

**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.

OPENING 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 Opening Brief in the above-captioned proceeding. In this Brief, OSSIA presents legal and policy arguments on the four questions the Commission listed in Phase I(a) from its Scoping Decision and provides brief comments on the topics from Phase I(b)¹.

OSSIA previously participated and raised similar issues throughout the process in Docket No. UM 2225 and in its Application for Rehearing or Reconsideration of Commission Order Nos. 22-390, 22-446, and 22-477. In this Brief, OSSIA argues that the Commission should utilize the discretion afforded to it by the legislature to meaningfully implement House Bill 2021 (“HB 2021”) in a manner that is beneficial to all Oregonians. OSSIA respectfully requests the Commission:

¹ *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).

1. Require retirement of renewable energy certificates (“REC”) to demonstrate compliance with HB 2021.
2. Provide guidance on its interpretation of “economic and technical feasibility” and determine other relevant factors that will be considered during CEP review.
3. Utilize the policy statement as a lens to all the Commission’s implementation activities.
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.

II. ARGUMENT

A. 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. 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.

HB 2021 requires that electricity delivered to Oregon retail consumers be emissions free by 2040. The law states, “retail electricity provider rely on nonemitting electricity in accordance with the clean energy targets set forth in ORS 469A.410 and eliminate greenhouse gas emissions associated with serving Oregon retail electricity consumers by 2040.”² The emissions targets

² ORS 469A.405

direct retail electricity providers to reduce emissions by specified percentages below a baseline emissions level associated with “electricity sold to retail electricity consumers.”³ Further, clean energy plans must be “in the public interest and consistent with the clean energy targets set forth in ORS 469A.410.”⁴ The “public interest” includes GHG emissions reductions “and any related environmental or health benefits,” and “any other relevant factors as determined by the commission.”⁵ Finally, the statute specifically gives the Commission authority to “adopt rules as necessary to implement [the law].”⁶ Therefore, the underlying intent of HB 2021 and reading that most closely hews to the language of the statute is one that conveys the benefits of emissions free electricity, including all of its environmental and health benefits to Oregon retail electricity consumers. As such, it is Oregon retail electricity consumers who should benefit from the RECs and not some other entity in state or out of state that the utility might sell the REC to for some other purpose.

At the core of the issue, the REC is the certificate that ensures cleanness. Without requiring the REC to be retired, Oregon retail consumers will receive the energy but not necessarily the cleanness associated with the REC. The PUC should not permit electricity providers to use their delivery of zero emissions power to customers in Oregon to comply with HB 2021, while they sell RECs representing the same generation to a buyer in another state. An organization or entity that purchases these RECs is doing it to represent their actions as clean. This type of action is not what the legislature intended when they passed this historic piece of legislation. Oregon’s energy landscape should not be subsidizing our shift to emission free

³ ORS 469A.400(1).

⁴ ORS 469a.420(2).

⁵ *Id.*

⁶ ORS 469A.465.

electricity by allowing the utilities to sell their RECs to other entities who would otherwise be investing in renewable energy resources.

In addition, and even if the Commission determines that it will not require the retirement of RECs to demonstrate compliance with HB 2021, the Commission should nevertheless require the utilities to provide an accounting of the RECs associated with generation that will be reported as nonemitting electricity sold to Oregon customers. There is a potential ratepayer harm if the utility is selling these RECs. The ratepayers will bear the costs for paying off the nonemitting resources acquired by utilities to comply with HB 2021, any proceeds the utility makes from selling RECs should entirely benefit the ratepayer. A thorough accounting is needed to ensure there is transparency for stakeholders and the Commission if the utility does not need to retire RECs to comply with HB 2021.

B. Guidance on Interpretation of HB 2021 Factors

The Commission should give guidance on its interpretation of “economic and technical feasibility” and other factors from HB 2021 Section 5(2). OSSIA argues that technical feasibility should mean a utilities’ Clean Energy Plan (“CEP”) must rely on realistic assumptions and consider the uncertainty and known risks around interconnection, transmission, permitting, development timelines, and that utilities should plan for contingencies in the event of delay or failure of any of the above criteria. There was discussion about modifying Integrated Resource Planning Guidelines in Docket No. UM 2225 to reflect technical feasibility. Ultimately, the Commission included some key planning questions that attempted to address some aspects of technical feasibility.⁷ While these questions directed the utilities to address critical barriers to the plans, they did not require utilities to address uncertainties and known risks around

⁷ Order No. 22-390 Appendix A at 52.

interconnection, transmission, permitting processes, development timelines, and directly plan for contingencies in the event any of the above listed events result in project delays or failures.

As stakeholders already began to review utilities' CEPs, Commission guidance on how it interprets economic and technical feasibility would be extremely valuable information for all parties involved. If the Commission interprets the factors from HB 2021 differently than stakeholders, it would be meaningful to lay out the Commission's understanding to better tailor stakeholder's comments to utility CEPs.

The Commission was given considerable discretion to implement HB 2021, the act enumerates several general factors that the Commission shall consider, but there is considerable space to determine other relevant factors. Section 5(2)(f) includes, "[a]ny other relevant factors as determined by the Commission."⁸ Section 14(1) provides that, "[t]he Commission may adopt rules as necessary to implement sections 1 to 15 of this 2021 Act."⁹ The Commission should utilize this discretion and determine additional factors that will inform whether a plan is in the public interest. While it may be presently difficult to ascertain all additional factors the Commission will consider prior to an acknowledgment decision of a CEP, OSSIA and other stakeholders would benefit from the Commission pre-determining what other relevant factors are.

In addition to the benefit to stakeholders during initial review of CEPs, the Commission should issue guidance as it is necessary to define delegative terms. The Commission was granted rulemaking authority through HB 2021 Section 14, it is therefore responsible to issue rules to complete the legislature's policymaking role to receive deference on review.¹⁰ Accordingly, the

⁸ ORS 469a.420(2).

⁹ ORS 469A.465.

¹⁰ *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or. 217, 228–29, 230 (1980).

Commission should issue rules to fulfill its duty to complete the legislatures policymaking role. The Commission can generate a non-exhaustive list of other factors that it will consider in order to leave room for additional factors it would like to add following consideration of the utilities first CEPs.

Specifically, OSSIA recommends that the Commission look to Section 2 of HB 2021 to inform the selection of additional factors that it will assess when considering whether a CEP is in the public interest.¹¹ These additional factors should attempt to reduce the impacts on environmental justice communities and, “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.”¹²

The Commission should issue rules on the related environment and health benefits to include those communities that are not situated in the utility service territory but are situated near utility fossil resources. It is necessary for a CEP to include actions that lead to reduced pollution burden and pollution exposure, creating identifiable health outcomes. The other factors OSSIA recommends the Commission include in its guidance on CEPs includes actions that lead to energy workforce development, with a focus on rural areas, to address the burden that scarce workforce pose to greater access to energy efficiency and other greenhouse gas reduction initiatives. These factors prioritize environmental justice communities and should be considered in the Commission’s assessment of the public interest.

The Commission should include in guidance that it will consider resiliency analysis consistent with the findings in Considerations for Resilience Guidelines for Clean Energy Plans

¹¹ ORS 469A.170(2)(f) (2021).

¹² *Id.*

report that the Department of Energy Grid Modernization Lab Consortium prepared for the PUC.¹³ Additionally, the Commission should consider actions that enhance community resiliency to the impacts of reliability and resiliency events. This could include a utility including actions to improve survivability of outages, especially for households that rely on power to keep necessary medical equipment and medications refrigerated.

Some additional factors that the Commission should include in guidance as other relevant factors that are necessary for consideration of the public interest is the creation and sustaining of meaningful living wage jobs in Oregon as they provide substantial community benefits to those communities. Similarly, the Commission should include a factor that considers the direct benefits to communities, such as increased county tax revenue and jobs that come from projects sited and built in Oregon.

C. Relevance of the Statements of Policy

The Statement of Policy in HB 2021 is not an invitation to contravene other sections of the bill, however it is a relevant tool to establish legislative intent. While, Oregon caselaw may suggest, “that... a policy statement... imposes no requirement that the agency do anything,”¹⁴ statutory policy statements can serve as context when interpreting a statute, so long as, such statements are not used to interpret statutory language in a way that departs from the meaning of the words actually used within the statute.¹⁵ While a policy statement cannot be used to contravene the statute, “such a general purpose statement may serve as a contextual guide for the meaning of a statute.”¹⁶ Here, the policy statement informs Commission discretion to implement

¹³ *Considerations for Resilience Guidelines for Clean Energy Plans For the Oregon Public Utility Commission and Electricity Stakeholders*, U.S. Department of Energy Grid Modernization Lab Consortium, (Sept. 7, 2022), <https://edocs.puc.state.or.us/efdocus/HAH/um2225hah113046.pdf>.

¹⁴ *Purdue Pharma, L.P. v. Or. Dep't of Human Servs.*, 199 Or. App. 199, 208 (2005).

¹⁵ *Northwest Natural Gas Co. v. PUC*, 195 Or. App. 547, 556 (2004).

¹⁶ *Warburton v. Harney Cnty.*, 174 Or App 322, 329, 25 P.3d 978 (2001).

delegative terms, such as “in the public interest,” and is precisely the role that policy statements can aptly be relevantly considered.

The Commission was given jurisdiction over many of the relevant sections to implement HB 2021, and as discussed above was given discretion by the legislature to develop rules and determine other relevant factors for review of utility CEPs. In areas where the Commission has discretion it should exercise good faith to carry forward the intent of the policy that the legislature specifically included in the Act. Stakeholders would like to see the community benefits and environmental justice aspects of the law included in the Commission’s review of CEPs.

Following the passage of Senate Bill 978, the Commission examined its role as a utility regulator in an actively adapting changing electricity sector. Following the process, the Commission released a Legislative Report in 2018 that laid out legislative actions to make progress on climate change and equity. The report noted, “The PUC cannot require utilities to accomplish societal objectives that are outside the scope of utility regulation and that impose costs that the Legislature has not required utilities and their customers to bear.”¹⁷ The Commission also stated that its legislative mandate is to use economic regulation to ensure that regulated utilities make safe and reliable electricity available... at reasonable, non-discriminatory rates.¹⁸

HB 2021 was the legislature’s direct answer to the report. The Act gives the Commission the authority and responsibility to regulate utilities to accomplish societal objectives that were previously outside the scope of utility regulation. HB 2021 requires the Commission to consider

¹⁷ *SB 978 Actively Adapting and Changing Electricity Sector*, Oregon Public Utility Commission, (Sept. 2018), <https://www.oregon.gov/puc/utilities/Documents/SB978LegislativeReport-2018.pdf>.

¹⁸ *Id.*

greenhouse gas emission reductions and other factors themselves, beyond being only viewed as an economic risk factor in utility resource planning.¹⁹ This historic piece of legislation expanded electric utility resource planning to include social equity, climate change mitigation, and inclusion of underrepresented communities. HB 2021 also discusses community benefits and economic development of the state. While it does not expressly include community benefits in the enumerated list of factors for consideration when considering whether a plan is in the public interest, HB 2021 gives the Commission the authority to determine other relevant factors.

Accordingly, the Commission should include a factor discussing the direct community benefits from actions through a utilities CEP. Oregon communities could receive benefits that have not traditionally been examined through the IRP Guidelines, including direct and indirect economic benefits from project development including job creation and reductions in emissions. These considerations are relevant and should be weighed in the review of CEPs and in all the Commission's implementation activities, including its oversight of utility requests for proposals, other acquisitions and setting utility rates.

D. Procedural Approach to Continual Progress

There was a substantial discussion about how utilities will demonstrate continual progress in Docket No. UM 2225, and while the Commission declined to provide guidance it did express general support for Staff's "year-over-year" continual progress framework. In terms of procedure for compliance with continual progress an order on CEP review would provide the Commission to direct action for failure to demonstrate continual progress. However, it is important that any Order that deals with compliance with continual progress requirements be a final order that would be subject to judicial review. There needs to be a procedural mechanism

¹⁹ Re Dev. of Guidelines for the Treatment of External Envtl. Costs, Docket No. UM 424, 1993 WL 388945 (Or. P.U.C. Aug. 10, 1993).

that allows for judicial review of agency actions prior to a subsequent general rate case. The IRP/CEP process kicks off a Request for Proposals and the procurement process which will ensure that any decision is locked in, and the results of that procurement will not be known for several years. By the time the decision could be subject to judicial review following a general rate case, it would be too late to course correct and too late to ensure progress is “continual.”

If the Commission is not supportive of making an Order reviewing a CEP a final Order, then OSSIA recommends the Commission develop an alternative compliance filing that would be subject to judicial review. Though we are not in favor of duplicative processes, the opportunity for stakeholders and the Commission to attempt to course correct when a utility is falling short of continual progress is a worthwhile endeavor.

E. Phase I(b) Comments

a) Cost Cap

It is worthwhile for the Commission to establish guidance for the cost cap process prior to a stakeholder bringing the claim forward. Any cost cap needs to be defined to not include projects that the utility would already need to acquire in the regular course of business and is not directly needed for compliance. Additionally, depending on the Commission’s decision to retire RECs for compliance with HB 2021, resources required for compliance with the Renewable Portfolio Standard should not count towards the HB 2021 cost cap.

b) OR Regulated REC Programs

Effects on other Oregon regulated REC Programs will likely depend on how the Commission decides Phase I(a)(1). If the Commission requires REC retirement for compliance with HB 2021, then there will be significantly fewer problematic interactions with other Oregon regulated REC programs. If the Commission chooses not to retire RECs, there are potential

implications for the Community Solar Program, as well as the Renewable Portfolio Standard and the Clean Fuels Program.

c) Early Compliance Incentives

Early compliance incentives should not be created prior to development of compliance determination procedures. OSSIA would like to see the completion of a compliance determination process before the 2030 targets are attained. A subsequent process to create early compliance incentives could be completed subsequently and see the early compliance incentives as attainable for the 2035 and 2040 targets.

III. CONCLUSION

Our brief provides meaningful legal and policy arguments that OSSIA believes will be useful to the Commission as it resolves these complex HB 2021 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 24th day of July 2023.

Respectfully submitted,



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