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.

PHASE II OPENING BRIEF OF NW ENERGY COALITION & RENEWABLE NORTHWEST

May 23, 2024

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I. INTRODUCTION

NW Energy Coalition and Renewable Northwest appreciate the opportunity to address questions relating to the implementation of the cost cap that applies to Oregon's 100% clean electricity law HB 2021 (2021). This brief responds to the questions presented in the Oregon Public Utility Commission's ("Commission") April 15, 2024 Memorandum.[1]

NW Energy Coalition and Renewable Northwest have been authorized to represent that the following organizations support this brief: Green Energy Institute, Mobilizing Climate Action Together, and Sierra Club.

In this brief, we first overview the Commission's organic statute, Oregon administrative law, and Oregon statutory interpretation law, as this legal background is foundational to the analysis that follows. We then answer each of the Commission's questions as follows:

- The cost cap applies only to costs utilities would not have incurred but for the passage of HB 2021;
- The forecasted costs covered by the cost cap should be only actual costs subject to ratemaking treatment, not speculative planning costs;
- HB 2021's cost cap is wholly separate from the cost cap housed in Oregon's Renewable Portfolio Standard ("RPS"); and
- The cost cap applies in individual years.

Each of these answers is supported by analysis below.

Again, NW Energy Coalition and Renewable Northwest thank the Commission for providing guideposts for HB 2021's cost cap before any issue under the cost cap arises organically, and we look forward to a Commission decision that balances protection of Oregon electricity customers with HB 2021's ambitious and deeply necessary policy of eliminating emissions from the majority of Oregon's electricity sector.

II. LEGAL BACKGROUND

Before addressing each of the Commission's specific questions, this brief will review two overarching legal frameworks that will guide the responses to those questions: the Commission's authority under its organic statute and broader Oregon administrative law, and Oregon's approach to statutory interpretation.[2]

a. The Commission Has Broad Authority To Implement HB 2021

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

[1] Oregon Public Utility Commission, Memorandum, Docket No. UM 2273 (Apr. 15, 2024).
[2] The content of this section substantially repeats material from our Opening Brief in Phase I of this docket but is reorganized to provide context for the arguments that follow.

do all things necessary and convenient in the exercise of such power and jurisdiction."[3] 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."[4] 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."[5]

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."[6] Given the regulatory paradigm that underlies the Commission's organic statute, it makes sense that the Commission's powers are broad – indeed, "sweeping."

Oregon administrative law affirms the broad discretion that the Commission has to implement Oregon's greenhouse gas ("GHG")-reduction policy -- including the cost cap -- 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."[7] 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.[8]

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 and discretion for refining and executing generally expressed legislative policy."[9] Therefore an agency's role in implementing a delegative statute is to "refin[e] and execut[e] generally expressed legislative policy."[10] HB 2021 is generally couched in delegative terms, so while the Commission must bear in mind the law's overall policy, its authority in implementing the law is

[3] ORS 756.050(2).
[4] *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)).
[5] *Gearhart v. Public Utility Commission of Oregon*, 356 Or 216, 339 P.3d 904, 921 (2014).
[6] *Id.* at 907.
[7] *Gordon v. Bd. of Parole*, 343 Or 618, 175 P.3d 461, 469 (2007).
[8] *Matter of Compensation of Arvidson*, 366 Or 693, 467 P.3d 741, 746 (2020).
[9] *Id.* (quoting *Springfield Ed. Ass'n v. School District*, 290 Or 217, 223-24, 621 P.2d 547 (1980), internal quotation marks omitted).
[10] *Springfield Ed. Ass'n*, 621 P.2d at 555.

at its peak, and its interpretation of these phrases will be entitled to deference by reviewing courts.

b. Oregon Statutory Interpretation Law Supports Reading the Cost Cap in Light of HB 2021's Policy and Purpose

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."[11] The underlying goal of this test is to "pursue the intention of the legislature if possible."[12] In seeking to give effect to the intention of the legislature, courts have regularly rejected statutory interpretations that would "frustrate the purpose" of the statute being interpreted.[13]

When a statute includes policy statements, the language of those policy statements is considered part of the "context" used to interpret the statute's operative provisions under the first prong of the *Gaines* approach.[14] This framework establishes a natural relationship between a statute's express policy and its operative provisions. Indeed, 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.'"[15]

Overall, therefore, in deciding how to implement HB 2021's cost cap, the Commission should use its broad authority and discretion to effectuate the intent and purpose underlying the legislature's enactment of HB 2021.

III. ARGUMENT

a. HB 2021's Cost Cap Applies Only to Actions Undertaken Specifically To Comply with the Law's Substantive Requirements

The cost cap reflected in Section 10 of HB 2021 includes a patent ambiguity: the cost cap is to be based on an "accounting for investments made, costs incurred or forecasted costs estimated by the electric company *for the purpose of compliance* with [HB 2021]," but thereafter discusses investments or costs that "*contribute to compliance*."[16] In seeking to reconcile these terms and reflect the legislature's intent, the best interpretation of the text and context of HB 2021 is that

[11] *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.
[12] ORS 174.020(1).
[13] *See*, *e.g.*, *State v. Kyger*, 506 P. 3d 376, 385 (Or. 2022); *State v. Rainoldi*, 268 P.3d 568, 573 (Or. 2011) (discussing *State v. Rutley*, 343 Or. 368, 375, 171 P.3d 361 (2007)); *Gaines*, 206 P.3d at 1052 n.15.
[14] *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 435 P.3d 698, 707 (2019) ("Context includes related statutory policy provisions.").
[15] *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).
[16] *Compare* HB 2021 §§ 10(1) & 10(2)(b), codified at ORS 469A.445(1) & 445(2)(b).

the cost cap applies only to investments or costs that would not have been incurred but for the substantive requirements of HB 2021; this interpretation is further bolstered by legislative history and broader maxims of statutory construction.

i. Text and Context

Section 10 provides an "offramp" framework for utilities incurring excessive costs pursuant to HB 2021 compliance but provides little guidance in determining to which investments the cost cap should apply. However, examining its provisions in light of the entire statute suggests that the state legislature intended to capture only those actions that the utility would not have taken except to meet the requirements of HB 2021 (i.e., the difference in cost between a utility's least-cost economic plan and a utility's fully compliant plan).

Sections 1 through 3 provide the Act's objectives: "eliminat[ing] greenhouse gas emissions associated with serving Oregon retail electricity consumers" and advancing clean energy solutions in accordance with strong clean energy targets.[17] Sections 4 through 6 provide specific operational provisions, including establishing clean energy targets, developing clean energy plans as a means to achieve those targets, and requiring continual progress with the Act's objectives. HB 2021 is imbued with a strong emphasis on environmental justice concerns, as highlighted in Sections 1(2)–(5), 2(3)–(4), and 6, underscoring the importance of minimizing burdens on affected communities when preparing for the clean energy transition. The purpose of the statute is to effectuate a just clean energy transition building upon but going beyond traditional economic regulation. A broad reading of the phrase "contribute to compliance" would run the risk of applying the cost cap to investments utilities would have undertaken on an economic basis even absent the passage of HB 2021, to then avoid compliance with the rest of Sections 1-9. This would undermine the purpose of the Act, negating the clean energy targets and rendering the clean energy plan and continual progress sections redundant.

While NW Energy Coalition and Renewable Northwest's recommended construction of the cost cap language could be interpreted as conflating costs undertaken "for the purpose of compliance" and costs that "contribute to compliance," one specific scenario may help to explain why the legislature used two different terms. Consider a renewable resource that straddles two policies, perhaps generating the last renewable energy certificates necessary for a purchasing utility to comply with the RPS but also providing additional zero-emissions energy to support the utility's compliance with HB 2021. The resource as a whole could not fairly be said to be an investment undertaken "for the purpose of compliance" with HB 2021 (because it is necessary for RPS compliance), but neither would the resource as a whole necessarily have been purchased but for the requirements of HB 2021. In this case, rather than devolving into a hair-splitting exercise about whether the share of the costs attributable to the portion of that resource that is surplus to the utility's RPS obligation were taken on "for the purpose of compliance" with HB 2021, the cost cap could be applied to that same share of resource costs, which unquestionably "contribute to compliance." Under this test, however, the cost cap would *not* apply to that portion of the resource costs undertaken to bring the utility into compliance with Oregon's RPS.

[17] HB 2021 § 2(1)-(2), codified at ORS 469A.405(1)-(2).

In light of the legislature's stated objectives, the Commission's interpretation of Section 10 should align with the goal of effectuating a just clean energy transition through the deployment of clean energy and demand-side resources. A narrow interpretation of "contributes to compliance" is the only interpretation consistent with the legislative intent that is reflected throughout the text and context of HB 2021 – a broader reading permitting existing costs and investments to contribute to compliance would run directly contrary to the Act's objectives of prioritizing clean energy and demand-side resource deployment and reducing GHG emissions.

ii. Legislative history

HB 2021's legislative history, particularly as it pertains to Section 10, is illuminating. The bill was first introduced in March 2021 after extensive negotiation involving a diverse array of stakeholders.[18] In April 2021, the -5 amendments revised Section 10 to its current language in response to concerns by energy advocates, consumer owned utilities, and environmental justice groups.[19] The -5s made a number of revisions to Section 10, most notably: 1) changed the covered entities from "retail electric providers" to "electric companies" and 2) modified the cost cap language from an inquiry into whether investments and costs "are related to compliance with … this 2021 Act, to include investments or costs associated with[PURPA facilities, energy efficiency, demand response, etc.]" to new language considering whether such costs "contribute to compliance" with the Act.[20]

The adoption of the -5's revised Section 10 shows the legislature's deliberate shift towards a less stringent cost cap (and, therefore, a more stringent approach to overall compliance). By replacing the broad inquiry into whether investments and costs are "related to compliance with ... this 2021 Act" with a more precise assessment of whether they "contribute to compliance with the Act," the legislature signaled its intent to establish a narrower cost-cap scope, suggesting that only investments and costs directly contributing to fulfilling the mandates of HB 2021 can be counted when calculating yearly compliance costs. In other words, while the phrase "contributes to compliance" may seem broad in comparison to "for the purpose of compliance," the transition from "related to compliance" to "contributes to compliance" demonstrates an effort to *narrow* the application of the cost cap. Such specificity in rewording Section 10 demonstrates the legislature's heightened focus on ensuring that expenditures align closely with the objectives and provisions outlined in the legislation, and the Commission's interpretation must effectuate that purpose.

Additionally, a look into public comment and testimony throughout the legislative process provides another layer of legislative history supporting a narrow read of the cost cap. Before the March 22, 2021, meeting of the House Committee On Energy and Environment, OSSIA provided testimony expressing concern with the -1 amendment (which used the "related to compliance" language), stating that the cost cap language "inappropriately" included programs

[18] HB 2021 as introduced was a study bill with no substantive content. The first true iteration of the concept that garnered discussion and provided the framework for the bill that ultimately passed was the -1 amendment available at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/ProposedAmendment/18839.
[19] HB 2021-5 amendment is available at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/ProposedAmendment/19946.
[20] *Compare* HB 2021-1, Section 9, *supra* n18 with HB 2021-5, Section 10, *supra* n19.

"that are not related to the cost of complying with an emissions reduction standard. For example, net metered solar on homes and businesses would not be part of the utilities' plan for emissions reduction, so it should not be included in the cost cap."[21]

The -5 amendments directly addressed these concerns, striking the language that included distributed generation, qualifying facilities, and accelerated depreciation of fossil fuel resources in the cost cap calculation. The -5s received broad support from utilities and energy advocates, with legislative hearings held April 5, 2021, and April 7, 2021. During the first hearing, PacifiCorp's then-Senior Vice President of Transmission Development Scott Bolton testified in support of the amended language, explaining how it would increase "renewable energy investment" by building upon the utility's existing integrated resource plan ("IRP"), stating that "frankly, a 100% clean energy standard will absolutely require even more renewable investment than what our current resource planning shows today, where we're not solving for that policy outcome, so there will continue to be considerable investment all across the footprint of the states and communities my company serves."[22]

Additionally, Portland General Electric's then-Vice President of Public Affairs Dave Robertson, when asked how the revised language would help PGE meet a 100% clean energy mandate, testified that the amendment "helps drive project development in Oregon" and holds utilities accountable to HB 2021 timelines by allowing them to dovetail their procurement objectives into the PUC existing IRP processes.

Such testimony from the utilities and their representatives illustrates an understanding shared broadly by advocates and stakeholders at the time of HB 2021's adoption: that the amendments would drive increased renewable energy investment and project development in Oregon. This interpretation suggests that the amendments were intended to bolster procurement efforts rather than count existing investments towards compliance, supporting a narrower reading of the language: that an investment "contributes to compliance" only if it would not have been undertaken but for HB 2021's policy mandates.

iii. Maxims of Statutory Interpretation

ORS 174.020(2) explains that where legislation contains two inconsistent provisions, the more specific provision controls.[23] In other words, "when one statute deals with a subject in general terms and another deals with the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, while giving effect to a consistent legislative policy."[24] The doctrine, called the "particular controls the general" maxim, is grounded in the idea that specific provisions are more closely tailored to addressing a contested issue, and therefore merit greater credibility. Because ORS 174.020 is a statute that applies independent of

[21] OSSIA March 17, 2021 Testimony, filed by Angela Crowley-Koch, available at thttps://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/19390.
[22] House Committee On Energy and Environment 04/05/2021 at 26:45, available at https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=202104107.
[23] ORS 174.020(2).
[24] *State v. Guzek*, 322 Ore. 245, 268, 906 P2d 272 (1995).

the *Gaines* framework, it likely accords higher priority than other maxims under the third prong of *Gaines*, but because it is a maxim it is addressed here.[25]

In interpreting Section 10's cost cap provision, "for the purpose of compliance with" and "contributes to compliance" can be harmonized only by adopting a narrow reading of the phrase "contributes to compliance." In other words, expenditures made in accordance with the statute invariably aid in complying with HB 2021, yet not all investments contributing to HB 2021 compliance are made exclusively to achieve the statute's objectives. The "particular controls the general" maxim favors an interpretation of Section 10 that considers only investments and costs that a utility would not have incurred but for Oregon's adoption of HB 2021.

Additionally, a broad interpretation of "contributes to compliance" would frustrate the entire purpose of the statute and lead to an absurd result. Under a broad interpretation whereby any investment that results in GHG reductions "contributes to compliance," a utility could invest significantly less than what is economic and still trigger an exemption from compliance under the cost cap, frustrating the purpose of the statute without actually controlling costs for customers.[26] In addition to the *State v. Gaines* framework, the Oregon Supreme Court adheres to what it calls the "absurd result maxim," the notion that, when a court must decide between multiple plausible meanings intended by the legislature, it will reject any interpretation leading to an absurd outcome conflicting with the legislation's overall policy.[27] In the case of Section 10's cost cap, allowing any cost or investment that "contributes to compliance" in the form of reducing utility GHG emissions to count towards the cost cap would produce an array of absurd results that fly in the face of HB 2021's decarbonization goals.

For the foregoing reasons, NW Energy Coalition and Renewable Northwest respectfully request that the Commission determine that the cost cap applies only to investments or costs that would not have been incurred but for the substantive requirements of HB 2021.

b. The Use of Forecasted Costs in Calculating HB 2021's Cost Cap Should Be Narrowly Applied

HB 2021's cost cap applies to not only actual incurred costs, but also "forecasted costs estimated by the electric company for the purpose of compliance."[28] Considering the text and context of the statute -- including the context that HB 2021 was developed to build on and complement the existing planning and procurement process -- this provision is best understood as applying only to identifiable costs associated with utility investments capable of being recovered in rates via a general rate case or the application of Oregon's renewable automatic adjustment clause, not hypothetical costs projected earlier in the planning and procurement process.

[25] *See*, *e.g.*, *Powers v. Quigley*, 198 P.3d 919, 923 (Or. 2008) (applying ORS 174.020(2) without addressing the *Gaines* framework).
[26] Recall that statutory interpretations that frustrate a statute's purpose are invalid. *See Kyger*, 506 P. 3d at 385; *Rainoldi*, 268 P.3d at 573; *Rutley*, 171 P.3d 361; *Gaines*, 206 P.3d at 1052 n.15.
[27] *State v. Vasquez-Rubio*, 917 P.2d 494, 497, 323 Ore. 275 (1996).
[28] HB 2021 § 10(1), codified at ORS 469A.445(1).

Given its broad powers, the Commission has discretion to interpret the range of forecasted costs that could or should be factored into an accounting for purposes of determining application of the cost cap. HB 2021 does not speak directly to the meaning of the phrase "forecasted costs." This phrase appears precisely twice in the statute: first, in Section 10(1), quoted above; and second, in Section 10(4)(b), which requires that any exemption issued pursuant to the cost cap be limited in time until actual and forecasted costs can bring the utility into compliance without exceeding the cap. Section 10 also uses the word "forecasted" in one other instance, directing the Commission to adjust the rate impact as determined in a cost-cap proceeding according to the delta between forecasted costs and actually incurred costs (given that a cost cap proceeding will likely take several months).

Since the text itself neither limits the term "forecasted costs" nor uses expansive language such as "*all* forecasted costs," it is for the Commission to use other signposts to exercise its discretion and define the term.

Under *Gaines*, the first of those signposts is "context", which -- under *Stop the Dump* -- includes policy statements.[29] The primary policy objective of HB 2021, as set forth by the legislature, is "[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."[30] Reviewing the cost cap language in light of this policy objective, the best read is that "forecasted costs" should be construed narrowly.

A narrow read of the phrase "forecasted" costs is justified by additional context in HB 2021. The law's primary operational tool -- the clean energy plan -- was explicitly built upon the existing IRP process. Section 4(3) provides that a clean energy plan must be "based on," "included in," "developed within," or "incorporated into" an IRP. IRPs have long been recognized as just that -- plans -- and not indications of actual costs likely to be incurred by the company undertaking the implementation of its plan. Commission acknowledgement of a plan is not preapproval for recovery of costs undertaken in conformance with the plan, but only evidence that can be used to support a prudence determination in a future rate case.[31]

This divide between hypothetical costs and actual costs is well established in the Oregon regulatory construct -- and is baked into Commission review of IRPs, which themselves are baked into HB 2021. Take Order 07-002, for example, which established the IRP guidelines currently in effect (but for one partial waiver):

> As we stated in Order No. 89-507 and reiterate here, the Commission does not make ratemaking decisions in the IRP process. Acknowledgment of the company's plan means only that we consider it reasonable at the time of our decision.[32]

[29] *See Gaines*, *supra* n.11; *Stop the Dump*, *supra* n.14.
[30] HB 2021, Section 2(1), codified at 469A.405(1).
[31] Order No. 07-002 at 24 (Jan. 8, 2007).
[32] Order No. 07-002 at 16 (Jan. 8, 2007).

Not only do IRPs bear no direct relationship to customer rates, but they are also based on broadly characterized needs to be met by proxy resources, which themselves may bear little relationship to the resources actually procured by a utility. As the Commission determined in its order conditionally acknowledging Portland General Electric's 2019 IRP:

> PGE's action plan continues a trend of technology-neutral procurement actions oriented to the utility's needs and the key elements of the preferred portfolio, rather than actions to procure the specific resource types in amounts set forth in the preferred portfolio. We continue to approve of this approach, given that we must be open to the opportunity for today's dynamic technology development and pricing to improve customer outcomes by securing lower cost results from RFP portfolios that diverge from the modeled technologies in the IRP preferred portfolio. Although we recognize that this approach challenges our traditional understanding of the sequential nature of the IRP and RFP, encouraging the processes to become iterative and overlapping, the IRP continues to provide a robust opportunity to test the general direction of the portfolio and to refine which components of the analysis are most significant and therefore most important to watch in the RFP and succeeding cost recovery proceedings.[33]

The Commission's observations in this 2020 order bear new importance in an era where utilities subject to HB 2021 are assessing in their IRPs speculative future resources such as small modular reactors, non-emitting peakers, and even a hypothetical perfect capacity resource that is designed to send a planning rather than procurement signal.[34] Applying the cost cap to resources that bear such a limited relationship to actual procurement decisions would run the risk of undermining the policy of HB 2021 and frustrating the statute's purpose.

This conclusion makes sense given the common use of forecasted costs in Oregon's rate recovery paradigm. In a standard general rate case, Oregon uses an embedded cost approach, meaning that utilities and regulators begin with historical costs and then *forecast* those costs into a future test year. A utility's actual costs may then fluctuate, but what the utility actually recovers in rates are those costs that were forecasted based on a historical test year and then carried forward to a future test year. This approach applies to both programmatic and resource costs -- in each case, historical costs associated with the program or resource are forecasted into a future test year to be recovered in rates. Notably, speculative costs such as proxy resources identified to an IRP preferred portfolio and even shortlisted resources in an RFP are not forecasted into customer rates -- only actual, identifiable costs.

For the foregoing reasons, NW Energy Coalition and Renewable Northwest suggest that the Commission determine that the term "forecasted costs" should include only costs capable of being forecasted into rates via a general rate case or Oregon's renewable automatic adjustment clause.

[33] Order No. 20-152 at 25 (May 6, 2020).
[34] *See*, *e.g.*, PacifiCorp 2023 IRP at 10 (nuclear and non-emitting peakers); Portland General Electric 2023 IRP & Clean Energy Plan at 255 (perfect capacity).

c. HB 2021's Cost Cap and Oregon's Renewable Portfolio Standard Cost Cap Are Not Intended To Interact

The starting point for assessing whether, and if so how, the HB 2021 cost cap and Oregon's RPS cost cap interact is actually not Section 10 of HB 2021, but rather Section 13. Section 13, titled "No modification to Renewable Portfolio Standards," provides: "The requirements of sections 1 to 15 of this 2021 Act do not replace or modify the requirements of ORS 469A.005 to 469A.210." That section reflects a straightforward policy that applies to all of HB 2021's operative provisions, including the cost cap: HB 2021 and the RPS do not interact.

This policy makes sense for a couple of key reasons. First, the mechanism for determining application of the RPS cost cap involves determining the incremental cost of compliance, calculated by determining "the difference between the levelized annual delivered cost of the qualifying electricity and the levelized annual delivered cost of an equivalent amount of reasonably available electricity that is not qualifying electricity."[35] Commission rules provide additional detail as to how to determine the incremental cost: "The incremental cost under ORS 469A.100(4) for long-term qualifying electricity is the difference between the levelized annual cost of qualifying electricity delivered in a compliance year and the levelized annual cost of an equivalent amount of electricity delivered from the corresponding proxy plant."[36] The rules go on to discuss the proxy plant concept in more detail.[37] The HB 2021 cost cap, by contrast, involves a broader investigation into costs undertaken to comply with the statute's GHG-reduction and equity goals and mandates, as discussed above. One cannot compare this suite of costs against a proxy plant. All of this is to say that, while there remain open questions about how the HB 2021 cost cap will be calculated, there is no question that the methodology will be distinct from that employed under the RPS cost cap.

Second, applying the HB 2021 cost cap to resources procured in order to comply with Oregon's pre-existing RPS could have absurd results. Because the methodologies are so distinct -- in particular given the breadth of HB 2021's policy requirements as compared to the RPS -- it is entirely possible that a utility could reach HB 2021's 6% threshold without either achieving the RPS's clean-energy requirement or reaching its 4% cost threshold, in which case it would be stuck between a rock and a hard place. In such a position, the utility could be required either to violate the RPS or to sacrifice some of the core requirements of HB 2021. HB 2021 Section 13 suggests that this result would not be consistent with the legislature's intent.

Finally, the simple "but for" test proposed above for HB 2021's cost cap *is* consistent with HB 2021 Section 13 and avoids potential tensions between the two policies. If the cost cap only applies to costs that would not have been incurred but for the passage of HB 2021, then by definition it cannot apply to costs undertaken to achieve a utility's RPS obligations (given that the RPS pre-dates HB 2021). This is the most sensible result under the suite of legislative language and policy considerations before the Commission in this proceeding.

[35] ORS 469A.100(4).
[36] OAR 860-083-0100(1)(c).
[37] OAR 860-083-0100(6) *et seq*.

For the foregoing reasons, NW Energy Coalition and Renewable Northwest recommend that the Commission determine that the RPS and HB 2021 cost caps do not interact -- in other words, RPS costs are RPS costs subject to the RPS cost cap, but are not HB 2021 costs subject to the HB 2021 cost cap.

d. HB 2021 Is Clear that the Cost Cap Applies Only in Individual Years

The Commission's Memorandum asks whether the statute, which authorizes a pause in utility compliance if a utility's "actual or anticipated cumulative rate impact … exceeds six percent of revenue requirement for a year" is clear in providing that the cost cap applies only in individual years.[38] NW Energy Coalition and Renewable Northwest can come up with no other viable construction of the quoted language from HB 2021 and therefore answer yes: the statute is clear that the cost cap applies only in individual years. We reserve the right to respond to other parties' briefs on this point should any party identify an alternative construction.

IV. CONCLUSION

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

- That the HB 2021 cost cap applies only to costs that would not have been undertaken but for the requirements of HB 2021;
- That "forecasted costs" subject to the HB 2021 cost cap should include only actual and not speculative costs;
- That the RPS cost cap and HB 2021 cost cap are completely separate; and
- That the HB 2021 cost cap applies only in individual years.

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 23rd day of May, 2024,

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[38] Memorandum at 2 (quoting HB 2021 Section 10(4), codified at ORS 469A.445(4)).