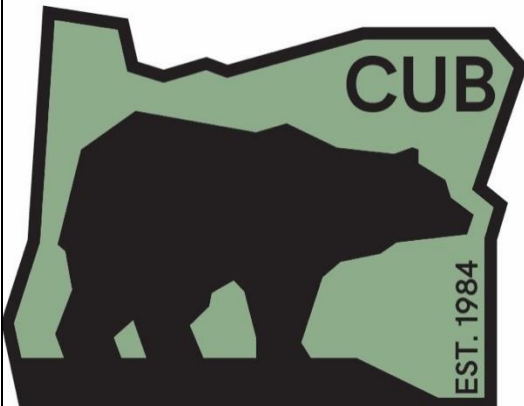


**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON  
UM 2273**

In the Matter of )  
)  
PUBLIC UTILITY COMMISSION OF )  
OREGON, )  
)  
Investigation Into House Bill 2021 )  
Implementation Issues. )  
\_\_\_\_\_ )

**PHASE II OPENING BRIEF  
OF THE  
OREGON CITIZENS' UTILITY BOARD**

May 23, 2024



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**I. INTRODUCTION**

Pursuant to Administrative Law Judge Mellgren’s *Memorandum* issued on April 15, 2024, the Oregon Citizens’ Utility Board (CUB) submits its *Phase II Opening Brief* in this docket addressing questions related to Section 10 of the 2021 Oregon Legislative Session’s House Bill 2021 (HB 2021),<sup>1</sup> i.e. the cost cap provisions.<sup>2</sup> Drawing upon the Commission’s directive in Order No. 24-002, Judge Mellgren listed four questions to be considered by parties’ in briefing, and also provided the opportunities for parties to modify or offer additional briefing related to the cost cap provisions in Section 10 of HB 2021.<sup>3</sup> To summarize, ALJ Mellgren asked:

1. Did the Legislature intend 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?
2. Does “forecasted costs estimated by the electric company” mean estimated future costs associated with an action the utility has already taken? Or should section 10 be interpreted also to encompass anticipated actions and their anticipated costs (i.e., actions acknowledged in an IRP, CEP, or RFP but not yet taken) and, if so, how much certainty should be required to recognize a cost under Section 10?

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<sup>1</sup> [House Bill 2021](#) (2021) (effective Sept. 25, 2021) (codified as ORS 469A.400 to 469A.475).

<sup>2</sup> UM 2273 – [Memorandum](#) (Apr. 14, 2024).

<sup>3</sup> *Id.*

3. How should the HB 2021 cost cap be applied to investments and costs required to satisfy the RPS?
4. Is HB 2021 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 or future years)?

CUB argues that the only costs and investments that can be considered for inclusion in the HB 2021 cost cap are those that would not have otherwise been incurred or forecasted but for HB 2021's directives. Accordingly, any costs or investments for RPS compliance should not be considered for inclusion in the HB 2021 cost cap. CUB also maintains that forecasted costs are meant to be considered as estimated future costs a cost cap investigation. And finally, CUB believes a determination of the cumulative rate impact for the purposes of the HB 2021 cost cap is based upon the new costs associated with that single year.

## **II. BACKGROUND**

In 2021, the Oregon Legislature passed HB 2021, Oregon's 100% emissions-free electricity law. HB 2021 directs Oregon's large investor-owned electric utilities (IOUs) to develop clean energy plans (CEPs) to meet the state's clean energy targets established by this law, currently meaning Portland General Electric (PGE) and Pacific Power (PacifiCorp or PAC).<sup>4</sup> Each CEP is based on or included in the IOU's integrated resource plan (IRP) filing made no earlier than January 1, 2022.<sup>5</sup> A multi-state utility like PacifiCorp must base its plans on or develop them consistent with a cost allocation methodology approved by the Oregon Public Utility Commission (PUC or Commission).<sup>6</sup> CEP actions and investments may include:

- development or acquisition of clean energy resources,
- acquisition of energy efficiency and demand response,

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<sup>4</sup> See Section 17, HB 2021: Oregon's other IOU, Idaho Power Company, is exempted from HB 2021 emissions-reductions' requirements due to its smaller size.

<sup>5</sup> HB 2021, Sec. 4(3)(a).

<sup>6</sup> HB 2021, Sec. 4(3)(b).

- developing new transmission and other infrastructure,
- retiring existing generating facilities,
- changes in system operation, and
- “any other necessary action.”<sup>7</sup>

GHG emissions associated with customer net metering or qualifying facilities are excluded from IOU’s total GHG emissions’ calculations.<sup>8</sup> HB 2021 also created a “reliability pause” to provide IOUs a temporary exemption from meeting the state’s emissions’ reduction goals under certain circumstances, but the utility may not be permanently exempted of its obligations under HB 2021.<sup>9</sup> Finally, HB 2021 also creates a process for the PUC to provide a temporary exemption in the event a cost threshold has been reached.<sup>10</sup>

Oregon law provides that either PGE or PacifiCorp, a customer advocacy organization, or the Commission may open an investigation directing the utility to provide an accounting of investments made, costs incurred or forecasted costs estimated by the electric IOU for the purpose of compliance with HB 2021.<sup>11</sup> Section 10 of HB 2021, codified as ORS 449A.445, sets an upper limit on how much a utility may spend to meet emissions’ reductions goals of HB 2021:

An electric company or an organization that represents broad customer interests and that has a written agreement with an electric company pursuant to ORS 757.072 may request that the Public Utility Commission open an investigation to provide accounting for investments made, costs incurred or forecasted costs estimated by the electric company for the **purpose of compliance** with sections 1 to 15 of this 2021 Act. In making a request under this section, the petitioner shall provide information regarding the investments or costs sufficient to determine whether the investments or costs **contribute to compliance** with sections 1 to 15 of this 2021 Act.<sup>12</sup>

If the Commission determines an investment or cost of an electric company contributes to compliance with HB 2021, the Commission is directed to determine the actual or anticipated rate

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<sup>7</sup> HB 2021, Sec. 4(5) (Including as required by [ORS 757.054](#)).

<sup>8</sup> HB 2021, Sec. 8(2).

<sup>9</sup> HB 2021, Sec. 8.

<sup>10</sup> ORS 469A.410; *see also* UM 2273 – [Order No. 23-059](#), Appx. A at 2 (Feb. 23, 2023).

<sup>11</sup> HB 2021, Sec. 10.

<sup>12</sup> HB 2021, Sec. 10(1) (emphasis added).

impact “on the same basis and with the same treatment for similarly situated investments or costs in the most recently approved general rate case or other relevant rate making proceeding” and then must:

- (a) Cumulatively calculate the rate impact caused by all investments or costs that have been the subject of a proceeding pursuant to this section, and must be included in calculation for the time period that the investment or cost would affect rates, as adjusted by any change in net costs expected or foreseeable at the time of inclusion;
- (b) Make any adjustments to the cumulative rate impact if the initial rate treatment was calculated on the basis of forecasted rate impact;
- (c) Allow parties to the proceeding to propose alternative rate or accounting treatment of the investment or cost to limit the potential rate impact of the investment or cost; and
- (d) Utilize cost allocation methodologies for attributing rate impacts of investments or costs for multistate electric companies.<sup>13</sup>

If the Commission determines the actual or cumulative rate impact exceeds six percent of the annual revenue requirement for one year, the utility will be given a narrowly tailored exemption to HB 2021’s requirements for a limited amount of time.<sup>14</sup> Finally, this determination is a one-time issue with no effect on or consideration in any other proceeding.<sup>15</sup> Participants in UM 2273 have raised questions about the Commission’s interpretations of the cost cap provisions of HB 2021. Both PGE and PacifiCorp disagree with the Commission’s assertion that a cost cap investigation expressed that the cost cap is “the most pressing area of uncertainty,”<sup>16</sup> and asked for Commission guidance on how it will determine whether specific investments contribute to compliance; how to calculate the rate impacts of “similarly situated investments”; and how the RPS and HB 2021 cost caps align.<sup>17</sup>

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<sup>13</sup> HB 2021, Sec. 10(3).

<sup>14</sup> HB 2021, Sec. 10(4).

<sup>15</sup> HB 2021, Sec. 5.

<sup>16</sup> UM 2273 – [Joint Utilities Phase I Opening Brief](#), 15 (July 24, 2023).

<sup>17</sup> *Id.* at 15-17.

PacifiCorp indicated it seeks early determinations on cost caps, expressing concern that “compliance with HB 2021’s 2035 and 2040 goals will both require significant investments and could threaten reliability to Oregon customers and potentially the broader system if new generation resource technologies are not developed.” According to PacifiCorp, guidance on cost cap and reliability issues should be prioritized to provide “an increased understanding of the system reliability issues that will drive up costs without proper planning,” and “[r]ecognizing the risk and establishing procedures to conduct the analyses identified in ORS §§ 469A.440 and 469A.445 would help avoid ad hoc analysis only after a utility identifies affordability or reliability risks.”<sup>18</sup>

PGE noted that “the cost cap creates a novel process, significantly different than the RPS cost cap”, especially given a party could ask for a cost cap investigation “at any time” and recommended a rulemaking on this issue “to avoid ad hoc determinations that might otherwise result from implementation of the cost cap.”<sup>19</sup>

Renewable Northwest and the NW Energy Coalition stated that HB 2021 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[s] to compliance.”<sup>20</sup> Both are concerned that electric IOUs “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.” They seek clarification from the Commission “that the costs that trigger HB 2021’s cost cap are those undertaken ‘for the purpose of compliance.’”<sup>21</sup>

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<sup>18</sup> UM 2273 - PacifiCorp Response Comments at 3 (Apr. 21, 2023).

<sup>19</sup> UM 2273 – [Reply Comments of PGE at 3](#) (Apr. 21, 2023).

<sup>20</sup> UM 2273 - [NW Energy Coalition's and Renewable Northwest's Opening Brief](#), 15 (July 24, 2023).

<sup>21</sup> *Id.*

NewSun, LLC asks the Commission to “offer clear guidance based on anticipated scenarios” of what investments are subject to the cost cap in order to “efficiently guide utilities in their resource planning efforts over the coming years,” and recommends guiding principles for the Commission’s consideration.<sup>22</sup>

#### Legislative History: HB 2021 (2021)

HB 2021’s legislative history provides helpful context for understanding the intent of the law. HB 2021 was introduced by Representative Pam Marsh, District in the 2021 House Committee on Energy and Environment.<sup>23</sup> Particular to the “cost cap” language, the -1 Amendment to 2021’s HB 2021 detailed what costs or investments could be considered for the “purpose of compliance” with Oregon’s clean energy goals and that the petitioner would provide information to determine whether the investment or costs were “related to compliance” with HB 2021.<sup>24</sup> Four days later, on March 22, a -4 Amendment was introduced, which incidentally removed the list of proposed costs and investments that could be considered for the cost cap determination. and inserted language that the Commission “shall determine by rule which investments or costs may be included in the request.”<sup>25</sup>

The House Committee on Energy and Environment directed the PUC to provide an estimate of the timeline for implementing HB 2021-1.<sup>26</sup> The PUC followed up stating that if an accounting was requested, the PUC expected it would have to open a contested case proceeding to examine 1) if an investment is related to HB 2021-1, and 2) whether the cumulative rate

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<sup>22</sup> [UM 2273 – NewSun LLC’s Phase I Opening Brief](#), 15 (July 24, 2023).

<sup>23</sup> [HB 2021 as introduced](#) (first reading on the House floor on March 2, 2021 and first [Public Hearing held before the House Committee on Energy and Environment on](#) March 22, 2021).

<sup>24</sup> [HB 2021, -1 Amendment](#), Sec. 9 (Mar. 18, 2021).

<sup>25</sup> [HB 2021, -4 Amendment](#), Sec. 9 (Mar. 22, 2021).

<sup>26</sup> Oregon Public Utility Commission, [Comments to the House Committee on Energy and Environment: HB 2021-1 Implementation](#), 1 (Mar. 26, 2021) (The PUC stated the Committee request was prompted by written testimony submitted by [Brittany Andrus of AndrusPDX Consulting](#) regarding the implementation timeline of HB 2021).



impact of HB 2021-1 investments exceed a cost cap.<sup>27</sup> Further, that the PUC “may need to examine whether rules are required to govern the identification of investments that are related to implementing the Clean Energy Plan and the calculation of rate impacts associated with those investments.”<sup>28</sup> The same day, a -4 Amendment was introduced, which incidentally removed the list of proposed costs and investments that could be considered for the cost cap determination, and inserted language that the Commission “shall determine by rule which investments or costs may be included in the request.”<sup>29</sup> Two weeks later at the second hearing on HB 2021, the rulemaking language was removed in a -5 Amendment, and the language “related to compliance” was changed to “contribute to compliance.”<sup>30</sup>

The -5 Amendment was robustly supported by Pacific Power and Portland General Electric.<sup>31</sup> Notably, in response to a question from Representative Mark Owens in response to his comment that HB 2021 reflects strong policies to meet a 100% emissions-reduction goal, Dave Robertson from PGE stated a critical benefit of this bill was that it could dovetail into existing planning processes at the PUC, particularly its Integrated Resource Planning and competitive bidding processes, and that Oregon cannot afford multi-year rulemakings to implement a law like this given the short timeline to meet HB 2021’s goals.<sup>32</sup> Representative Ken Helm acknowledged

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<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.*

<sup>29</sup> [HB 2021, -4 Amendment](#), Sec. 9 (Mar. 22, 2021).

<sup>30</sup> [HB 2021, -5 Amendment](#), Sec. 10 (Apr. 6, 2021).

<sup>31</sup> Pacific Power, [House Bill 2021 -5 amendment – Letter of Support](#) (Apr. 6, 2021) (“HB 2021-5 is a Clean Energy Standard that will ensure the steady reduction of Oregon’s electricity-sector greenhouse gas emissions. This is a clear strategy that ensures all the decarbonization tools available to us are used in the most effective way to achieve our targets at the least-cost possible.”); Testimony of Scott Bolton, Pacific Power, HB 2021: House Committee on Energy and Environment, 81<sup>st</sup> Or. Leg. Assembly (2021), 00:12:22, available at <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2021041076>; Portland General Electric, [Support for HB 2021 with the -5 amendments](#) (Apr. 8, 2021) (“The -5 amendments to HB 2021 reflect a thoughtful and effective approach to the challenges of decarbonizing the electricity sector affordably and reliably.”; *see* Testimony of Dave Robertson, PGE, HB 2021: House Committee on Energy and Environment, 81<sup>st</sup> Or. Leg. Assembly (2021), 00:59:57, available at <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2021041076>).

<sup>32</sup> *Id.* at 1:07:20.

the intention that went into the cost cap language and that it enabled a balance between meeting the energy goals and impact on ratepayers.<sup>33</sup> This cost cap language was included in HB 2021 as enrolled in ORS 469A.445.<sup>34</sup> See Table 1 below for a visual representation of the cost cap language legislative history.

**Table 1 – HB 2021 Legislative Progression**

Date	Document	Cost Cap Language
3/2/21	<a href="#">HB 2021 Introduced</a> (placeholder)	
3/18/21	<a href="#">HB 2021-1</a>	<p>Sec. 9(1): "...In making a request under this section, the petitioner shall provide information regarding the investment or costs sufficient to determine whether the investment or costs are related to compliance with sections 1 to 12 of this 2021 Act, to include investments or costs associated with:</p> <p>"(a) Clean energy generation facilities that are in advance of need for serving retail electricity consumers or in advance of renewable energy resources required by ORS 469A.052;</p> <p>"(b) Qualifying facilities, as defined in ORS 757.050, community solar projects, as defined in ORS 757.386, or net metering facilities, as defined in ORS 757.300;</p> <p>"(c) Distribution system improvements and upgrades necessary to permit increased distributed energy resources, including generation and storage resources, and communication devices, supervisory control and data acquisition equipment or similar management equipment;</p> <p>"(d) Energy efficiency or demand response measures that cannot receive an incentive under ORS 757.054 due to lack of cost-effectiveness;</p> <p>"(e) Capacity resources, including physical and contractual resources;</p> <p>"(f) Accelerated depreciation of fossil-fueled generation resources;</p> <p>"(g) Actions taken under a clean energy plan adopted pursuant to sections 1 to 12 of this 2021 Act; and</p> <p>"(h) Any other investment or cost demonstrated by the petitioner to be made for the purpose of compliance with sections 1 to 12 of this 2021 Act.</p>
3/22/21	<a href="#">HB 2021-4</a>	Struck Sec. 9(1) starting from "...to include investments or costs associated with" and subsections "a" through "h", and inserted language that the Commission "shall determine by rule which investments or costs may be included in the request."
3/26/21	<a href="#">PUC Comments</a>	"If requested, the PUC is required to use a contested case proceeding to examine (1) whether an investment is related to HB 2021-1 and; (2) whether the cumulative rate

<sup>33</sup> Testimony of Representative Ken Helm, House District 27, HB 2021: House Committee on Revenue, 81<sup>st</sup> Or. Leg. Assembly (2021), 00:17:17, available at <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2021051192>.

<sup>34</sup> [HB 2021, -23 Amendment](#), Sec. 10 (Apr. 8, 2021).

Date	Document	Cost Cap Language
		impact of HB 2021-1 investments exceed a cost cap. The PUC may need to examine whether rules are required to govern the identification of investments that are related to implementing the Clean Energy Plan and the calculation of rate impacts associated with those investments.”
4/6/21	<a href="#">HB 2021-5</a>	Removed the -4 rulemaking language removed and “related to compliance” was changed to “contribute to compliance.”
4/8/21	<a href="#">HB 2021-23</a>	Sec. 10 cost cap language contained in HB 2021 as enrolled.

### III. DISCUSSION

**A. The HB 2021 cost cap applies to costs and investments that would not have been incurred or forecasted but for HB 2021.**

**i. The plain language of HB 2021 and its legislative history show the Oregon Legislature intended to capture only those actions that the utility would not have taken but for meeting the requirements of HB 2021.**

Traditional ratemaking requires utilities to make prudent investments that are least-cost and least-risk to its customers who fund them. Layering policy goals, like decarbonizing the electricity grid, shifts the lens of that analysis to consider what are the cost-effective opportunities to meet Oregon’s clean energy goals, not simply selecting the cheapest option available. Oregon utilities and regulators, and CUB, cannot operate in a vacuum disconnected to the contemporaneous policy changes that butt up against traditional ratemaking processes. As a means to keep the costs and investments made for the purposes of complying with HB 2021 reasonable, the Legislature included a cost cap provision on utility investments and costs that would otherwise not have been made but for HB 2021. The first question posed by the Commission for this briefing concerns the intent behind the legislature’s description of applicable investments and costs for the cost cap.

Statutory interpretation requires discerning the intent of the legislature. The first step in doing so is examining “both the text and context of the statute”, which serves as the “the best

evidence of the legislature's intent."<sup>35</sup> If the legislature's intent is not clear from the text and context inquiry, the next step is considering legislative history which "may be used to confirm seemingly plain meaning and even to illuminate it."<sup>36</sup>

If legislative intent is still unclear, the next step is to apply "maxims of statutory construction" which intends to "pursue the intention of the legislature if possible."<sup>37</sup> ORS 174.020 has long codified "the "cardinal rule" of statutory construction that a court "shall pursue the intention of the legislature if possible"; courts have regularly rejected statutory interpretations that would "frustrate the purpose" of the statute being interpreted.<sup>38</sup>

In *State of Oregon v. Gaines*, the Oregon Supreme Court stated:

there is no more persuasive evidence of the intent of the legislature than "the words by which the legislature undertook to give expression to its wishes." *State ex rel Cox v. Wilson*, 277 Or 747, 750, 562 P2d 172 (1977) (quoting *U.S. v. American Trucking Ass'ns.*, 310 US 534, 542-44, 60 S Ct 1059, 84 L Ed 1345 (1940)). Only the text of a statute receives the consideration and approval of a majority of the members of the legislature, as required to have the effect of law. Or Const, Art IV, § 25. The formal requirements of lawmaking produce the best source from which to discern the legislature's intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law.<sup>39</sup>

Under Oregon law, the text and context of the statute in question are given the primary weight in the three step *State v. Gaines* statutory interpretation process.<sup>40</sup> When examining a statute's text and context, the Commission gives words of common usage "their plain, natural, and ordinary meaning."<sup>41</sup>

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<sup>35</sup> *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993).

<sup>36</sup> *State v. Gaines*, 346 Or 160, 171 (2009).

<sup>37</sup> *Id.* at 172 and ORS 174.020(1).

<sup>38</sup> *Gaines*, 346 Or at 165.

<sup>39</sup> *Id.* at 171.

<sup>40</sup> *In re Portland General Electric Company, Application for Transportation Electrification Programs*, OPUC Docket No.UM 1811, Order No. 18-054 at 7 (Feb. 16, 2018); *in re PacifiCorp, dba Pacific Power, Petition for Declaratory Ruling Regarding ORS 757.480*, OPUC Docket No. DR 47, Order No. 14-254 at 4 (Jul. 8, 2014).

<sup>41</sup> OPUC Order No. 14-254 at 4 citing *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 859 (1993).

Here we can examine the plain language of the law in the context of the legislative history to shed light on both the context and legislative intent of this section. HB 2021-5 changed the original bill language “related to compliance” to the more directive “contribute to compliance”. Per Merriam-Webster’s Dictionary, “relate to” means “to be connected with something”,<sup>42</sup> whereas “contribute” means “to supply” or “play a significant part in making something happen.”<sup>43</sup> With the -5 Amendment and its adoption in the final bill, the Legislature directed that those costs subject to the cost cap not merely be *connected* to compliance, implying a tangential relationship, but rather are intended to play a significant part in meeting the emissions’ reduction directives of HB 2021.

The plain language of the statute shows the Legislature intended to capture only those actions that the petitioner can prove the utility would not have taken, except to meet the requirements of HB 2021. And this conclusion is supported by the language changes in the legislative history of HB 2021. If a utility has costs or investments merely connected to the goals of HB 2021, then those costs and investments would not be subject to the cost cap. As such, if there was a need for investment in something outside of HB 2021 – it would have happened anyway and was not intended for the cost cap.

For example, Oregon is experiencing much higher load forecast from data server farms and other similarly consuming large customers. If the least cost/least risk resources to meet this load are clean resources, it may seem that they contribute to compliance. However, if the response is to suspend HB 2021’s requirement and not invest in those resources, then there is a load/resource balance problem. The fact that clean energy resources are the marginal resource that a utility would select to meet load undermines the idea of including those costs in the cost cap

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<sup>42</sup> “Relate to”, MERRIAM-WEBSTER, available at: <https://www.merriam-webster.com/dictionary/relate%20to> (2024).

<sup>43</sup> “Contribute”, MERRIAM-WEBSTER, available at: <https://www.merriam-webster.com/dictionary/contribute> (2024).

calculation. We cannot color code resources for compliance based on whether they are clean or not. Instead, we have to first identify where resources are being added to meet load growth and comply with Oregon’s Renewable Portfolio Standard (RPS) and other historic policy objectives (e.g., net metering, community solar) and exclude them from costs and then only include costs in the cap that are incremental based on this law.

HB 2021 is not the RPS. It is not based on an inventory of clean energy. It is about emissions. If a utility invests in **new** least cost/least risk clean energy resources to meet **new** load, that investment does not contribute to compliance, because it does nothing to reduce GHG emissions. The intent of HB 2021 is to engage in this “but for HB 2021” analysis. To say otherwise runs counter to the legislature’s directive to conduct a cost cap investigation for the purposes of determining what is an investment or cost to meet HB 2021’s directives. For example, the legislature did not direct the Commission to incorporate HB 2021 into the RPS cost cap statute. Instead, they created a separate investigation for the purpose of distinguishing the two policies. Just as utilities are expected to meet the prudence burden in requests for rate increases, the legislature intended that utilities also be able to show that the costs and investments each Company argues is subject to the cost cap are specifically intended to meet HB 2021’s compliance requirements.

- ii. Expansion of existing programs can be considered for the cost cap provision, but only the incremental costs of expanding the program for the specific purpose of compliance with HB 2021.**

Nothing in HB 2021 explicitly prohibits the Commission from considering whether expansion of existing programs can be subject to the cost cap provision. Both PGE and PacifiCorp have put forward expansions of existing programs to meet HB 2021 compliance requirements. For example, PacifiCorp has planned to meet certain HB 2021 requirements with

its existing community solar program.<sup>44</sup> As another example of how a cost cap review could work, We can look to what happened with PGE’s planned investment in energy efficiency in its recently acknowledged 2023 IRP.<sup>45</sup> CUB argued and Staff agreed that PGE’s energy efficiency modeling in its initial preferred portfolio was not pursuing all cost-effective energy efficiency.<sup>46</sup> Ultimately PGE agreed to add 53 MWa of additional energy efficiency to its IRP. This can serve as an example of how a cost cap review would work: The Commission would have to consider whether PGE’s increase in EE was due to the requirement to achieve all cost effective EE or if it was a compliance strategy. If it decided that it was being pursued because it was cost effective, then it would not be considered in the cost cap. Ultimately, we have to ensure that we are only capturing the incremental cost of expanding the program for the specific purpose of compliance, and not sweeping in costs associated with the program that customers would be paying even if the legislature had not passed HB 2021.

The Commission has broad regulatory authority over the rates and service terms and conditions of the public utilities under the purview of its regulatory apparatus.<sup>47</sup> Since 1911, the Oregon legislature has delegated the authority to regulate public utilities exclusively to the Commission.<sup>48</sup> A key component of this regulatory authority is the responsibility to protect public utility customers. Specifically, the Commission:

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<sup>44</sup> See *In the Matter of PACIFICORP, dba PACIFIC POWER, 2023 Integrated Resource Plan*, Docket No. LC 82, Order No. 24-073 (Mar. 19, 2024).

<sup>45</sup> *In the Matter of Portland General Electric Company, 2023 Clean Energy Plan and Integrated Resource Plan*, Docket No. LC 80 (hereinafter “LC 80”), Order No. 24-096 (Apr. 18, 2024) (Note: PGE’s 2023 IRP was acknowledged with conditions, but its CEP was not. PAC did not submit its energy efficiency investments for consideration in the CEP, rather in its IRP preferred portfolio.)

<sup>46</sup> LC 80 – CUB’s Round 1 Comments at 2 (July 27, 2023); LC 80 - *Corrected version of Staff’s (7/27/23) Opening Comments* at 27-28 (July 28, 2023).

<sup>47</sup> UE 428 – PacifiCorp’s Opening Brief at 2 citing *see, e.g.*, ORS 756.040(1); ORS 756.062(2); *P.N.W. Bell Tel. Co. v. Sabin*, 534 P.2d 984, 991 (Or. App. 1975) (“The Commissioner appears, therefore, to have been granted the broadest authority—commensurate with that of the legislature itself—for the exercise of his regulatory function.”).

<sup>48</sup> OPUC Order No. 08-487 at 4.

is expressly charged with representing utility customers and the public generally ‘in all controversies respecting rates, valuations, service, and all matters of which the commission has jurisdiction,’ and to use those powers ‘to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates.’<sup>49</sup>

Therefore, at the core of the Commission’s legislatively-delegated general powers enumerated in ORS 756.040(1) is the responsibility to protect utility customers from unreasonable practices.

The legislative history of HB 2021 shows that legislators started with the intention of being prescriptive about what investments or costs were to be considered for the HB 2021 cost cap provision.<sup>50</sup> In HB 2021-4, the HB 2021-1 language was replaced with a directive to the PUC to conduct a rulemaking to determine the eligible costs and investments.<sup>51</sup> This language was also subsequently removed in HB 2021-23 which reflected the cost cap section now in the law. Accordingly, CUB submits that the lack of these specific directives reflects the Legislature’s intent that the Commission retain the discretion to determine eligible costs and investments, which may include expanding existing emissions-reductions resources and programs. This delegation of authority makes sense in the context of the Commission’s broad authority granted by the Legislature. Where expansions of a program would not be taken, but for HB 2021 compliance, that new expansion would come under the cost cap. As discussed above, nothing in HB 2021 explicitly prohibits the Commission from considering whether expansion of existing programs, such as the small scale renewable program, can be subject to the cost cap provision.<sup>52</sup>

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<sup>49</sup> *Id.* at 4 citing ORS 756.040(1).

<sup>50</sup> *See* HB 2021-1 (posted on Mar. 18, 2021).

<sup>51</sup> *See* HB 2021-4 (posted on Mar. 22, 2021).

<sup>52</sup> However, CUB maintains that any investments or costs related to Renewable Energy Certificates (RECs) would not qualify for consideration in a cost cap investigation and that satisfying the RPS is a separate requirement and the costs of satisfying the RPS exist independently of HB 2021.



**iii. Importantly, the least cost/least risk test still applies to investments and costs considered for the cost cap.**

While establishing the parameters of what falls under the cost cap, the legislature did not create an exemption to the least-cost/least-risk standard. As with all investments, the Company must make investments to meet its HB 2021 requirements in a least-cost/least-risk manner. These investments, per Section 4(3), are made with other investments such that HB 2021 compliance investments are “incorporated into” a least-cost/least risk integrated resource plan.<sup>53</sup> This intent of the legislature is further supported by the rate impact determination language in the cost cap section of the bill:

Upon determining that an investment or cost of an electric company contributes to compliance with sections 1 to 15 of this 2021 Act, the commission shall determine the actual or anticipated rate impact for the investment or cost on the same basis and with the same treatment for similarly situated investments or costs in the most recently approved general rate case or other relevant rate making proceeding.<sup>54</sup>

The HB 2021 mandate did not create a blank check; HB 2021 compliance resources and expenses must be made under the same standard as other investments.

**B. HB 2021 intends that forecasted costs to be considered as estimated future costs in a cost cap investigation.**

Based on the law’s language a utility’s *costs and investments incurred* to meet HB 2021’s goals are subject to the bill’s costs cap, as are also the *forecasted costs* estimated by the electric company for the purpose of compliance.<sup>55</sup> Forecasted capital investments do not raise rates until they are used and useful, so it would be difficult to conclude that they have contributed to violating the six percent cost cap.

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<sup>53</sup> See HB 2021, Section 4(3)(a): A clean energy plan must be based on or included in an integrated resource plan filing made no earlier than January 1, 2022, and filed no later than 180 days after the integrated resource plan is filed, or developed within an integrated resource planning process and incorporated into the integrated resource plan filed with the commission.

<sup>54</sup> HB 2021, Sec. 10(3).

<sup>55</sup> HB 2021, Sec. 10(1), codified at ORS 469A.445(1).

The plain language of the statute makes this clear by distinguishing between “costs incurred” (dollars spent) and “forecasted costs estimated by the company” (estimated future costs) in a Commission cost cap investigation.<sup>56</sup> And since the legislature did not explicitly define “forecasted costs”, we can again infer that the intent was to defer to the Commission’s broad authority to interpret what can properly be considered “forecasted costs.”

Oregon uses future test years and forecasts rates, and rates often include forecasted non-capital costs. For example, a power cost case might include new Qualifying Facilities (QFs) whose contracts projected an online date, or it might include a battery storage capacity contract. Oregon uses future test years for ratemaking. The Commission starts with historic costs, and then adjusts them for known and measurable changes, including forward-looking costs. Speculative future costs are not included in rates, but actual forecasted costs are.

Further, HB 2021 provides guidance that “rate impact” for the purposes of the cost cap will be considered with the “similarly situated investments or costs or costs in the most recently approved general rate case or other relevant rate making proceeding”, as discussed above.<sup>57</sup>

HB 2021 requires a CEP to be based on or included in an IRP, or developed within the IRP process.<sup>58</sup> And the Commission’s considerations of forecasted costs in IRPs is instructive as to its expectation for consideration of forecasted costs. As the Commission recently stated:

The IRP is a road map for providing reliable and least-cost, least-risk electric service to the utility’s customers, consistent with state and federal energy policies, while addressing and planning for uncertainties. The primary outcome of the process is the “selection of a

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<sup>56</sup> HB 2021, Sec. 10(1).

<sup>57</sup> See HB 2021, Sec. 10(3).

<sup>58</sup> HB 2021, Sec. 4(3)(a).

portfolio of resources *with the best combination of expected costs and associated risks and uncertainties for the utility and its customers.*”<sup>59</sup>

And that:

In reviewing an IRP, we assess reasonableness based on the information available at the time. Our decision to acknowledge or not acknowledge an action item does not constitute ratemaking. Acknowledgment, or non-acknowledgment, of an IRP is a relevant but not exclusive consideration in our examination of whether the costs associated with a utility’s resource investment should be recovered in customer rates. The question of whether a specific utility investment or procurement decision was prudent and reasonable will be examined in the subsequent rate proceeding.<sup>60</sup>

IRPs are plans built on forecasted costs. IRP analyses do not provide anticipated rate impact of each investment. Rather, they compare net present value revenue requirement for the life of a project, but do not provide a year-by-year projection of “rate impact.” This means that additional analysis is needed beyond what is supplied in an IRP for the purposes of HB 2021 compliance:

We 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. These concerns will be relevant to our determination of the public interest in future CEP acknowledgment. Thus, despite the traditional focus of long-term planning on net present value of revenue requirement over the full planning horizon, going forward we expect that resource planning—at minimum in the identification of annual actions in the CEP—must include greater attention to near-term management of costs and rate pressures.<sup>61</sup>

Importantly, the Commission expects *reasonable* forecasts for planning assumptions, as seen in the Commission’s recent decisions not to acknowledge PGE’s CEP:

Staff believes that the Company has not acted consistently with previous Commission orders requiring a utility to utilize a reasonable forecast for QF related planning assumptions. In particular, Staff notes the language in Commission Order No. 21-184 which states that modeling renewals of wind QFs in Idaho Power's IRP should include

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<sup>59</sup> *In the Matter of PACIFICORP, dba PACIFIC POWER, 2023 Integrated Resource Plan*, Docket No. LC 82, Order No. 24-073, 2-3 (Mar. 19, 2024) (emphasis added) (citing *In the Matter of Investigation into Integrated Resource Planning*, Docket No. UM 1056, Order No. 07- 002 at Appendix A, Guidelines 1-13 (Jan. 8, 2007) corrected by Order No. 07-047 (Feb. 9, 2007); *In the Matter of Investigation into the Treatment of CO2 Risk in the Integrated Resource Planning Process*, Docket No. UM 1302, Order No. 08-339 (June 30, 2008) (refining Guideline 8 addressing environmental costs.) and Order No. 07-002 at Appendix A, Guideline 1.

<sup>60</sup> *Id.* at 3.

<sup>61</sup> See *In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, 2023 Clean Energy Plan and Integrated Resource Plan*, Docket No. LC 80, Order No. 24-096, 22 (Apr. 18, 2024).

some percentage, "rather than taking an all or nothing approach... Staff reiterates that an all or nothing forecast virtually guarantees an overestimation or an underestimation."<sup>62</sup>

Accordingly, the Commission declined acknowledgement of PGE's avoided cost pricing inputs and directed PGE to recalculate its IRP inputs.<sup>63</sup>

Likewise, when PacifiCorp incorporated unreasonable price escalations for renewable resources, the Commission stated:

[w]hile it is reasonable to assume cost escalations due to recent market conditions, PacifiCorp's estimates are far above the consensus. Compared to other studies that have adjusted for the recent market changes in renewable energy, PacifiCorp's adjustments have overstated the effects of inflation. Recently published studies have shown that cost increases may not be as persistent as PacifiCorp assumes.<sup>64</sup>

CUB expects the Commission will similarly use its broad authority to only consider those forecasted costs that are reasonable. While forecasted costs are uncertain, and arguably some are difficult to predict, the Commission already considers forecasted costs in its decision-making, and they are distinguishable from speculative future costs which are not included in rates. And the plain language of the statute shows the legislature intended forecasted costs to be considered in a Commission cost cap investigation.

**C. RPS investments and costs should be excluded from the HB 2021 cost cap.**

Investments that satisfy the RPS would have been made without HB 2021 and in accordance with the but for analysis above, should be excluded from consideration in a HB 2021 cost cap. Section 13 of HB 2021 explicitly states that this law does not "replace or modify the requirements" in the RPS. That law is still in place. As CUB argued in briefing in Phase I of the

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<sup>62</sup> *Id.*, Appx. A at 25 ("Staff Recommendation 9. The Commission should decline to acknowledge PGE's avoided cost pricing inputs and direct PGE to recalculate its IRP inputs using an assumption of 75 percent for QF renewals and the QF success rate for Schedule 202 projects.")

<sup>63</sup> *Id.* at 22.

<sup>64</sup> LC 82 - Order No. 24-073, Appx. A at 51-53.

UM 2273 investigation, the RPS is a load-based program whereas HB 2021 is an emissions-based program specific to providing Oregonians with 100% clean electricity:

It is an approach that requires real emission reductions and does not allow RECs to be used as offsets to eliminate those emissions. Offsetting emissions is what creates the need to assign those emissions to the REC-less power from the source that is itself, non-emitting. CUB believes that SB 1547 and HB 2021 were well-designed and can work together while keeping load-based RECs removed from HB 2021's emissions-based compliance at the same time, CUB supports the Commission's intention to consider whether there are double-counting impacts on the programs it regulates.<sup>65</sup>

The HB 2021 cost cap only applies to costs that contribute to HB 2021 compliance and that would not have happened but for HB 2021. Any costs made to satisfy Oregon's RPS requirements cannot be considered for the HB 2021 cost cap, as discussed above.

**D. HB 2021 refers to the cumulative rate impact, based upon the new costs associated with that single year.**

CUB believes the HB 2021 cost cap applies to the new costs associated with that single, specific year. The cumulative nature is that it includes that specific year's rate impact caused by previous year's investments if those investments contributed to compliance.

Section 10 provides that once the Commission makes a determination that an investment or cost contributes to compliance with HB 2021, it shall determine the "actual or anticipated rate impact" and use this calculation to determine the cumulative rate impact of the cost or investment.<sup>66</sup> If the actual or anticipated cumulative rate impact exceeds six percent of the annual revenue requirement for a year, the Commission is directed to provide the utility with an exemption from HB 2021's compliance requirements on a temporary basis.<sup>67</sup>

The language in HB 2021 refers to the cumulative rate impact as determined by a cost cap investigation, stating the Commission shall: [c]umulatively calculate the rate impact caused

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<sup>65</sup> UM 2273 – CUB's Phase I Opening Brief at 17 (July 25, 2024).

<sup>66</sup> HB 2021, Sec. 10(3).

<sup>67</sup> HB 2021, Sec. 10(4).

by all investments or costs that have been the subject of a proceeding pursuant to this section, and must be included in calculation for the time period that the investment or cost would affect rates.”<sup>68</sup> While we are looking at each individual year that the cost cap applies, the plain language of the statute states that the cost cap investigation’s calculation will include the current costs of both actual investments and forecasted costs based on their rate impact during that particular year of review.<sup>69</sup> And this is supported by the statutory language that allows for future adjustments to the cumulative rate impact if the initial accounting was based upon the basis of the forecasted impact.<sup>70</sup>

However, this question raises a rightfully concerning issue about determining when an exemption to compliance is in place when the cost cap is reached. While this adjustment exists, this raises the question of how often the Commission will review the forecasted costs with the actual costs incurred. Will the Company be expected to provide those updates in its annual CEP update? Or will a cost cap review be necessary? CUB argues that former is preferable as more efficient to determining when an exemption to compliance should be lifted, rather than requiring another cost cap review proceeding which could take months. And any actual rate adjustments appropriately considered in a ratemaking proceeding.

HB 2021 directs that if the particular cost cap investigation determines “actual or anticipated cumulative rate impact calculated...exceeds six percent of the annual revenue requirement for a year,” the Commission must “narrowly tailor” an exemption and must limit the time of that exemption.<sup>71</sup> Given the legislature has stated these exemption limitations are specific to the cumulative rate impact calculation in that particular investigation, CUB believes the

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<sup>68</sup> HB 2021, Sec. 10(3).

<sup>69</sup> HB 2021, Sec. 10(4).

<sup>70</sup> HB 2021, Sec. 10(3)(b).

<sup>71</sup> HB 2021, Sec. 10(4).

legislature intended that the Commission will determine, on an investigation-by-investigation basis, the scope and timing of any review of the actual costs of those costs originally forecasted in the cost cap investigation. However, CUB is not arguing that the Commission may not consider a rulemaking to provide a standardized process for a cost cap review.

#### **IV. CONCLUSION**

CUB reiterates that the Legislature intended that the only costs and investments that can be considered for inclusion in the HB 2021 cost cap are those that would not have otherwise been incurred or forecasted but for HB 2021's directives. As such, any costs or investments for RPS compliance should not be considered for inclusion in the HB 2021 cost cap. CUB also maintains that forecasted costs are meant to be considered as estimated future costs a cost cap investigation. And finally, CUB believes a determination of the cumulative rate impact for the purposes of the HB 2021 cost cap is based upon the new costs associated with that single year.

Dated this 23<sup>rd</sup> day of May 2024.

Respectfully submitted,

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