**

Section 4(4)(e) requires that the electricity provider in its CEP demonstrate that it is making continual progress towards the 2030, 2035, and 2040 compliance deadlines. Section 4(6) also requires that the Commission “shall ensure that an electric company demonstrates continual progress . . . and is taking actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions.”

The Commission Staff recommendation proposes that utilities show continual progress by demonstrating year-over-year emissions reductions on an expected basis in the CEP,¹³ but without saying what level of emissions reductions is expected such as a linear emissions reduction constraint. However, it is the Commission’s obligation to ensure that continual progress is demonstrated.

As such, please explain how the Commission plans to implement and/or is implementing the requirement for continual progress and if/when the Commission plans to have rules in place enforcing this continual progress requirement. In addressing this question, please discuss the Commission role related to this legal compliance standard in facilitating successful decarbonization and how it might be a tool for the measurement of adequacy of efforts by a retail electricity provider in achieving compliance with necessary emissions reductions, as well as potential utilization in consideration of any penalties that might should apply.

5. DIRECT BENEFITS

- a. **Please explain how the Commission plans to implement Section 2 of HB 2021 and if/when the Commission plans to have rules in place governing that section.**

Section 2 of HB 2021, among other things, declares that it is the policy of the State that non-emitting electricity used to comply with the law be generated, to the maximum extent practicable, in a manner that provides direct benefits to communities in the state in the form of meaningful living wage jobs, promoting workforce equity, and increasing energy security and resiliency.

As I understand it, the Commission declined to enforce Section 2 of the bill in a utility request for proposal (“RFP”) even where the Commission, in the same docket, allowed for or left open the possibility of the utility acquiring more resources in the name of

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UM 2225 Staff Report at 15, 17 (Sept. 28, 2022) available at <https://edocs.puc.state.or.us/efdocs/HAU/um2225hau15478.pdf>.

meeting HB 2021’s non-emitting requirements.¹⁴ In that RFP docket, the Commission noted:

“We declined to require any language preferring in-state projects. We noted that we will continue to consider this provision as we work through HB 2021 implementation, and there will be discussion beginning in multiple other forums of capturing community benefits from HB 2021 implementation. At this early stage, however, we found there is no clear basis in the operative provisions of the law to require PGE to adjust RFP scoring to explicitly create an in-state preference, nor has there been discussion of the potential policy and legal downsides of doing so.¹⁵”

Now, in the Commission Staff recommendation for UM 2225, there is no mention of how Section 2 will be implemented. As such, I am hoping to better understand the Commission’s role, obligations, and implementation plans within this context, including the items detailed below.

- Please explain how the Commission plans to implement Section 2 of HB 2021 and if/when the Commission plans to have rules in place governing that section.
- When should “discussion of potential policy and legal downsides” for complying with HB 2021 occur, if not before procurement processes that are subject to, and intended to comply with, HB 2021?
- Given the Commission’s role in oversight of electric company procurements (RFPs, in particular), which agency (or other authority) does the Commission believe is responsible for implementing the state policies, as relates to the provisions in HB 2021, Section 2, paragraph 2?
- Please comment on the Commission’s view of what “the maximum extent practicable” would be for the share of “electricity generated that produces zero greenhouse gas emissions” being located in Oregon and thereby providing “additional direct benefits to communities in this state in the forms of creating and sustaining meaningful living wage jobs, promoting workforce equity, and increasing energy security and resiliency.”
- Please comment on how Oregon will achieve its state policy of “the maximum extent practicable” if significant procurement of renewables is finalized, contracted, and (likely) approved by the Commission before the Commission develops standards related to the same.
- Given the tight timelines for achieving 2030’s 80% emission reduction requirements, please comment on whether delay in Commission action related to “direct benefits” under Section 2 poses risks to our ability to achieve those benefits as a state.

¹⁴ Portland General Electric Company, 2021 All-Source Request for Proposals, Public Utility Commission of Oregon Order No. 21-460 at 9-10 (Dec. 10, 2021) available at <https://apps.puc.state.or.us/orders/2021ords/21-460.pdf>; Portland General Electric Company, 2021 All-Source Request for Proposals, Public Utility Commission of Oregon Order No. 22-315 at 6 (Aug. 31, 2022) available at <https://apps.puc.state.or.us/orders/2022ords/22-315.pdf>.

¹⁵ Order No. 21-460 at 9-10.

6. OTHER ISSUES

- a. What other creative actions is the Commission considering to facilitate Oregon's success in achieving HB 2021's requirements and targets, both in terms of emission standards in Section 3 of HB 2021 and other state policies?**

In addressing this question, please include discussion of potential changes and use of the Commission's authority in areas such as:

- PURPA and QF-related contracting and interconnection policies;
- Implementation and improvements of standard contracting, feed-in-tariff policies, and other actions to ease and accelerate decarbonization;
- Changes to project size and on-system requirements, and other artificial limitations for community solar programs;
- Changes to the RFP cycles and frequency;
- Modifications to RFP bidding criteria and PPA terms and conditions, to diversify and expand bidder options and pricing structures;
- Additional contingency procurement levels to account for failures;
- Expansion of direct access programs;
- Encouragement of IOU funding of BPA transmission studies;
- Policies to facilitate resiliency improvements and investments around Oregon, including in procurement criteria (for example in RFP bid criteria or PURPA contracting policies); and
- Limitations on utility ownership of generation to reduce ownership bias burdens on the procurement processes.

Thank you for this opportunity to engage, and for your consideration of these important topics. To the extent that the Commission's answers to the questions in this letter involve technical materials or legal analyses, I would like to understand those bases for relevant conclusions. As noted above, a timely response that will help inform my work and development of legislation for the 2023 Legislative Session will be greatly appreciated. Please contact my office at any time if there are questions.

Sincerely,



Representative Ken Helm
House District 34
Oregon State Legislature