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May 21, 2009

Via Electronic and U.S. Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Rulemaking to Implement SB 838 Relating to Renewable Portfolio Standard
Docket No. AR 518

Dear Filing Center:

Enclosed please find the Phase III Comments on behalf of the Industrial Customers of Northwest Utilities ("ICNU") in the above-referenced docket.

Thank you for your assistance.

Sincerely yours,

/s/ Allison M. Wils
Allison M. Wils

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Phase III Comments on behalf of ICNU upon the parties, on the service list, by electronic mail and by postage prepaid first class mail to the persons who have not provided electronic mail addresses.

Dated at Portland, Oregon, this 21st day of May, 2009.

/s/ Allison M. Wils
Allison M. Wils

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 518 – Phase III

In the Matter of a Rulemaking to Implement SB 838 Relating to Renewable Portfolio Standard	)	COMMENTS OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

I. INTRODUCTION

The Industrial Customers of Northwest Utilities ("ICNU") submits these comments to the Oregon Public Utility Commission ("OPUC" or the "Commission") regarding Commission Staff's ("Staff") proposed rules OAR §§ 860-083-100 through 860-083-0500, as well as the proposed definitions in OAR § 860-083-0010 (collectively, "Phase III rules"). The Phase III rules seek to implement certain aspects of Senate Bill 838 ("SB 838"), which adopts a Renewable Portfolio Standard ("RPS") for the State of Oregon.

ICNU appreciates the diligent effort expended by all parties participating in the rulemaking process, especially Staff. The comments below address only a couple of narrow, albeit highly important issues.

II. COMMENTS

ICNU has two significant concerns regarding Phase III rules. First, concerning bundled renewable energy certificates ("REC") sales, the proposal to substitute a mere disclosure requirement, in place of actual Commission approval, may create an unwarranted prudency presumption that unfairly benefits electric companies. Second, it is unnecessary to add any

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reference to Oregon Department of Energy ("ODOE") rules and regulations that are currently under review before the Oregon Court of Appeals.

A. The OPUC Should Maintain the Requirement that all REC Sales Must Be Approved by the Commission

Until May 8, 2009, proposed Phase III rules required that "[a]n electric company must receive approval from the commission *before* selling bundled renewable energy certificates included in the rates of Oregon retail electricity consumers." OAR § 860-083-300(4) (emphasis added). This section assures that REC sales are subject to a direct prudency review by the OPUC. Staff has proposed amendments, however, that may eliminate this prudency review requirement. Staff proposes to delete this section and, in place of the approval requirement, direct electric companies to simply inform the Commission of REC sale plans in a biennial Implementation Plan ("IP"). OAR § 860-083-400(5)(c).

Staff's proposed amendments will almost certainly not afford the same thoroughness of review that the Commission would otherwise be required to give, when electric companies attempt to sell bundled RECs. At the same time, an unmerited, quasi-presumption of prudency may be established for electric companies in future REC sales. Indeed, Staff comments that "[h]aving the planned sale acknowledged would bolster a company's argument that the sale and replacement were prudent." OPUC Staff Comments at 11 (May 8, 2009).

The problem with the proposed amendments, as well as Staff's supporting logic, is that it is by no means certain that a mere disclosure of "planned" REC sales will translate into a thorough prudency review of those plans by the Commission. Even Staff does not allege that the Commission would *review* REC sales under the proposed amendments; the alternate term chosen by Staff connotes something less—only an "acknowledgement" would be given by the

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OPUC. Whereas the former requirement assures active review by the Commission, the proposed amendments allow for passive acknowledgement.

Staff claims that the proposed amendments will benefit electric companies: "An electric company would benefit from a Commission acknowledgement of its plans to sell bundled RECs." Id. Yet, Staff does not explore how a lesser standard of review would "benefit" consumers. Staff observes that without Commission "acknowledgement" of its plans, "an electric company might face difficult questions when it seeks cost recovery for . . . RECs that replaced the sold RECs." Id. The apparent danger in adopting a lesser requirement—of mere disclosure of planned REC sales—is that electric companies may be able to effectively avoid "difficult questions" altogether; prudency and accountability questions that should be asked might never really be answered, if the OPUC's "acknowledgment" is not thorough enough to adequately examine planned REC sales. In short, acknowledgement of REC sales may be a mere ministerial act, if planned REC sales receive little practical attention buried among numerous disclosures in an IP. Such a result will hardly "benefit" consumers, even if it benefits electric companies.

At this stage, neither Staff nor ICNU can do more than conjecture about how thoroughly the Commission will review planned REC sales in an IP. But it is certainly possible (and even probable) that once electric companies begin to file IPs, many stated "plans" to sell RECs may never actually come to fruition. While no one can assuredly predict how IP review will play out, all parties can be certain that OAR § 860-083-300(4) will better guarantee a direct and thorough prudency review of REC sales.

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B. The OPUC Should Not Adopt any Rules Referencing OAR § 330-160-0030 Because This Rule May Soon Be Invalidated in a Pending Appeal

As ICNU contended in Phase II comments, the Commission should refrain from referencing OAR § 330-160-0030 in its proposed AR 518 rules. The legality of this regulation, promulgated by ODOE, is presently in question and is the subject of a review before the Oregon Court of Appeals. As the Commission can adopt Phase III rules without reference to these questionable ODOE regulations, last minute amendments to incorporate those regulations are unnecessary.

Staff has avoided any reference to OAR § 330-160-0030 in its Phase III rules. OAR § 330-160-0030 creates a vintage date of January 1, 2007, for qualifying electricity that may be used for compliance with an RPS. Conversely, ORS § 469A.020 assigns a vintage date of January 1, 1995, to qualified electricity that may be used for compliance with an RPS. Plainly, there is a fundamental disconnect between the 2007 vintage date promulgated by the ODOE and the 1995 vintage date enacted by the Oregon legislature. As this apparent incongruity is the subject of a current appeal, Staff has avoided direct reference to the challenged ODOE rule—potentially saving the Commission from having to revise its rules if and when the ODOE regulations are invalidated.

At least one party, Portland General Electric Company ("PGE"), contends that explicit reference to OAR § 330-160-0030 ought to be made. PGE claims that since "participants in AR 518 have all assumed that [ODOE] regulations . . . are applicable and will govern in any proceeding . . . . For clarity sake, the final order in this docket or the final rules should confirm that the ODOE regulations will apply . . . ." Comments of PGE at 2 (May 14, 2009). First, as should be manifest from ICNU's comments in Phase II of AR 518, ICNU does

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not believe that OAR § 330-160-0030 is valid. Second, it would be improper for the Commission to "confirm that the ODOE regulations will apply" when the Court of Appeals is currently considering that question. In Phase III, Staff has, correctly, withheld promotion of any conclusion on the matter before an appellate decision is announced.

Ultimately, Phase III rules do not require any explicit reference to the challenged ODOE regulations to be valid. Staff has properly defined qualifying electricity according to statute. OAR § 860-083-0010(32). If the Oregon Court of Appeals determines that OAR § 330-160-0030 conforms to statute, then no reference to that regulation is necessary—the regulation will be a proven, simple extrapolation from the statutory definition of qualifying electricity, which is already contained in Phase III rules. If, however, the Court of Appeals determines that a 2007 vintage date conflicts with SB 838 and the Court invalidates OAR § 330-160-0030; then, by rejecting further changes, the Commission will be spared from any needless amendments to these rules in the future.

III. CONCLUSION

ICNU appreciates the opportunity to submit these comments and looks forward to participating in future rulemakings regarding SB 838.

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Dated this 21st day of May, 2009.

Respectfully submitted,

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