

**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.

REPLY BRIEF OF THE OREGON  
SOLAR + STORAGE INDUSTRIES  
ASSOCIATION

**I. INTRODUCTION**

**A. Background**

Pursuant to Administrative Law Judge (“ALJ”) Mapes’s June 8, 2023 Memorandum, and the Public Utility Commission of Oregon’s (“PUC” or “Commission”) Order No. 23-227, the Oregon Solar + Storage Industries Association (“OSSIA”) respectfully submits its Reply Brief in the above-captioned proceeding.<sup>1</sup> In this Brief, OSSIA responds to or supports various arguments made in other stakeholders Opening Briefs on the issues of the Commission’s interpretation of the public interest standard, the effect of the policy statements, and how continual progress should be measured.

**II. REPLY ARGUMENT**

**B. RECs Retirement and Accounting**

OSSIA continues to respectfully urge the Commission to require the retirement of RECs to demonstrate compliance with HB 2021. In addition and alternatively, if the Commission does not require retirement of RECs, then the Commission should require transparency into the utilities activities involving RECs through a complete accounting of the RECs sold by utilities.

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<sup>1</sup> *In re Public Utility Comm. Of Oregon Investigation Into House Bill 2021 Implementation Issues*, Docket No. UM 2273, Order No. 23-194 (Jun. 5, 2023).

Additionally, OSSIA is supportive of the REC arguments laid out in the Green Energy Institute's Opening Brief. HB 2021 is a load-based program and must require the retirement of RECs to avoid double counting issues. Even if the Commission decides that HB 2021 is not a load-based program, it is within the Commission's discretion to determine what constitutes compliance with the law per Section 5. Using this discretion, the Commission should prevent the double counting of emissions reductions, through the retirement of RECs, to maintain the integrity of HB 2021.

**C. The Commission Should Provide Guidance to Further Define Criteria for Acknowledgement of a CEP.**

Several Intervenors support the Commission providing additional guidance on what will be considered in the assessment of the public interest.<sup>2</sup> In OSSIA's Opening Brief, we argued that the Commission should give guidance on its interpretation of "economic and technical feasibility" and other factors from HB 2021 section 5(2). Regarding economic and technical feasibility, OSSIA and other stakeholders argued that the Commission should define it to require CEPs to use realistic assumptions.<sup>3</sup> The costs and timelines assumptions used in CEPs should consider the uncertainty and risks around interconnection, transmission, permitting, development timelines, and plan for contingencies in the event of delays or project failures.

Similarly, OSSIA argued stakeholders would benefit from determination of other relevant factors now as it would allow tailored advocacy during each utilities CEP review process. Some commenters discouraged Commission adoption of specific factors because public interest determinations are fact based and choosing them would demonstrate others are disfavored.<sup>4</sup>

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<sup>2</sup> Opening Brief of the Oregon Solar + Storage Industries Association at 5-6, Sierra Club, Rogue Climate, Columbia Riverkeepers and Coalition of Communities of Color Opening Brief at 3-4, Climate Solutions Opening Brief at 3, Pine Gate Renewables, LLC Opening Brief at 3, Columbia River Inter-Tribal Fish Commission Opening Brief at 8.

<sup>3</sup> Opening Brief of the Oregon Solar + Storage Industries Association at 4; Opening Brief of NewSun Energy LLC at 2; Opening Brief of NW Energy Coalition & Renewable Northwest at 9.

<sup>4</sup> Joint Utilities Opening Brief at 4; Opening Brief of the Oregon Citizens Utility Board at 19-20.

However, the identification of factors does not preclude the Commission from applying those factors to unique fact-based scenarios. Identification of other factors sets the stage for the later application to the unique facts of each CEP, the factors themselves would not predetermine a public interest determination. Rather the factors would indicate to all parties the areas that will be examined within a CEP. Additionally, the Commission can provide clarity on the selection of factors by including language stating that the factors that will be considered is not an exhaustive list and more can be added as the CEP review process undergoes more iterations.

The Joint Utilities make a few arguments against determining other factors. First arguing that ORS 469A.420 does not require additional factors beyond those enumerated in Section 5 (a)-(e) and draws a comparison of the statute to ORS 759.255. Second by arguing canon of statutory construction requires any other relevant factors to be tied to the specific factors in Section 5 (a)-(e). However, these arguments should not be read to prevent the Commission from determining other relevant factors.

As raised in OSSIA's Opening Brief, the legislature granted rulemaking authority through HB 2021 Section 14 and the Commission is responsible for completing the legislature's policymaking role to receive deference on review.<sup>5</sup> While the Commission may not be required to determine other relevant factors, it is the best practice to determine some factors that it will consider prior to completing the review process. There are additional benefits to improving advocacy for stakeholders, many of whom have spent a great deal of time working to help implement HB 2021 and simultaneously provide comments on each utility CEP. Determining other relevant factors will allow stakeholders to better articulate their comments during CEP

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<sup>5</sup> *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or. 217, 228–29, 230 (1980).

review to each of the various factors. Additionally, the comparison to ORS 759.255 is not compelling. That statute states:

“the commission must find that the plan is in the public interest. In making its determination the commission shall consider, among other matters, whether the plan:

- (a) Ensures prices for telecommunications services that are just and reasonable;
- (b) Ensures high quality of existing telecommunications services and makes new services available;
- (c) Maintains the appropriate balance between the need for regulation and competition; and
- (d) Simplifies regulation.”<sup>6</sup>

This language is constructed in an entirely different manner than ORS 469A.420(2), where the statute specifically instructs the Commission to consider the factors listed in (a) through (e) and, “(f) any other relevant factors as determined by the Commission.”<sup>7</sup> While ORS 759.255(2) includes the language among other matters, ORS 469A.420(2) includes the other relevant factors in the criteria that it must consider in its review of a CEP.

The Joint Utilities also attempt to use a canon of statutory construction, specifically referring to *ejusdem generis*.<sup>8</sup> The principle states that where general words or phrases follow several specific words or phrases, the general words are specifically construed as limited and apply to things of the same class as those expressly mentioned before. This canon of statutory construction is best used with lists with similar items, however the factors listed in ORS 469A.420(2) cover extremely broad categories including: reductions in greenhouse gas emissions and related environmental or health benefits, the economic and technical feasibility of the plan, reliability and resiliency of the electric system, and costs and risks to customers.

*Ejusdem generis* should not be used to subvert the intent of the statute, here the specific phrases

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<sup>6</sup> ORS 759.255(2).

<sup>7</sup> ORS 469A.420(2).

<sup>8</sup> Joint Utilities Opening Brief at 6.

are broad and meant to include a wide range of social factors. The canon should not apply in this instance as the list does not have a common thread. If ejusdem generis is applicable, then other relevant factors can still be applied to a wide range of topics contained throughout ORS 469A.420(2).

**D. Section 2 Policy Statements Should Inform Commission Implementation of HB 2021**

Almost all participants in this docket agree that while the policy statements are not binding, they should be utilized to interpret the discretionary provisions of HB 2021. OSSIA previously argued that the Commission should utilize the Section 2 policy statement in areas where the Commission has discretion under other provisions of HB 2021, especially when the Commission reviews whether a CEP is in the public interest. The Joint Utilities argue that the Policy Statements should not be used to impose any substantive legal requirements and that the Policy Statement conflicts with other PUC-related policy statements.<sup>9</sup> The Joint Utilities also argue that Oregon cannot require in-state siting of non-emitting generation resources because of the dormant commerce clause.

The Commission can read HB 2021's Policy Statement in a manner consistent with the other policy statements raised by the Joint Utilities. Additionally, the Commission has extensive experience balancing the state's various policy objectives including many of the ones listed by the utilities: balancing market competition, cost-effectiveness, or PURPA. The Commission can implement the Section 2 Policy Statement through the public interest factors during CEP review or other actions where the Commission is implementing or making progress towards HB 2021, like an IRP or RFP approval, without conflicting with Oregon's other policy goals.

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<sup>9</sup> *Id.* at 8.

The dormant commerce clause does not prevent the Commission from utilizing the Policy Statements in Section 2 to implement HB 2021. The Joint Utilities focus their discussion of the Policy Statement on the notion of an in-state resource preference; however, the Policy Statement contains no language requiring in-state resources. The Policy Statement states,

“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[.]”<sup>10</sup>

The Policy statement also includes reference to consultation with federally recognized Indian tribes and that implementation should be done in a manner that minimizes burdens for environmental justice communities.<sup>11</sup> The Commission can examine and weigh the additional direct benefits to communities in Oregon without reading the Policy Statement as creating an in-state resource preference. This position does not violate the US Constitution nor the dormant commerce clause.

The Commerce Clause of the US Constitution gives Congress the power to “regulate commerce with foreign nations, among states, and with the Indian tribes.”<sup>12</sup> This has been interpreted to allow Congress to regulate interstate commerce and indirectly to prohibit states from discriminating against out of state interests. The dormant commerce clause is the aspect that, “prevents the States from adopting protectionist measures and thus preserves a national market for goods and services.”<sup>13</sup> Courts have created a process to assess whether a state law violates the dormant commerce clause. First, courts assess whether the law facially discriminates against interstate commerce. If the law does facially discriminate, then it must advance a

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<sup>10</sup> ORS 469A.405(2).

<sup>11</sup> ORS 469A.405(3); and ORS 469A.405(4).

<sup>12</sup> U.S. Const. Art. I, § 8, cl. 3.

<sup>13</sup> *Tennessee Wine and Spirits Retailers Ass. v. Thomas*, 139 S.Ct. 2449, 2460 (2019).

legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.<sup>14</sup> If the law is not facially discriminatory to interstate commerce and instead regulates fairly to effectuate a permitted local interest while incidentally effecting interstate commerce.<sup>15</sup> Then, “it will be upheld unless burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>16</sup> States generally pass laws that benefit the state or its citizens, this alone does not cause a law to be facially discriminatory or violate the dormant commerce clause.<sup>17</sup>

In this case, the Policy Statement of HB 2021 is facially neutral. It does not include any language that could be read to discriminate against out-of-state generation. Instead, the language fairly uses the term, “to the maximum extent practicable,” when it refers to the additional direct benefits to Oregon communities. Additionally, the Policy Statement refers to several legitimate local interests, such as living wage jobs, workforce equity, energy security, resiliency, and reducing barriers to environmental justice communities. HB 2021 does not impose a burden on interstate commerce, and evaluating the CEPs to examine the legitimate local interests from the Policy Statement would similarly not burden interstate commerce.

The Commission does not need to create an in-state resource preference by implication to effectuate the Policy Statement from HB 2021. The act intends to incorporate social issues into the Commission’s assessment of utility resource planning, and the Policy Statement points to policy directives from the legislature that are meaningful to implementation of the law.

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<sup>14</sup> *Dep’t of Revenue of Ky. V. Davis*, 553 U.S. 328, 338 (2008).

<sup>15</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>16</sup> *Id.*

<sup>17</sup> *Direct Energy Services, LLC v. PURA*, 347 Conn. 101 (2023)

## **E. Continual Progress Process**

In OSSIA's Opening Brief we argued that any order or other mechanism that determines continual progress should be a final order subject to judicial review. The Joint Utilities argued that the Commission's review of continual progress is strictly limited to reviewing the utilities CEPs because when the statute discusses continual progress it references back to a section on acknowledgement of a CEP. However, the section that references back, O.R.S. 469A.415(6), specifically adds additional requirements that are not included in subsection 415(4)(e). The additional requirements are, "The commission shall ensure that an electric company demonstrates continual progress as described in subsection (4)(e) of this section and is taking actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers."<sup>18</sup> The law does not restrict the Commission to assessing continual progress only when a CEP is reviewed, it requires the Commission to assess whether the utility is taking actions as soon as practicable. While the Commission will receive the most up to date information through each CEP, the term as soon as practicable suggests that continual progress should be considered more frequently than every two years. In UM 2225, the Commission indicated that it could recommend corrective actions to utilities that fall behind on making continual progress. It seems reasonable to review continual progress more regularly to ensure that actions are taken as soon as practicable and to direct corrections if the continual progress standard is not being met.

## **III. CONCLUSION**

OSSIA's Opening and Reply briefs provide meaningful legal and policy arguments that OSSIA believes will be useful to the Commission as it resolves these complex HB 2021

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<sup>18</sup> ORS 469A.415(6).



implementation issues. To summarize, OSSIA recommends the Commission consider the above arguments and select to:

1. Require retirement of RECs to demonstrate compliance with HB 2021 and require transparent accounting of RECs.
2. Provide guidance on its interpretation of “economic and technical feasibility” and predetermine several other relevant factors for consideration of the public interest.
3. Utilize the policy statement as a lens for all implementation activities of the Commission.
4. Create a compliance mechanism that will allow the Commission and stakeholders visibility into the utilities efforts to demonstrate continual progress towards the emissions targets.

Thank you for your attention to these comments.

Dated this 21st day of August 2023.

Respectfully submitted,



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