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May 23, 2024

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
201 High St. SE, Suite 100
Salem OR 97301

Re: In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Investigation into House Bill 2021 Implementation Issues.
Docket No. UM 2273

Dear Filing Center:

Please find enclosed the Alliance of Western Energy Consumers' Opening Brief in the above-referenced docket.

Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/ Nannette M. Moller
Nannette M. Moller

Enclosure

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 ALLIANCE OF WESTERN ENERGY CONSUMERS

I. INTRODUCTION

Pursuant to Administrative Law Judge Mellgren's April 15, 2024, Memorandum, the Alliance of Western Energy Consumers ("AWEC") hereby files this Opening Brief with the Public Utility Commission of Oregon ("Commission") addressing the HB 2021 Section 10 cost cap questions set forth in the Memorandum.

AWEC's responses to the Commission's questions are based on an understanding that, in passing HB 2021, the Legislature intended for electric companies[1] to achieve the emissions reduction targets in the law in the required timeframe,[2] if doing so did not compromise the reliability of the electric system[3] and did not result in excessive cost impacts to customers ("excessive" being defined in this context as costs that exceed the cost cap in ORS 469A.445).

[1] HB 2021 also applies to Electricity Service Suppliers; however, the subject of the Commission's questions is limited to the cost cap applicable to "electric companies" and not ESSs.

[2] 80% below the "baseline emissions level" by 2030; 90% below the "baseline emissions level" by 2035; and 100% below the "baseline emissions level" by 2040. ORS 469A.410.

[3] ORS 469A.440.

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AWEC interprets the language in ORS 469A.445, therefore, in a manner that best achieves these potentially competing goals.

Specifically, as more fully described below, the cost cap for electric companies should be implemented in a manner that isolates the costs associated with HB 2021 compliance that exceed the costs electric companies would have incurred anyway to meet their basic reliability obligations. This does not mean that costs must be incurred solely for HB 2021 compliance to be considered in an evaluation of the cost cap; rather, they could be incurred for a multitude of reasons, but they exceed what the electric company would otherwise incur in the absence of HB 2021's requirements. Moreover, in a proceeding to determine whether the cost cap has been reached, the Commission should review these costs on a forecasted basis, as a retrospective review of costs is unlikely to protect customers from those cost impacts.

That said, AWEC is also interested in the perspectives of other parties on the Commission's questions and reserves the right to modify its position on any of the topics below based on a review of other party briefs. Fundamentally, AWEC's interest is in ensuring that the cost cap can be implemented predictably and in a manner that ensures customers do not face excessive costs for HB 2021 compliance. If there are alternative ways to achieve these objectives other than what is proposed here, AWEC is open to such alternatives.

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II. ARGUMENT

a. HB 2021's cost cap should be interpreted to apply to the portion of resources that contribute to the law's emission reduction mandates and exceed the cost of alternative resources a utility would otherwise need to acquire to meet its load service obligations.

The Commission asks whether, in using the phrases "for the purpose of compliance" and "contributes to compliance," the Legislature "intend[ed] to capture only those actions that the petitioner can prove the utility would not have taken, except to meet the requirements of HB 2021? Or does Section 10 capture a broader category of actions?"[4] AWEC's interpretation of these phrases together within the context of the statute indicates that they both support the same outcome – costs a utility incurs that contribute to HB 2021 compliance and exceed the cost a utility would otherwise incur to serve its load should be applied toward the cost cap.

When construing statutory terms, Oregon courts begin with the text and context,[5] and given that the Legislature used different phrases, it is reasonable to assume it was intended for them to have different meanings. Principles of statutory interpretation dictate that the Commission should give effect to every word the Legislature used, if possible.[6] The meanings of these phrases, however, are reconcilable based on the context in which they are used.

The phrase "for the purpose of compliance" is used one time in Section 10(1) and is within the context of identifying the scope of investments and costs that could be considered in an investigation under Section 10. Within this context, the most relevant definitions of

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4 Docket No. UM 2273, Memorandum, at 1 Apr. 15, 2024).

5 *Umatilla Cnty. v. Or. DOE* (In re Site Certificate for the Nolin Hills Wind Power Project), 372 Ore. 194, 210 (2024), citing *State v. Gaines*, 346 Ore. 160, 171-172 (2009).

6 ORS 174.010.

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"purpose" are "something set up as an object or end to be attained" and "a subject under discussion or an action in a course of execution."[7] Thus, it is not the case that the sole purpose of a utility investment must be HB 2021 compliance, to the exclusion of all other purposes, for a cost to be considered within the cost cap. Rather, HB 2021 compliance must simply be *a* purpose of the cost incurrence. This test establishes the scope of costs and investments that can be considered toward the cost cap.

Meanwhile, "contribute[s] to compliance" is used four times: once in Section 10(1), once in Section 10(2)(b), once in Section 10(2)(d) and once in Section (3). In each of these sections, the phrase is used within the context of an outcome – answering whether specifically quantified costs either have or are anticipated to contribute to compliance with HB 2021 (versus some other purpose). It cannot be ignored that the Legislature could have, but did not, use the same phrasing when discussing relevant investments and costs.

Accordingly, the Commission should interpret these phrases in a manner that best effectuates both of them together within the framework of HB 2021. This can be accomplished by identifying costs that not only contribute to HB 2021 compliance, but costs that were also incurred (or would be incurred) in favor of lower cost alternatives that either would not have contributed to HB 2021 compliance or would have contributed to a lesser extent. Through this analysis, a cost not only contributes to HB 2021 compliance, but was also incurred to at least some extent for the purpose of HB 2021 compliance. Thus, if a utility enters into a long-term contract for a slice of the output from a legacy hydro resource, the cost of this contract (or a

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[7] *Purpose,* MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/purpose (last visited May 22, 2024).

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portion thereof) would only be considered under the HB 2021 cost cap if the utility either did not need this output for reliability obligations or a lower cost alternative that was not HB 2021 compliant was available to meet those reliability obligations. Under this hypothetical, clearly at least a purpose of this contract is to meet HB 2021 emissions obligations – otherwise the contract would be imprudent. If, conversely, this contract is a least-cost, least-risk means of meeting load, then it would not be considered under the cost cap regardless of the fact that it is non-emitting; the output from this contract was needed independent of HB 2021's requirements.

Importantly, under this interpretation, it is imperative that utilities evaluate all available technologies for meeting reliability requirements so that a cost differential can be established. In its 2023 Integrated Resource Plan ("IRP"), while PGE included information about natural gas resources,[8] it excluded these resources from its portfolio analysis because they did not contribute to HB 2021 compliance.[9] This makes it impossible to compare the cost of actions that are necessary to ensure compliance with HB 2021's emissions mandates against actions that do not achieve such compliance but do meet the utility's reliability obligations. That differential represents the above-market cost of actions that contribute to compliance with HB 2021 and that would determine whether the cost cap is triggered.[10]

Further, costs a utility incurs to meet other legal requirements, but that also contribute to compliance with HB 2021, should be considered under the cost cap to the extent they are higher in cost than alternative available technologies for meeting load. For instance,

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8 Docket No. LC 80, PGE IRP/CEP § 8.1.9.

9 *See id.* Chapter 11.

10 Of course, utilities should only assess resources they can lawfully pursue, which would exclude coal-fired resources and natural gas resources above 25 MW located within Oregon. *See* HB 2021 Section 28; ORS 469.020(8).

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qualifying facility ("QF") purchases, resources acquired to meet the renewable portfolio standard ("RPS"), community-based renewable energy resources, small-scale renewable resources, community solar resources, and net metering all potentially contribute to a utility's ability to meet HB 2021's emissions mandates.[11] Furthermore, each of these separate legal mandates share a common purpose with HB 2021; that is, carbon emissions reduction. Thus, a purpose of the acquisition of these resources is to achieve HB 2021 compliance and the cost of these resources contribute to that compliance. Utilities have separate mandates to acquire these resources – Federal law requires purchasing from QFs and ORS 469A.210 requires that at least ten percent of a utility's aggregate electrical compacity must be comprised of community-based renewable energy projects by 2030 – so a finding that a utility has reached the cost cap in HB 2021 would not necessarily relieve that utility of any obligation it has to acquire these resources under a separate legal requirement. The acquisition of these resources could, however, relieve the utility of the need to procure additional resources not needed to meet these other legal mandates, but that are needed for HB 2021 compliance.

Other interpretations of the phrases "for the purpose of compliance" and "contributes to compliance" either do not reconcile these two phrases or nullify the purpose of the cost cap. If the cost cap were interpreted to apply to actions that were taken *solely* "for the purpose of compliance" with HB 2021, it is likely that very few costs would be included within the cost cap, as virtually every action the utility takes satisfies multiple objectives. A utility may, for instance, acquire a new carbon-free resource to meet HB 2021 compliance while also

[11] Such circumstances were recognized by PGE in its 2023 IRP. ("It could be the case that PGE acquires non emitting generation that helps move towards HB 2021 emissions targets but not RPS obligations.") Docket No. LC 80, PGE IRP/CEP at fn. 299).

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meeting reliability needs and satisfying a portion of its RPS requirements. Such a restrictive interpretation of the cost cap would not effectuate the Legislature's intent to protect customers from excessive costs of complying with HB 2021's carbon reduction mandates.

Conversely, if the cost cap applies to *any* action that "contributes to compliance," then virtually any resource action the utility takes would fall under the cost cap. This creates practical problems, as the utility obviously needs to comply with its reliability obligations, so if the Commission looks at any action that "contributes" to HB 2021 compliance, then the utilities are virtually guaranteed to hit the cap without any indication that HB 2021 compliance was the reason the cap was hit, as opposed to, for example, the need to reliably meet load. This interpretation effectively renders the cost cap meaningless because utilities will have to acquire resources one way or the other.

In sum, the cost cap should be applied in a manner that demonstrates that HB 2021 compliance is driving additional costs beyond what utilities would already incur to meet their other obligations.

b. The inclusion of "forecasted costs" should encompass anticipated actions and costs.

AWEC recommends that Section 10 be interpreted to encompass a utility's anticipated actions and costs, not just forecasted costs of actions already taken. This is for two reasons. First, this interpretation is directly supported by the statutory language that allows the Commission to consider "forecasted costs estimated by the electric company" in determining whether the cost cap has been reached.[12] Second, using forecasted costs avoids a no-win

[12] ORS 469A.445(1).

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situation whereby customers or the utility are financially responsible for investments that exceed the cost cap. In a scenario where Section 10 is based only on costs a utility has already incurred, one of two consequences will result if the utility reaches the cost cap. Either customers will bear any costs above the six percent cost cap, thereby nullifying the customer protection intended by the Legislature, or the utility would bear the cost of exceeding the cost cap, thereby failing to recover the full prudently incurred cost of the resource. Reading "forecasted costs" to include anticipated actions and costs resolves this issue and is therefore reasonable.

The Commission recently recognized the need to evaluate forecasted costs in utilities' IRPs and CEPs, noting the "need" that the IRP/CEP process "deliver more information about rate impacts."[13] According to the Commission, "[w]e must be able to rely on the resource planning process to guide steady continual progress on emissions reductions strategies but also to illuminate tradeoffs that may be required to avoid exacerbating near-term affordability concerns."[14] As such, the Commission set forth an expectation that resource planning "must include greater attention to near-term management of costs and rate pressures."[15]

In this vein, in a subsequent proceeding to finally determine if the cost cap is reached, the Commission could use the cost data assumed by the utilities in their IRPs and CEPs as the data on which the Commission would evaluate whether the HB 2021 cost cap is triggered based on a utility's action plan. The advantage of this approach is that the IRP process provides an opportunity to evaluate and refine cost assumptions and whether an action "contributes to compliance" with HB 2021. The disadvantage is that the IRP/CEP is often dealing with

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13 LC 80 Order No. 24-096, at 22 (Apr. 18, 2024).
14 *Id*.
15 *Id.*

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assumed, not actual, costs; thus, the actual costs a utility would incur to meet its action plan may differ materially from its IRP assumptions.

Alternatively, the Commission could make a preliminary determination on the cost cap as part of its acknowledgment order in an IRP/CEP proceeding, but subject to better information on likely actual costs the utility would incur. For example, if a utility issues a request for proposals ("RFP") as an outcome of its IRP, the cost of resources that contribute to compliance with HB 2021 could be determined based on the final short list of bids the utility receives. This approach has the advantage of greater cost certainty, but there could be timing concerns. Any final determination of whether the utility has reached the HB 2021 cost cap must be done in a separate proceeding.[16] It is unclear how long such a proceeding would take, and RFP bids are time-limited (as may be the utility's resource need).

Most importantly, the Commission should be clear about which forecasted costs it will consider in a HB 2021 cost cap investigation. Without at least a basic understanding of how the Commission will evaluate the costs that contribute to HB 2021 compliance, AWEC cannot be in a position to bring a proceeding to determine if the cost cap has been reached, given the time and resources such a proceeding would require. On this point, AWEC notes that, even if the Commission were inclined to require the utilities to take the risk of a disallowance if they proceed to incur costs knowing that those costs are likely to result in them exceeding the cost cap, HB 2021 has potentially foreclosed this option. ORS 469A.445(5) states that a determination on whether the utilities have reached the cost cap "may not be used as collateral or

[16] ORS 469A.445(1), (6). This proceeding may be brought by the electric company, by the Commission itself, or by an organization that is a party to an intervenor funding agreement.

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presumptive evidence in any other proceeding that determines rate recovery of the investment or cost …." In other words, even if the utility exceeds the cost cap (knowingly or otherwise), that fact cannot alone be used as evidence of imprudence. This further supports AWEC's recommendation above that the Commission evaluate the cost cap based on forecasted costs yet-to-be-incurred by the utility so that customers are protected from excessive costs.

c. There is no interaction between the HB 2021 cost cap and the RPS cost cap.

The Commission asks how the HB 2021 cost cap should be applied to investments and costs required to satisfy the RPS. Simply put, the HB 2021 cost cap should be applied to investments that are determined to contribute to compliance with HB 2021, as described in the response to question (a) above, regardless of whether those costs are associated with investments that also satisfy the RPS.

The RPS is a distinct piece of legislation, with a cost cap that relieves a utility from compliance with that law "to the extent that the incremental cost of compliance, the cost of unbundled renewable energy certificates and the cost of alternative compliance payments … exceeds four percent of the electric utility's annual revenue requirement for the compliance year."[17] Had the Legislature intended HB 2021 to amend application of the RPS cost cap, it would have needed to make this intention explicit through operative statutory language.[18] Because the Legislature did not take this action, there is no direct interaction between the HB 2021 cost cap and the RPS cost cap. Indeed, the Legislature made explicit that the requirements

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17 ORS 469A.100(1).

18 *Patton v. Target Corp.*, 349 Or 230 (2010) (Oregon Supreme Court finding that "there is an unabridged gap between what the legislature is said to have intended and what the words that the legislature chose to use actually do" and that the legislature's method fell short of translating its intent into operational language.).

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of HB 2021 "do not replace or modify the requirements of [the RPS]."[19] Further, the RPS and HB 2021 are intended to serve fundamentally different purposes. The Commission has already recognized that HB 2021 is an emissions-based law whereas the RPS is a requirement to acquire renewable resources.[20] Compliance with the former is based on emissions reporting the utilities provide to the Oregon Department of Environmental Quality; compliance with the latter is based on the retirement of renewable energy certificates. Under AWEC's reading of the cost cap in HB 2021, an RPS-eligible resource could be considered under the HB 2021 cost cap either if the utility does not otherwise need the resource for load service obligations or if the resource is higher cost than alternative resources that are available to meet load service obligations. Thus, a resource cost could be considered under both cost caps, depending on the circumstances. The Commission should not interpret the HB 2021 cost cap in relation to the RPS cost cap.

d. Accurate review of the cost cap as it relates to revenue requirement requires comparison of the capital and power costs of investments to that same year's revenue requirement, without considering past or future years.

The Commission asks whether HB 2021 Section 10 is "clear that the cost cap applies only in individual years, based on the relevant costs experienced in a single year as a percentage of that same year's revenue requirement (i.e. without considering past of future years)"?[21] AWEC's understanding of how the cost cap would be implemented is that all costs that are determined to "contribute to compliance" would be forecasted out "for the time period that the investment or cost would affect rates …."[22] Thus, for example, if a utility acquired a

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19 ORS 469A.460.
20 Docket No. UM 2273, Order No. 24-002.
21 Docket No. UM 2273, Memorandum, at 2 Apr. 15, 2024).
22 ORS 469A.445(3)(a).

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new wind resource and it was determined that all or a portion of the cost of that resource "contributes to compliance" with HB 2021's emissions mandates, then the cost of that resource would be forecasted out for its depreciable life. In addition, the power cost impacts would be forecasted out for the same period, likely using forward prices assumed in the utility's IRP. Tax impacts (e.g., PTC or ITC) would also be included based on how they are reflected in rates. These impacts would then be compared to the utility's revenue requirement. For the sake of comparison, the utility's revenue requirement should also be forecasted out for as long as the costs that contribute to HB 2021 compliance are assumed to impact rates.

However, if the utility is determined to have exceeded the HB 2021 cost cap, AWEC recommends that this determination be revisited with each general rate case, as permitted under ORS 469A.445(3)(b).[23] There are several reasons for this. First, general rate cases affect all of the utility's rates and, therefore, are likely to materially impact its revenue requirement (the denominator in the cost cap calculation). Second, a cost cap determination will be a snapshot in time. In reality, additional actions will occur during the forecast period, most of which are likely to impact rates through a general rate case. Re-evaluating the cost cap in such a proceeding will also allow inclusion of new costs that contribute to HB 2021 compliance and adjustments to costs already included within the cost cap (the numerator in the cost cap calculation). Third, while all things being equal, a resource depreciates on a straight-line basis, the depreciation of a resource is only updated in a general rate case, so customer rates do not reflect straight-line depreciation in the same way that it might be modeled for the HB 2021 cost cap. Thus, to the

[23] "The commission shall use the actual or anticipated rate impact of each investment or cost to calculate the cumulative rate impact and shall…[m]ake any adjustments to the cumulative rate impact if the initial rate treatment was calculated on the basis of forecasted rate impact." ORS 469A.445(3)(b).

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extent depreciation results in a reduction to the costs that contribute to HB 2021 compliance, that will only occur following a general rate case. Finally, revisiting the cost cap in a general rate case should mitigate administrative burden relative to a framework in which the Commission must evaluate the cost cap every year. In other words, if a utility is found to have exceeded the cost cap, it should be presumed to continue to exceed it until demonstrated otherwise in a general rate case proceeding. This should also provide greater predictability for the utility in terms of what actions it is allowed or not allowed to take relative to a framework in which its compliance position could change annually.

III. CONCLUSION

To effectuate the Legislature's intent in drafting HB 2021, it is reasonable to read Section 10 in such a way that ensures customer protection while utilities strive to meet emission reduction mandates, as well as other legal obligations. As such, anticipated costs and actions associated with resources a utility would otherwise not acquire but for HB 2021 compliance – regardless of whether such resources satisfy the RPS or other legal requirements – should be considered when determining the cost cap. Finally, review of HB 2021 compliant resources for purposes of the cost cap determination requires the Commission to compare the capital and power costs of those resources to that same year's revenue requirement, without consideration of

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past or future years. Notwithstanding the positions set forth herein, AWEC is interested in hearing other party's perspectives on the cost cap issues and is open to further discussion.

Dated this 23rd day of May 2024.

Respectfully submitted,

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