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 NW ENERGY COALITION & RENEWABLE NORTHWEST

July 24, 2023

TABLE OF CONTENTS

I. INTRODUCTION

NW Energy Coalition and Renewable Northwest appreciate the opportunity to address near-term, well-defined issues related to implementation of Oregon's 100% clean electricity law HB 2021 (2021) that require guidance from the Oregon Public Utility Commission ("Commission"). This brief responds to the prompts provided in the Commission's June 5, 2023 Scoping Order in this docket.[1]

First, while the brief does not directly address Renewable Energy Certificates ("RECs"), it does address questions about the Commission's authority and HB 2021's approach to emissions accounting that have been raised as part of the discussion to date on issues related to RECs. Specifically, the Commission has authority to address greenhouse-gas issues outside the scope of the Oregon Department of Environmental Quality's ("DEQ") accounting framework, and that accounting framework is more likely than not a load-based program.

Second, the brief explains that clarifications regarding the meaning of "public interest" in HB 2021's standard for acknowledgement of utility Clean Energy Plans would likely be helpful for utilities and interested parties.

Third, the brief discusses HB 2021's policy statements, concluding that the Commission can – and likely should – apply those policy statements as part of the "public interest" test for clean energy plan acknowledgement, but cannot constitutionally establish a preference for in-state resources.

Fourth, the brief suggests that an assessment of "continual progress" should generally take place as part of the process of reviewing and acknowledging clean energy plans, but that a narrow annual informational filing may be helpful in the first years of HB 2021 implementation.

Finally, the brief identifies additional issues that will likely require guidance or clarification from the Commission, including resolving ambiguous language in HB 2021's cost cap provisions, addressing the effects of HB 2021 on certain REC-based programs, and updating both planning and procurement procedures and the Commission's integrated resource plan ("IRP") guidelines. The brief also observes that a dedicated docket on performance-based regulation would be an appropriate venue for consideration of early compliance incentives.

Again, NW Energy Coalition and Renewable Northwest thank the Commission for its attention to these issues and look forward to the Commission's eventual resolution of what have proven to be the most challenging issues in carrying out HB 2021's ambitious and deeply necessary policy of eliminating emissions from the majority of Oregon's electricity sector.

[1] Oregon Public Utility Commission, Order No. 23-194, Docket No. UM 2273 (June 5, 2023).

II. ARGUMENT

a. The Commission Should Consider the Scope of Its Authority and the Structure of HB 2021's Accounting Framework

While NW Energy Coalition and Renewable Northwest take no position on RECs directly in this docket, we write to address some relevant points on which there appears to be some confusion.

i. The Commission Has Discretion To Address Issues Relating to Emissions Beyond HB 2021's Targets.

Based on the Commission's organic statute, the language of HB 2021, and Oregon administrative law, the Commission has discretion to address issues relating to emissions beyond the DEQ accounting construct that is the basis for HB 2021's targets (a construct that does not currently include RECs).

The Commission's organic statute at ORS 756.040 establishes its "General Powers", including the "power and jurisdiction to supervise and regulate every public utility … in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction."[2] The Commission has taken different forms over the years, but since the legislature granted it power over electric utilities in 1911 courts have acknowledged its unique regulatory role and the breadth of its authority. In 1920, for example, the Oregon Supreme Court observed that "the manifest substance and effect" of the Commission's organic statute was that "courts must respect the decision of the commission, if it has not departed from the scope of its authority established by the legislative power of the state."[3] And more recently, in 2014, the Court pointed to ORS 756.040(2) and observed that "the PUC's statutory authority is phrased in sweeping terms."[4]

This broad authority is not an accident. In that same 2014 opinion, the Court explained the reason for it: "Public utilities exhibit characteristics of natural monopolies. For that reason, public utilities often are granted exclusive territories within which to operate, and many aspects of public utility operation are closely regulated by public utility commissions."[5] Given the regulatory paradigm that underlies the Commission's organic statute, it makes sense that the Commission's powers are broad – indeed, "sweeping."

The Commission's broad authority provides an important backdrop for considering its role under HB 2021. HB 2021 is itself a sweeping piece of legislation that sets forth both policy goals and specific operative requirements that play out at the Commission (among other provisions).

The statute's policy goals will be discussed further below, but there is one that is important to this discussion: "[i]t is the policy of the State of Oregon … [t]hat retail electricity providers rely

[2] ORS 756.050(2).
[3] *Hammond Lumber Co. v. Public Service Commission*, 96 Or 595, 603, 189 Pac. 639 (1920) (excerpted in Ralph Hoeber, "The Role of the Courts in Public Utility Regulation as Exemplified in Oregon," *Land Economics* (Feb. 1957)).
[4] *Gearhart v. Public Utility Commission of Oregon*, 356 Or 216, 339 P.3d 904, 921 (2014).
[5] *Id.* at 907.

on nonemitting electricity in accordance with the clean energy targets set forth in section 3 of this 2021 Act and eliminate greenhouse gas emissions associated with serving Oregon retail electricity consumers by 2040."[6]

The statute's specific requirements are centered on a set of mandatory emission-reduction targets -- 80% below a statutorily prescribed baseline using DEQ accounting by 2030, 90% by 2035, and 100% by 2040.[7] To meet those targets, HB 2021 established a new planning mechanism, the Clean Energy Plan ("CEP"), which must be filed with and ultimately reviewed by the Commission.[8] CEPs are required to contain several elements: they must demonstrate how a utility will achieve the law's greenhouse gas-reduction targets, they must include annual goals for progress including acquisition of clean energy and demand-side resources, they must examine resiliency opportunities and community-based renewable energy, they must maintain reliability and affordability, and they must demonstrate continual progress toward achieving the law's targets -- "including demonstrating a projected reduction of annual greenhouse gas emissions."[9]

The action the Commission must take in response to CEPs is straightforward, though it also leaves room for discretion in implementation (as will be discussed further below). The "Commission shall acknowledge the clean energy plan if the commission finds the plan to be [1] in the public interest and [2] consistent with the clean energy targets set forth in section 3 of this 2021 Act."[10] On the first point, the statute directs the Commission to consider several discretionary factors in deciding whether a plan is in the public interest and therefore should be acknowledged: "reduction of greenhouse gas emissions … and any related environmental or health benefits," "economic and technical feasibility," "reliability and resiliency," federal incentives, customer costs and risks, and "[a]ny other relevant factors as determined by the commission."[11] On the second point, the statute speaks plainly: to determine whether a plan is consistent with HB 2021's binding targets, the "Commission shall use the greenhouse gas emissions reported to the department under paragraph (a) of this subsection and provided to the commission."[12]

In addition to its acknowledgment role, the Commission has another legislative mandate related to HB 2021's substance: it "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."[13] This directive is not located in the subsection of the statute addressing acknowledgement authority; rather, it is a broadly worded standalone mandate to the Commission.

[6] HB 2021, Section 2(1), codified at ORS 469A.405(1).
[7] *Id.* § 3; ORS 469A.410.
[8] *Id.* §§ 3 & 4; ORS 469A.410 & 415.
[9] *Id.* § 4(4); ORS 469A.415(4).
[10] *Id.* § 5(2); ORS 469A.420(2).
[11] *Id.*
[12] *Id.* § 5(4)(b); ORS 469A.420(4)(b).
[13] *Id.* § 4(6); ORS 469A.415(6).

Careful consideration of HB 2021's language and structure demonstrate that the statute's policy and operative provisions expressly authorize consideration of greenhouse gas reductions beyond those accounted for in the 80%, 85%, and 90% targets. First, "[i]t is the policy of the State of Oregon … [t]hat retail electricity providers rely on nonemitting electricity in accordance with the clean energy targets set forth in section 3 of this 2021 Act **and** eliminate greenhouse gas emissions associated with serving Oregon retail electricity consumers by 2040."[14] Second, "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" (subsection (4)(e) invokes the targets and therefore the DEQ accounting framework).[15] And third, the "Commission shall acknowledge the clean energy plan if the commission finds the plan to be in the public interest **and** consistent with the clean energy targets set forth in section 3 of this 2021 Act", where the public interest includes "any reduction of greenhouse gas emissions."[16] In each case, the statute points to the targets then uses the conjunction "and", connoting a cumulative requirement, to place additional focus on greenhouse gas emissions separate from the targets. Indeed, the Oregon Supreme Court has repeatedly noted that where conjunctive language, particularly the word "and," is used to connect phrases in a statute, the connected phrases establish separate and distinct obligations.[17]

Finally, Oregon administrative law affirms the broad discretion that the Commission has to implement Oregon's greenhouse gas-reduction policy by virtue of its organic statute and the text of HB 2021. The Commission has structured this docket as a contested case, so the applicable standard should a Commission order be appealed is set forth in ORS 183.482(8). The Oregon Supreme Court has summed up that standard as follows: "The standards of review set out in ORS 183.482(8) reflect a legislative policy, embodied in the [Administrative Procedures Act], that decisions by administrative agencies be rational, principled, and fair, rather than *ad hoc* and arbitrary."[18] Oregon courts tend not to use the word "deferential" when discussing their review of agency actions writ large. However, as to an agency's interpretation of statutory language, a court will apply different standards for "exact, inexact, or delegative" terms, with a "deferential" standard in the case of delegative language.[19]

The Oregon Supreme Court has explained that "delegative terms express incomplete legislative meaning that the agency is authorized to complete," noting that "[t]he legislature may use general delegative terms because it cannot foresee all the situations to which the legislation is to be applied and deems it operationally preferable to give to an agency the authority, responsibility

[14] *Id.* § 2(1) (emphasis added); ORS 469A.405(1).
[15] *Id.* § 4(6) (emphasis added); ORS 469A.415(6).
[16] *Id.* § 5(2); ORS 469A.420(2). While the text and primary legislative context here speak for themselves, should it be necessary legislative history and maxims of statutory construction may be addressed in reply briefing.
[17] *See*, *e.g.*, *Broadway Cab LLC v. Employment Dept.*, 358 Or 431, 364 P.3d 338, 344 (2015) ("Because the elements are conjunctive, it is Broadway's burden to establish … each of the four criteria."); *State v. Barrett*, 331 Or 27, 10 P.3d 901, 903 (2000) ("The use of the conjunctive in *former* ORS 161.062(1) … indicates that two separate inquiries are required" (emphasis in original)); *McCabe v. State of Oregon*, 314 Or 635, 841 P.2d 635, 638 (1992) (observing that "the words 'and' and 'or,' as used in statutes, are not interchangeable, being strictly of a conjunctive or disjunctive nature").
[18] *Gordon v. Bd. of Parole*, 343 Or 618, 175 P.3d 461, 469 (2007).
[19] *Matter of Compensation of Arvidson*, 366 Or 693, 467 P.3d 741, 746 (2020).

and discretion for refining and executing generally expressed legislative policy."[20] While different elements of HB 2021 fall at different points on the exact-inexact-delegative spectrum, phrasing such as "the Commission shall ensure that an electric company … is taking actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers"[21] and the "Commission shall acknowledge the clean energy plan if the commission finds the plan to be in the public interest" are sufficiently broad as to be self-evidently delegative.[22] Accordingly, the Commission's authority in implementing these statutory mandates is at its peak, and its interpretation of these phrases will be entitled to deference by reviewing courts.

The Commission's organic statute affords it particularly broad power, the language of HB 2021 provides delegative authority over utility greenhouse gas emissions, and Oregon administrative law provides that delegative authority is entitled to deference; for all these reasons, the Commission has discretion to address issues relating to emissions beyond DEQ's accounting construct.

ii. HB 2021's Emissions Accounting Is Likely Load-Based, but the Point of Accounting Is Unclear

In some respects, HB 2021 is clear about its centerpiece, the binding 2030, 2035, and 2040 emission reduction targets: the targets are to be "measured … as greenhouse gas emissions reported under ORS 468A.280", verified by DEQ, and used as half of the Commission's standard for Clean Energy Plan acknowledgement.[23] As the Commission explored in a recent workshop, however, other language in HB 2021 creates ambiguity on the point of emissions accounting.[24]

Section 2(1) establishes the policy "[t]hat retail electricity providers rely on nonemitting electricity in accordance with the clean energy targets set forth in section 3 of this 2021 Act and eliminate greenhouse gas emissions associated with serving Oregon retail electricity customers by 2040." The latter language speaks of serving load – language associated with a load-based standard – but it is cast as distinct from the targets, separated from the targets by an "and." It is not dispositive.

Section 3(2) provides that HB 2021 cannot "establish[] a standard that requires a retail electricity provider to track electricity to end use retail customers." That language does not obviously have to do with accounting, but rather with tracking. Admittedly, if it were focused on accounting, its framing *could* be read as generation-based. But the reference to tracking (and lack of reference to accounting) was intentional: it was a reaction to contemporaneous conversations about implementation of Washington's Clean Energy Transformation Act in which some interested

[20] *Id.* (quoting *Springfield Ed. Ass'n v. School District*, 290 Or 217, 223-24, 621 P.2d 547 (1980), internal quotation marks omitted).
[21] HB 2021 § 4(6) (emphasis added), codified at ORS 469A.415(6).
[22] For example, the following terms have been identified as delegative: "good cause," "fair," "unfair," "undue," "unreasonable," and "public convenience and necessity." *Springfield Ed. Ass'n*, 621 P.2d at 555.
[23] HB 2021 §§ 3(1), 5(1)(b) & 5(2); ORS 469A.410(1), 420(1)(b) & 420(2).
[24] *See generally* UM 2273 Commission Workshop on Renewable Energy Certificates (June 29, 2023), *available at* https://edocs.puc.state.or.us/efdocs/HAH/um2273hah101953.pdf.

parties interpreted some advocates' positions as requiring physical source-to-sink electricity tracking (an impossibility).[25] Section 3(2) is not dispositive.

Section 5(4) requires that "(a) A retail electricity provider shall report annual greenhouse gas emissions associated with the electricity sold to retail electricity consumers by the retail electricity provider to the Department of Environmental Quality in the manner set forth under ORS 468A.280, or rules adopted pursuant thereto" and that the Commission "shall use the greenhouse gas emissions reported to the department under paragraph (a) of this subsection and provided to the commission to determine whether or not the retail electricity provider has met the clean energy targets set forth in section 3 of this 2021 Act." This language is clear and straightforward, with no need for a "but." It establishes that HB 2021's targets reflect "emissions associated with the electricity sold to retail electricity consumers" – a load-based standard. This is the dispositive language.

This language also squares with ORS 468A.280, the statute underlying DEQ's reporting program that forms the basis for HB 2021's emission-reduction targets. ORS 468A.280 applies to "electricity that is imported, sold, allocated or distributed for use in this state" – not the clearest phrasing, but language that is most easily construed as establishing a load-based program due to the phrase "for use in this state."[26]

Should the Commission determine otherwise, it will likely be necessary to significantly revisit the meaning of HB 2021.[27] For example, if HB 2021 is generation-based, then to what generators does it apply? All resources owned and contracted by a covered utility? If so, does it mean that covered utilities may not operate emitting thermal units after 2040, regardless of whether they are being operated for wholesale rather than retail? And if not, then how should one constrain the set of generators to which the standard does apply? If the constraint is that the standard applies to the set of generators used to produce the power sold to retail consumers, then the argument has come full circle and the program would be more appropriately described as load-based. So, while a determination that HB 2021 is generation-based may be permissible under the statute, it would raise significant questions that no one in the suite of dockets implementing HB 2021 – UM 2225, LC 80, LC 82 – has yet sought to answer. And it would do so just six years before the statute's first emission-reduction mandate.

[25] *See*, *e.g.*, Testimony of Max Greene on behalf of Renewable Northwest (Apr. 7, 2021) (explaining that this language "stops just short of requiring proof of delivery of clean power … to end users – an issue that has caused difficulties in implementing Washington's Clean Energy Transformation Act"), *available at* https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24294.

[26] Reading "for use in this state" from ORS 468A.280 together with "sold to retail electricity consumers" from HB 2021 Section 5(4) suggests that, under Oregon's greenhouse-gas statutory schema, electricity is used in this state when it is sold to retail consumers – again, implying that the program is essentially load-based.

[27] *See also* Portland General Electric 2023 Clean Energy Plan and Integrated Resource Plan at 89 ("HB 2021 sets 2030, 2035, and 2040 greenhouse gas (GHG) targets for energy associated with PGE retail load"); PacifiCorp 2023 Clean Energy Plan at 71 ("HB 2021 sets targets to reduce emissions associated with Oregon retail sales").

b. Certain Clarifications Regarding the Meaning of Public Interest Would Assist the Commission, Utilities, and Interested Parties

As noted above, certain sections of HB 2021 are delegative, leaving room for the Commission to "refin[e] and execut[e] generally expressed legislative policy."[28] Section 5(2) is one such section – the legislature has set forth a number of items that the Commission must "consider" in determining whether to acknowledge a Clean Energy Plan, but each of these items is cast in broad language that leaves significant room for the Commission to rely on its expertise in making an acknowledgement decision. That the Commission's acknowledgement authority is delegative is likely uncontroversial; the question, however, is whether and to what extent the Commission should provide up-front guidance as to what constitutes the public interest, as opposed to assessing the public interest through the lens of specific utility filings. NW Energy Coalition and Renewable Northwest recommend that the Commission provide up-front guidance on at least four public-interest considerations: economic and technical feasibility, availability of federal incentives, and two "other relevant factors" – community benefits and impacts, and consistency with general policy expressed by HB 2021.[29]

i. Economic and Technical Feasibility

In assessing economic and technical feasibility, as required by HB 2021 Section 5(2)(b), the Commission should ensure that plans are realistic and implementable and not overly speculative. For a utility to demonstrate economic and technical feasibility through that lens – realistic, implementable, non-speculative – will likely require assessments of the potential interplay between established and emerging resources in both the near and medium terms. Some resources that will likely be necessary for utilities to meet their HB 2021 obligations in the 2030s have long lead times, so timely identifying those resources is imperative. To be confident that early investments in long-lead resources are reasonable similarly requires a thorough assessment of diverse portfolios – perhaps another way of thinking of economic and technical feasibility is a focus on "low-regrets" solutions. Guidance to this effect would likely be useful to utilities and other interested parties.

ii. Availability of Federal Incentives

In considering the availability of federal incentives, as required by HB 2021 Section 5(2)(d), the Commission should ensure that utilities subject to HB 2021 are assessing not only how these incentives will affect the supply side – resource costs and the acceleration of some emerging technologies – but also how they will affect the demand side – electrification, conservation and demand response, and the development of renewable fuels. Again, guidance to this effect would likely be useful.

[28] *Springfield Ed. Ass'n*, 621 P.2d at 555.

[29] Additional guidance on greenhouse gas reductions outside of the ORS 468A.280 framework would also likely be appropriate and helpful, but this inquiry may benefit from more dedicated attention after the initial round of utility Clean Energy Plans.

iii. Community Benefits and Impacts

HB 2021 authorizes the Commission to consider as part of the public interest "[a]ny other relevant factors as determined by the Commission." One such factor the Commission should consider is community benefits and impacts. Because this factor is necessary to effectuate HB 2021's overall policy but is not explicitly spelled out in statute, it would be appropriate for the Commission to adopt it as an acknowledgement factor by order in this docket.

One of HB 2021's core motivating principles is to support energy justice and to ensure greater consideration of community benefits and impacts as part of Oregon's energy planning framework.[30] This principle is supported by some of HB 2021's specific operative provisions. HB 2021 Section 6 establishes a "Community Benefits and Impacts Advisory Group." The Group "must include representatives of environmental justice communities and low-income ratepayers and may include representatives from other affected entities within the electric company's service territory."[31] Working with the Group, each utility subject to HB 2021 must develop a biennial report on community benefits and impacts; this report is to be filed with the Commission but is not itself subject to acknowledgement or approval.[32] A utility may also consult its Group on "[t]he development and equitable implementation of a clean energy plan."[33]

However, while HB 2021 is suffused with consideration of community benefits and impacts, as well as other equity considerations, the text of HB 2021 generally does not apply direct regulatory significance to these factors.[34] The statute does, however, empower the Commission to adopt "[a]ny other relevant factors as determined by the Commission" as part of its test for the public interest when reviewing Clean Energy Plans for acknowledgement. Community benefits and impacts are highly relevant to HB 2021. Accordingly, the Commission should clarify that community benefits and impacts comprise a key factor in determining whether a Clean Energy Plan is in the public interest and should be acknowledged.

The introduction to this section of the brief also referenced consideration of a Clean Energy Plan's consistency with HB 2021's general policy statements as a potential element of the Commission's public-interest determination; that argument is addressed in more depth in the following section.

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[30] *See*, *e.g.*, Floor Letter of Rep. Khanh Pham (Jun. 24, 2021), *available* at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/FloorLetter/3263; Testimony of Akashdeep Singh on behalf of OPAL Environmental Justice Oregon (Apr. 8, 2021), *available at* https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24336; Testimony of Nikita Daryanani on behalf of Coalition of Communities of Color (Apr. 8, 2021), *available at* https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24253.

[31] HB 2021 § 6(1), codified at ORS 469A.425(1).

[32] *Id.* § 6(2)(a); ORS 469A.425(2)(a).

[33] *Id.* § 6(2)(b)(A); ORS 469A.425(2)(b)(A).

[34] Language invoking energy justice is also central to HB 2021's policy statements, which will be addressed in the next section of this brief.

c. HB 2021's Policy Statements Should Inform the Commission's Consideration of the Public Interest but May Not Constitutionally Establish a Preference for In-State Resources

i. HB 2021's Policy Statements Should Inform the Commission's Consideration of the Public Interest

As has been noted above, an agency's role in implementing a delegative statute is to "refin[e] and execut[e] generally expressed legislative policy."[35] This administrative law principle gels well with statutory-interpretation law. In Oregon the general starting point for interpreting a statute is *State v. Gaines*, which sets out a three-part analytical framework: one must first "examine[] the text and context of the statute," then if the legislative intent is unclear one may consider legislative history, and finally if the legislative intent is *still* unclear one may "resort to general maxims of statutory construction."[36] When a statute includes policy statements, the language of those policy statements is not given direct effect but instead is considered part of the "context" used to interpret the statute's operative provisions.[37] Again, this framework establishes a natural relationship between a statute's express policy and its operative provisions. To return once again to administrative law, the link between policy and operative provisions is strong enough that the core task of an "[a]ppellate court[] review[ing] an agency's interpretation of delegative terms [is] to ensure that the interpretation is 'within the range of discretion allowed by the more general policy of the statute.'"[38]

Against that backdrop, a review of HB 2021 is in order. The key operative provisions of HB 2021 are those establishing the Clean Energy Plan process. As has been discussed *supra*, the Commission's statutorily delegated obligation with respect to Clean Energy Plans is to "acknowledge the clean energy plan if the commission finds the plan to be in the public interest and consistent with the clean energy targets set forth in section 3 of this 2021 Act."[39] And as has also been discussed *supra*, the legislature's use of the term "public interest" is delegative. The legislature's delegation to the Commission is at its broadest under the last factor spelled out for assessing the public interest: "[a]ny other relevant factors as determined by the commission."[40] Since the Commission's role in implementing this delegative element of HB 2021 is to "refin[e] and execut[e] generally expressed legislative policy," and a reviewing court would assess Commission actions through the lens of "the more general policy of the statute," it is only logical to conclude that the Commission has at least the discretion – and more likely the obligation – to consider HB 2021's policy statements when assessing whether a Clean Energy Plan is in the public interest.[41]

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[35] *Springfield Ed. Ass'n*, 621 P.2d at 555.
[36] *State v. Gaines*, 346 Or 160, 206 P3d 1042, 1046 (2009) (internal citations and quotation marks omitted). Though *Gaines* is couched in terms of judicial review of statutory language, it is relevant to an agency seeking to interpret a statute as well.
[37] *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 435 P.3d 698, 707 (2019) ("Context includes related statutory policy provisions.").
[38] *OR-OSHA v. CBI Services, Inc.,* 356 Or 577, 341 P.3d 701, 706 (2014) (quoting *Springfield Ed. Ass'n*, 621 P.2d at 547).
[39] HB 2021 § 5(2); ORS 469A.420(2).
[40] *Id.*
[41] *Springfield Ed. Ass'n*, 621 P.2d at 555; *OR-OSHA*, 341 P.3d at 706.

For the foregoing reasons, HB 2021's policy statements should inform the Commission's consideration of the public interest for the purpose of Clean Energy Plan acknowledgement. What that inquiry might look like will be discussed in the following section.

ii. HB 2021 Does Not and the Commission May Not Constitutionally Establish a Preference for In-State Resources

HB 2021 provides in Section 2 that "It is the policy of the State of Oregon … [t]hat 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 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."[42] Whether and how the Commission can effectuate this statutory language has been the subject of significant discussion in the two years since the Legislature passed HB 2021. Based on the analysis presented in this brief, the Commission should consider Section 2 in implementing discretionary provisions of HB 2021 while steering widely clear of establishing an in-state resource preference, which would be flatly unconstitutional. One possible solution is to adopt Section 2 into the public interest test for clean energy plan acknowledgement, while taking care to do so in a non-discriminatory manner.

In Oregon the general starting point for interpreting a statute is *State v. Gaines*, whose three-part analytical framework has been described above.[43] When a statute includes policy statements, the language of those policy statements is not given direct effect but instead is considered part of the "context" that must be analyzed alongside the text of the statute's operative provisions.[44] This exercise of using policy statements to interpret operative language is not toothless – courts may reject a textual interpretation that would undermine the legislature's express policy intent or accept a textual interpretation that would further it.[45]

HB 2021 is structured in a manner that reflects Oregon statutory-interpretation law. Section 3, for example, provides that Oregon utilities shall comply with greenhouse gas emission-reduction targets "to the extent compliance is consistent with sections 1 to 15 of this 2021 Act."[46] This specific example signals that the legislature intended the policy announced in Section 2 to serve as context for interpreting Section 3. Having established that the policy statements in Section 2 are relevant to at least some operative provisions of the statute, it is necessary to consider what that means for the Commission.

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[42] HB 2021 § 2(2), codified at ORS 469A.405(2).
[43] *Gaines*, 206 P3d at 1046.
[44] *Stop the Dump Coalition*, 435 P.3d at 707.
[45] *TriMet v. Amalgamated Transit Union Local 757*, 362 Or 484, 497, 412 P.3d 162 (2018) (rejecting a result that "would severely undermine the policy" announced by the statute); *American Federation of State County and Municipal Employees v. City of Lebanon*, 360 Or 809, 388 P.3d 1028, 1036 (2017) (accepting a result that furthers "[t]he legislature's statement of policy").
[46] HB 2021 § 3(1), codified at ORS 469A.410(1) ("… to the extent compliance is consistent with ORS 469A.400 to 469A.475").

That answer must be sharply bounded by the doctrine of constitutional avoidance. In Oregon "[i]t is axiomatic that [a court] should construe and interpret statutes in such a manner as to avoid any serious constitutional problems."[47] This principle is equally true for state agencies tasked with administering a statute, who are similarly constitutionally constrained. In the case of HB 2021, where discussions of Section 2 have included the possibility of an in-state preference, to avoid constitutional problems means to review the dormant Commerce Clause doctrine.

Probably the most directly relevant dormant Commerce Clause case is *Wyoming v. Oklahoma*, decided by the United States Supreme Court in 1992. In *Wyoming*, the Oklahoma Legislature had adopted a resolution directing "Oklahoma utilities using coal-fired generating plants [to] seriously consider using a blend of at least ten percent Oklahoma coal."[48] The Supreme Court explained that "the Commerce Clause of the United States Constitution … directly limits the power of the States to discriminate against interstate commerce" and in particular to adopt "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[49] Further, the Court provided, when a state adopts "simple economic protectionism," the Constitution provides "a virtually *per se* rule of invalidity."[50] More specifically, state protectionism can only survive scrutiny if the state can "justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake" or if Congress has demonstrated "clear and unambiguous intent … to permit the discrimination against interstate commerce" at issue.[51] In *Wyoming*, the Oklahoma resolution establishing an in-state preference "[could]not be characterized as anything other than protectionist and discriminatory," the state's justifications were inadequate, and Congress had not given it a green light, so the Court struck it down.[52]

The doctrine underlying the decision in *Wyoming* was reaffirmed by the United States Supreme Court this term in *National Pork Producers Council v. Ross*. In upholding a California ballot initiative that restricted the sale of pork in California based on substantive rather than geographic considerations, the Court reaffirmed that the "antidiscrimination principle" discussed in *Wyoming* "lies at the very core of our dormant Commerce Clause jurisprudence."[53] The principal dissent agreed "that many of the leading cases invoking the dormant Commerce Clause are properly read as invalidating statutes that promoted economic protectionism."[54] *Wyoming* and *Pork Producers* together stand for the straightforward principle that the state – and therefore the Commission – may not adopt a preference for in-state resources.

Another party to this docket has circulated a post-*Pork Producers* case from the Supreme Court of Connecticut, assessing a decision by the Connecticut Public Utilities Regulatory Authority ("PURA") to limit the use of RECs for a voluntary clean energy program to those from "the

[47] *Bernstein Bros. v. Dept. of Rev.*, 294 Or 614, 661 P.2d 537, 541 (1983) (internal citation and quotation marks omitted), quoted in *State v. Straughan*, 327 P.3d 1172 (Or App 2014).
[48] *Wyoming v. Oklahoma*, 502 U.S. 437, 443 (1992) (quoting the underlying Oklahoma resolution).
[49] *Id.* at 454 (internal citations and quotation marks omitted).
[50] *Id.* at 454-55.
[51] *Id.* at 456-57.
[52] *Id.* at 455-57.
[53] *National Pork Producers Council v. Ross*, --- U.S. --- (2023) (internal quotation marks omitted).
[54] *Id.* (Roberts, CJ, dissenting).

NEPOOL GIS, NYGATS, and PJM-GATS systems … collectively includ[ing] all or part of twenty states."[55] In that case – *Direct Energy Services* – the court rejected an argument that the PURA decision was discriminatory (which would have invoked the type of strict scrutiny discussed above) and instead assessed the decision through "the more permissive *Pike* test."[56] Under *Pike*, "[w]here [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[57] In *Direct Energy Producers*, the court applied *Pike* and found no burdens on interstate commerce, and therefore no constitutional defect.

The above discussion leads to the question: what can the Commission do with respect to HB 2021 Section 2? An in-state preference is plainly off the table, as is any other finger on the scale that crosses the line of protectionism. But protectionism aside, the best guideposts for the Commission are in *Pike*.[58] Perhaps the simplest way to effectuate Section 2 without running afoul of the dormant Commerce Clause is to incorporate Section 2 as part of the "public interest" that the Commission will assess in deciding whether to acknowledge a clean energy plan, along the lines discussed above. Not: has the utility planned to procure sufficient Oregon projects? Rather: has the utility explained whether and how its plan will result in meaningful living wage jobs, workforce equity, and energy security and resiliency for the communities it serves? This latter inquiry would support the legislature's declared policy, including its directive in Section 3 to achieve greenhouse gas reduction targets "consistent with" Section 2, while also "regulat[ing] even-handedly," imposing only "incidental" effects on interstate commerce (if any), and not creating burdens that exceed local benefits – and therefore staying squarely within the permissive zone of *Pike*'s framework.

d. Existing Process Is Likely Sufficient for Assessing Continual Progress, but Annual Reports May Be Helpful in the Short Term

HB 2021 invokes the phrase "continual progress" twice in Section 4: first, Section (4)(e) provides that a covered utility's Clean Energy Plan must "[d]emonstrate the electric company is making continual progress within the planning period towards meeting the clean energy targets" and second, Section (4)(6) provides that the Commission "shall ensure that an electric company demonstrates continual progress as described in section (4)(e)."

In its Scoping Order, the Commission has requested briefing not on the substance of HB 2021's continual progress requirement, but on its process – how should the Commission "oversee continual progress and prompt action by utilities, as required by HB 2021 Section 4(6)?" As the language of HB 2021 does not speak to this question directly, a reasonable starting point is the statute's legislative history. That history demonstrates that HB 2021 was intended to build on existing programs and processes. In testimony submitted on March 23, 2021, Max Greene stated

[55] *Direct Energy Services v. Public Utilities Regulatory Authority* (2023).
[56] *Id.* The court's conclusion that the PURA decision was non-discriminatory was commonsense, given that its twenty-state procurement footprint was hardly protectionist.
[57] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
[58] A brief note on *Pike* – there is some question as to exactly what the case means post-*Pork Producers*, as the Court produced no majority opinion on how *Pike* applied to the underlying California law.

on behalf of Renewable Northwest that HB 2021's "emissions-plus-planning approach builds on two existing programs," including the Commission's integrated resource planning process, and therefore "should be straightforward to implement."[59] On March 26, 2021, Michael Grant submitted comments on behalf of the Public Utility Commission similarly observing that "HB 2021-1 provides a streamlined Clean Energy Program that leans on the existing PUC planning process."[60] On April 6, 2021, Scott Bolton wrote on behalf of Pacific Power: "HB 2021 retains Oregon's leading integrated resource planning (IRP) process to guide the planning for emissions reduction."[61]

Against this backdrop, the default position would be for the Commission to rely on existing processes, and in particular on Clean Energy Plans, to assess continual progress. With that said, however, it may be worth considering requiring a more frequent – perhaps annual – update in the first years of HB 2021 implementation, so the Commission and interested parties have more visibility into how the covered utilities are carrying out their obligations under the statute. If the Commission elects to establish more frequent reporting, however, any required report should be relatively narrow and the standalone reporting obligation should be limited to a term of years rather than applied indefinitely. Keeping the administrative burden of HB 2021 light will help to ensure that utility efforts are focused on actually achieving the policy of HB 2021.

e. A Second Phase of This Docket Is Warranted so the Commission Can Consider and Provide Direction on Additional Key Issues

Following Phase I of this docket, additional issues remain that would be appropriate to address in a second phase of the docket. These issues include two of those identified by the Commission in its Scoping Order, as well as additional issues that will be briefly presented below.

i. The Commission Should Provide Direction on Ambiguities in HB 2021's Cost Cap Language

HB 2021 Section 10 establishes a cost cap that uses two different phrases to refer to those costs that might trigger the cap: "costs incurred or forecasted costs estimated by the electric company *for the purpose of compliance*" and "investment[s] or cost[s]" that "*contribute[] to compliance*."[62] For years prior to and since HB 2021's enactment, covered utilities have been investing in resources such as wind and solar generation that displace generation from emitting sources and therefore "contribute to compliance" with HB 2021's greenhouse gas reduction mandate. Clarification is required from the Commission that the costs that trigger HB 2021's cost cap are those undertaken "for the purpose of compliance."

[59] *Available at* https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/19840.
[60] *Available at* https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/236918.
[61] *Available at* https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/23713.
[62] HB 2021 §§ 10(1) & 10(2)(b), codified at ORS 469A.445(1) & 445(2)(b).

ii. Oregon-Regulated REC Programs Will Likely Require Attention Following Resolution of REC Issues in Phase I

HB 2021 is clear that its enactment left Oregon's Renewable Portfolio Standards unaffected.[63] Other regulated programs using RECs, however, may need to be re-examined following the Commission's resolution of REC issues in Phase I of this docket. For example, how (if at all) does HB 2021 affect the community solar program or the regulated utilities' green tariff programs? Precisely what shape such an inquiry takes will depend on the Commission's Phase I resolution.

iii. Early Compliance Incentives Would Be Best Addressed in a Dedicated Docket on Performance-Based Regulation

The Commission committed in 2018 to open a docket investigating performance-based ratemaking.[64] Performance-based regulation involves identifying policy goals and outcomes that are inadequately incentivized under the standard ratemaking structure, developing metrics that demonstrate progress toward achieving those policy goals and outcomes, and determining appropriate incentives tied to the accomplishment of those identified metrics. A dedicated performance-based regulation investigation docket would likely be the ideal venue for holistically reviewing early compliance incentives in conjunction with other possible performance incentives.

iv. Other Issues Merit Consideration in Phase II

Two other main issues merit consideration in a second phase of this docket: planning and procurement procedures, and updated IRP Guidelines post-HB 2021.

The Commission indicated in its Scoping Order that it will likely address potential changes to its planning and procurement procedures in 2024. While Oregon's planning and procurement processes are perhaps the most robust in the region, the processes can also be time-consuming. Following HB 2021, utilities will likely need to procure new resources on a near-constant basis. To balance robustness and timeliness, and to ensure Oregon utilities can accomplish HB 2021's clean energy targets, the Commission should prioritize updates to its planning and procurement processes, initiating the workstream before 2024 if possible.

An update to the Commission's IRP Guidelines is similarly warranted but not as urgent. As the Commission and interested parties discussed in Docket No. UM 2225, following the last decade's significant changes to Oregon's energy policy – and particularly HB 2021 – the current IRP Guidelines do not fully reflect Oregon's planning environment. These significant changes merit updates to the IRP Guidelines, and Phase II could be an appropriate venue to take up those updates.

[63] *Id.* § 13, codified at ORS 469A.460.
[64] Oregon Public Utility Commission, "SB 978: Actively Adapting to the Changing Electricity Sector" ar 3 (Sept. 2018), *available at* https://www.oregon.gov/puc/utilities/Documents/SB978LegislativeReport-2018.pdf.

III. CONCLUSION

For the foregoing reasons, NW Energy Coalition and Renewable Northwest request that the Commission issue an order determining:

- That the Commission has authority to regulate greenhouse gas emissions associated from Oregon utilities beyond the confines of DEQ's accounting framework;
- That HB 2021 is a load-based program;
- That the "public interest" includes findings that a plan is realistic and implementable, incorporates federal incentives on the supply and demand side, and is responsive to the interests of a community benefits and impacts advisory group;
- That the "public interest" also includes general consistency with HB 2021's express policy goals;
- That HB 2021 does not establish an in-state resource preference;
- That review of clean energy plans presents an appropriate forum for consideration of "continual progress"; and
- That a second phase of this docket is necessary to consider additional issues related to implementation of HB 2021.

Again, NW Energy Coalition and Renewable Northwest appreciate the Commission's consideration of these issues and look forward to additional process in this docket.

Respectfully submitted this 24th day of July, 2023,

/s/ Max Greene
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