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June 20, 2024

Via Electronic Filing

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

Re: Investigation into House Bill 2021 Implementation Issues.
Docket No. UM 2273

Dear Filing Center:

Please find enclosed the Reply Brief on behalf of the Alliance of Western Energy Consumers (“AWEC”) in the above-referenced docket.

Thank you for your assistance. Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/ Nannette M. Moller
Nannette M. Moller

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2273

In the Matter of)	
)	
PUBLIC UTILITY COMMISSION OF)	REPLY BRIEF OF THE ALLIANCE OF
OREGON,)	WESTERN ENERGY CONSUMERS
)	
Investigation into House Bill 2021)	
Implementation Issues.)	
_____)	

I. INTRODUCTION

Pursuant to the April 15, 2024, Memorandum issued by Administrative Law Judge (“ALJ”) Mellgren, the Alliance of Western Energy Consumers (“AWEC”) hereby submits this Reply Brief. AWEC’s review of other parties’ opening briefs indicates that its position overlaps with some parties on some issues and diverges on other issues. For instance, AWEC is largely in alignment with Portland General Electric and PacifiCorp (the “Joint Utilities”) with respect to how the Commission should determine whether investments apply toward the HB 2021 cost cap given the statutory language. AWEC’s and the Joint Utilities’ reading is more expansive than the Oregon Citizens’ Utility Board (“CUB”) and Renewable Northwest and the NW Energy Coalition (“RNW/NWEC”), as discussed in more detail below. Likewise, AWEC shares the other parties’ conclusion that the HB 2021 cost cap is unrelated to, and independent of, the cost cap in the renewable portfolio standard (“RPS”). However, AWEC and the Joint Utilities reach a different conclusion with regard to the significance of this.

Ultimately, then, what appears clear is that the Commission has some discretion to interpret how to apply the HB 2021 cost cap, and the parties have provided the Commission with a range of options. While AWEC believes its interpretation of the statute is the most reasonable, given its language and the Legislative intent to protect customers from excessive costs, the Commission’s most important task is to establish a clear framework for applying the cost cap. Uncertainty regarding how the cost cap will apply risks nullifying the cap, to the detriment of customers. Eligible parties or the Joint Utilities will be reluctant to undertake the effort and expense to bring a petition pursuant to ORS 469A.445(1), 2(b) in order determine whether the cost cap has been exceeded without reasonable clarity over how to calculate costs toward the cap. Further, because the Joint Utilities are already incurring costs to comply with HB 2021 – and customers are starting to feel the effects of these costs – AWEC urges the Commission to establish clarity on the how the cap will be applied as soon as practicable.

II. ARGUMENT

a. **CUB and RNW/NWEC’s reading of Section 10 only applying to investments and costs made for the purpose of compliance is overly narrow.**

CUB argues that “[i]f 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.”¹ Similarly, RNW/NWEC argue that “[i]n 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

¹ CUB Opening Brief at 12.

absurd results that fly in the face of HB 2021’s decarbonization goals.”² CUB and RNW/NWEC’s overly narrow interpretation of Section 10 does not comport with the plain language of the text, fails to give full effect to the statute, and is contrary to the Legislature’s intent.

Principles of statutory interpretation dictate that the Commission should give effect to every word the Legislature used, if possible.³ Furthermore, when interpreting a statute “the court’s task is to discern the intent of the legislature.”⁴ As CUB acknowledges, “the best evidence of the legislature’s intent” is to examine “both the text and context of the statute.”⁵ CUB’s principal argument in favor of its position is that the -5 Amendment to HB 2021 indicated the Legislature’s intent for the term “contributes to compliance” to mean that a cost must “play a significant part in meeting the emissions’ reduction directives of HB 2021.”⁶ The -5 Amendment, CUB notes, modified the language from “related to compliance” to “contribute to compliance”, and concludes that the new language is “more directive.”⁷ CUB then, however, takes an illogical leap by concluding that the phrase “contribute to compliance” establishes a “but/for” test in which only costs that would not have been incurred but for HB 2021 are subject to the cost cap.⁸

CUB may be correct that “contribute to compliance” should be read differently from “related to compliance”, but its interpretation does not align with the definition it cites for the word “contribute.” To “play a significant part in making something happen” is not the same as being the sole cause of making something happen. Any investment that brings the Joint Utilities

² RNW/NWEC Opening Brief at 9.

³ ORS 174.010.

⁴ *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or. 606, 610-11, 859 P.2d 1143, 1145-46 (1993) (internal citations omitted).

⁵ CUB Opening Brief at 10-11 citing *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610 (1993).

⁶ *Id.* at 12.

⁷ *Id.*

⁸ *Id.* at 12-13.

closer to their emissions requirements under HB 2021 plays a significant part in their compliance efforts with that law; it does not matter whether the investment may also contribute to other statutory obligations, or even if the investment was pursued primarily for a different statutory obligation. CUB’s conclusion effectively removes the term “contribute to compliance” from Section 10, despite the fact that it is used four times in that section.

RNW/NWEC similarly cite to the -5 Amendment in support of their argument, stating that “[t]he 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).⁹ RNW/NWEC reason that “[b]y 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.”¹⁰ RNW/NWEC further argue that “[s]uch 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.”¹¹ AWEC agrees that costs that directly contribute to HB 2021 compliance should be considered under the cost cap and further agrees that costs that contribute to compliance align with the objectives of HB 2021 given that such costs are associated with investments that further emissions reductions. However, to conclude that the Legislature “suggested” a narrow reading of the cost cap by replacing the phrase “related to compliance” with

⁹ RNW/NWEC Opening Brief at 7.

¹⁰ *Id.*

¹¹ *Id.*

“contributes to compliance”¹² directly contradicts the purpose of cost cap to the detriment of customers and does nothing to indicate that the phrase “contributes to compliance” should, in effect, be read to mean that investments must have been made specifically for HB 2021 compliance and for no other reason.

In addition to diverging from CUB’s own definition of “contribute”, CUB and RNW/NWEC’s statutory interpretation of Section 10 is too narrow and would result in impractical outcomes. As held by the Supreme Court of Oregon and noted by CUB, “courts have regularly rejected statutory interpretations that would ‘frustrate the purpose’ of the statute being interpreted.”¹³ Practically speaking, virtually every action a utility takes will satisfy multiple objectives, which may include but not be limited to emissions reductions.¹⁴ In drafting Section 10(4) it is inarguable that the Legislature intended to protect customers from excessive costs of complying with HB 2021’s carbon reduction mandates. However, under CUB and RNW/NWEC’s interpretation of Section 10, a resource that results in emissions reductions – i.e. contributes to compliance – but also for example, meets the utility’s reliability needs or satisfies a portion of its RPS obligations, would not fall under the cost cap. Such an outcome could result in the Joint Utilities furthering their compliance toward HB 2021’s emissions mandates at great cost to customers, but without any of those costs considered toward the cost cap.

RNW/NWEC mistakenly assert that “[i]n interpreting Section 10’s cost cap provision, ‘for the purpose of compliance with’ and ‘contributes to compliance’ can be harmonized

¹² *Id.*

¹³ CUB Opening Brief at 11 *citing State v. Gaines*, 346 Or 160, 171 (2009).

¹⁴ Given that a utility cannot acquire coal-fired resources and natural gas resources above 25 MW located within Oregon, it is foreseeable that many of a utility’s new resources acquired for any purpose will be non-emitting. *See* HB 2021 Section 28; ORS 469.020(8).

only by adopting a narrow reading of the phrase ‘contributes to compliance.’”¹⁵ However, AWEC’s understanding of the statute allows for both phrases to be interpreted in a manner that effectuates both of them together without requiring a narrow reading. Specifically, to the extent that a purpose (whether or not the sole or even primary purpose) of a utility investment is emissions reduction, and the investment in fact contributes to such emissions reduction, it should be considered as an HB 2021 investment and subject to the cost cap. As explained by RNW/NWEC, “‘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.’”¹⁶ AWEC’s reading of Section 10 accomplishes goal and is therefore reasonable.

Accordingly, AWEC’s reading adheres to the principles of statutory interpretation by considering both the text and context of the statute. Furthermore, AWEC’s interpretation supports the policies of HB 2021. Notably, the Joint Utilities similarly conclude that costs that contribute to compliance may fall under the cost cap, regardless of whether they would have otherwise been made in the absence of HB 2021.¹⁷ AWEC recommends the Commission reject CUB and RNW/NWEC’s overly narrow reading of Section 10 which excludes all costs that contribute to compliance from the cost cap to the detriment of customers.

¹⁵ RNW/NWEC Opening Brief at 9.

¹⁶ *Id.* at 8 citing ORS 174.020(2).

¹⁷ *See* Joint Utilities Opening Brief at 2-5.

b. RNW/NWEC’s argument that only actual costs subject to ratemaking treatment should be included in the cost cap is contrary to the plain language of Section 10 and the Legislature’s intent.

In responding to the Commission’s question of whether the inclusion of “forecasted costs” in the statute allows for consideration of estimated future costs, RNW/NWEC argue that, based on the text and context of HB 2021, the cost cap 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.”¹⁸ RNW/NWEC’s reading of the Section 10(4) cost cap is contrary to the plain language of the statute and the Legislature’s intent, thereby negating the customer protections intended by the cost cap.¹⁹ Notably, the Joint Utilities, CUB, and AWEC all agree that forecasted costs should be considered for purposes of the cost cap.²⁰ AWEC urges the Commission to deny RNW/NWEC’s recommendation because it is unworkable as proposed.

As AWEC noted in its Opening Brief, if anticipated future costs are not allowed to be considered under the cost cap, it creates a no-win situation in which customers, or the utility are financially responsible for investments that exceed the cost cap. If the investment has already been made, a determination that it has resulted in exceedance of the cost cap is too little too late. RNW/NWEC do not address or resolve this catch-22 in their argument.

¹⁸ RNW/NWEC Opening Brief at 9.

¹⁹ The plain language of Section 10 allows the Commission to consider “forecasted costs estimated by the electric company” in determining whether the cost cap has been reached.” ORS 469A.445(1).

²⁰ Joint Utilities Opening Brief at 7; CUB Opening Brief at 16.

RNW/NWEC also note that costs assumed in Integrated Resource Plans (“IRP”) “bear no direct relationship to customer rates” and that they are “based on broadly characterized needs to be met by proxy resources.”²¹ AWEC does not disagree that the costs identified in IRPs are generic and there may be significant differences between IRP costs and the costs of actual investments. However, as CUB notes, “the Commission already considers forecasted costs in its decision-making”²² Moreover, the Commission recently stated that it “need[s] the IRP and CEP process to deliver more information about rate impacts” and that the Commission “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.”²³

As such, AWEC suggested the IRP as one option for developing forecasted costs that can be considered in an analysis of the cost cap. If, however, the Commission agrees that these costs are insufficiently certain for cost cap purposes, then it should address timing issues associated with a cost cap investigation. That is, AWEC proposed an alternative in which the cost cap could be based on the short list of resources in an RFP, which have a far more definite cost than IRP proxy resources; however, a cost cap investigation based on a short list will require time, which may be in shorter supply once a short list is finalized than it is during the IRP investigation. Moreover, an RFP shortlist of resources likely only represents a fraction of the total costs a utility incurs that could be considered toward the cost cap (more on this below).

²¹ RNW/NWEC Opening Brief at 11.

²² CUB Opening Brief at 19.

²³ LC 80, Order No. 24-096, at 22 (Apr. 18, 2024).

Thus, even if the Commission determines that forecasted costs in an IRP should not be considered in a cost cap investigation, the IRP should have a role in at least providing a preliminary indication of whether a utility is likely to exceed the cap if it follows through on its action plan. Such a finding will put parties on notice that the cost cap may be exceeded based on the utility's actions, which will in turn create more certainty for parties when a cost cap investigation is initiated.

c. CUB and RNW/NWEC's overly narrow reading of Section 10 improperly excludes RPS investments from being considered under the cost cap.

In responding to the ALJ's question "[h]ow should the HB 2021 cost cap be applied to investments and costs required to satisfy the RPS,"²⁴ CUB and RNW/NWEC's recommendations are directly informed by their overly narrow reading of the phrases "for the purpose of compliance" and "contributes to compliance". Accordingly, CUB reasons that "[t]he 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."²⁵ RNW/NWEC similarly assert that "[i]f 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)."²⁶

CUB's and RNW/NWEC's interpretation appear to give an unsupported preference to the RPS with respect to the application of a cost cap. An investment in a renewable resource

²⁴ Memorandum at 2.

²⁵ CUB Opening Brief at 20.

²⁶ RNW/NWEC Opening Brief at 12.

may be undertaken for a number of reasons, including both HB 2021 compliance and RPS compliance. It will, as a practical matter, be impossible to disentangle the “reason” for the investment. And yet, under CUB’s and RNW/NWEC’s reading, such an investment would be ineligible for consideration under the HB 2021 cost cap simply because it also contributes to RPS compliance. Nothing in either HB 2021 or the RPS supports such an interpretation.

Parties agree and ORS 469A.460 states that there is no interaction between the cost caps included in HB 2021 and the RPS.²⁷ However, under AWEC’s reading of Section 10, which gives effect to both phrases “for the purpose of compliance” and “contributes to compliance,” the lack of interaction between the two costs caps does not prohibit a resource that contributes to HB 2021 compliance from also potentially being considered under the RPS cost cap, if applicable. As set forth above, AWEC’s interpretation of the two phrases adheres to the principles of statutory interpretation, supports the policies of HB 2021, and ensures customers are protected to the extent intended by the Legislature.

d. Further process on the HB 2021 cost cap may be warranted, particularly to analyze how power costs should be incorporated.

In addition to responding to the Commission’s questions, PacifiCorp submitted a separate brief posing additional issues for consideration. AWEC agrees with the spirit of PacifiCorp’s separate brief, which is intended to ensure as much clarity regarding the application of the cap as possible. As AWEC noted above, clarity on how the cap will be implemented is of paramount importance in ensuring that it will, in fact, be implemented. However, AWEC does not believe that some of the issues PacifiCorp identified need to be resolved in this proceeding. This

²⁷ AWEC Opening Brief at 10; CUB Opening Brief at 19, Joint Utilities Opening Brief at 8; RNW/NWEC Opening Brief at 12.

includes the question of whether HB 2021 strategies would be subject to power cost sharing bands, or whether utilities should prioritize investments to accelerate emissions reductions as much as possible, recognizing that this may trigger the cost cap sooner than a more linear approach. These issues, while important, are not relevant to how the cost cap should be implemented and, thus, are outside of the scope of this investigation.

One issue, however, that is directly within the scope of this investigation but is not specifically considered by the Commission's questions, is how power costs should be incorporated into a cost cap investigation. AWEC recognizes that this is a singularly complex issue, but it is also likely to be critical to whether a utility reaches the cost cap or not. A substantial portion of the Joint Utilities' rate increases in recent years are due to power costs, driven by market prices. A major contributor to the increase in market prices has been the removal of dispatchable, emission-producing, generation resources and the increase in variable, emission-free, resources. Isolating some portion of power cost increases and determining that such portion is due to actions that have contributed to HB 2021 compliance (and should therefore be considered toward the cost cap) would be exceedingly difficult. Yet, it would also be incorrect and disingenuous to claim that there is no relationship between the policy of reducing emissions and the increase in power costs. AWEC believes that further investigation and analysis of this issue is critical to accurately applying the HB 2021 cost cap.

In this spirit, AWEC does not oppose the Joint Utilities suggestion of workshops or other collaborative discussions on these issues.²⁸ Such further processes should, however, not unduly delay a final determination of how the cost cap will be applied.

²⁸ Joint Utilities Opening Brief at 9.

III. CONCLUSION

For the reasons set forth herein, AWEC recommends the Commission reject CUB and RNW/NWEC's narrow reading of Section 10 because it does not comport with the plain language of the text, fails to give full effect to the statute, and is contrary to the Legislature's intent. AWEC further recommends that the Commission reject RNW/NWEC's argument that only actual costs be considered under the cost cap.

Dated this 20th day of June 2024.

Respectfully submitted,

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