

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**UM 1662**

In the Matter of )  
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 PORTLAND GENERAL ELECTRIC )  
 COMPANY and PACIFICORP dba )  
 PACIFIC POWER )  
 )  
 Request for Generic Power Cost )  
 Adjustment Mechanism Investigation )  
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**OPENING BRIEF OF THE  
CITIZENS' UTILITY BOARD OF OREGON**

October 19, 2015



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_____	)	

1 Pursuant to Administrative Law Judge (“ALJ”) Powers’ Ruling issued September  
2 23, 2015, the Citizens’ Utility Board of Oregon (“CUB”) submits its Opening Brief in  
3 docket UM 1662.

4 **I. Introduction**

5 There are two fundamental issues for Commission consideration in this docket—  
6 the first is whether dollar-for-dollar recovery of variable RPS compliance costs is  
7 required by Oregon law or compelled by policy, and the second is whether, assuming an  
8 affirmative answer to the first issue, the Renewable Resource Tracking Mechanism  
9 (“RRTM”) is the appropriate mechanism to achieve the law and/or policy objectives  
10 deemed applicable.

11 With regard to the first issue, dollar-for-dollar recovery of variable RPS  
12 compliance costs is not required pursuant to ORS 469A.120(1) and would not be

1 consistent with sound ratemaking policy. In CUB’s view, PacifiCorp’s and PGE’s  
2 (“Joint Utilities”) RRTM proposal is simply another attack on the consumer protections  
3 present in their respective power cost adjustment mechanisms (“PCAM”), and therefore  
4 should be rejected as the Commission has rejected the Joint Utilities’ previous attempts.

5 Notwithstanding the first issue, the Joint Utilities’ proposal nevertheless fails  
6 because it does not appropriately address the alleged problem. The Joint Utilities’  
7 proposal, when applied to plausible scenarios, makes clear that the RRTM would disrupt  
8 the balance between customers and shareholders by unfairly shifting non-RPS  
9 compliance costs to ratepayers.

10 Because the Joint Utilities’ proposal is not required by ORS 469A.120(1), is not  
11 consistent with sound ratemaking policy and is fundamentally flawed, it should be  
12 rejected.

## 13 **II. Argument**

### 14 **A. Issue #1: Whether Oregon law or policy compels dollar-for-dollar recovery of** 15 **variable RPS compliance costs.**

16 ORS 469A.120, the statute that governs cost recovery for RPS compliance, does  
17 not require the Commission to impose dollar-for-dollar recovery of RPS compliance  
18 costs. Although the Commission has broad discretion in establishing rate recovery  
19 mechanisms for the costs borne by a utility in its provision of utility service, those  
20 mechanisms are supported by ratemaking principles that appropriately balance the  
21 interests of shareholders and ratepayers. Additionally, the Joint Utilities have not  
22 established that dollar-for-dollar recovery of variable RPS compliance costs should be

1 adopted on a policy basis. For these reasons, the Joint Utilities’ RRTM proposal should  
2 be rejected.

3 *i. ORS 469A.120 does not require dollar-for-dollar recovery of variable RPS*  
4 *compliance costs*

5 The Joint Utilities argue that the plain language and legislative history of the RPS  
6 support their request for the RRTM.<sup>1</sup> As CUB, Staff and ICNU argued in their  
7 prehearing briefs, general tenants of statutory interpretation do not support the Joint  
8 Utilities’ request for dollar-for-dollar recovery of variable RPS compliance costs.<sup>2</sup>

9 The first step of statutory interpretation is to examine the text and context of the  
10 statute.<sup>3</sup> ORS 469A.120 states, in relevant part:

11 (1) Except as provided in ORS 469A.180 (5), all prudently incurred costs  
12 associated with compliance with a renewable portfolio standard are  
13 recoverable in the rates of an electric company, including interconnection  
14 costs, costs associated with using physical or financial assets to integrate,  
15 firm or shape renewable energy sources on a firm annual basis to meet  
16 retail electricity needs, above-market costs and other costs associated with  
17 transmission and delivery of qualifying electricity to retail electricity  
18 consumers.

19 (2) The Public Utility Commission shall establish an automatic adjustment  
20 clause as defined in ORS 757.210 or another method that allows timely  
21 recovery of costs prudently incurred by an electric company to construct  
22 or otherwise acquire facilities that generate electricity from renewable  
23 energy sources and for associated electricity transmission.

24 Notwithstanding any other provision of law, upon the request of any  
25 interested person the commission shall conduct a proceeding to establish  
26 the terms of the automatic adjustment clause or other method for timely  
27 recovery of costs. The commission shall provide parties to the proceeding  
28 with the procedural rights described in ORS 756.500 to 756.610, including  
29 but not limited to the opportunity to develop an evidentiary record,  
30 conduct discovery, introduce evidence, conduct cross-examination and  
31 submit written briefs and oral argument. The commission shall issue a

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<sup>1</sup> UM 1662 – Joint Prehearing Brief of Portland General Electric and Pacific Power (“Joint Utilities Prehearing Brief”) at 8-11.

<sup>2</sup> UM 1662 – CUB Prehearing Brief at 5-8; Staff Prehearing Brief at 3-4; ICNU Prehearing Brief at 7-12.

<sup>3</sup> UM 1662 - CUB Prehearing Brief at 5, citing *State v. Gaines*, 346 Or 160, 171-172 (2009).

1 written order with findings on the evidentiary record developed in the  
2 proceeding.<sup>4</sup>

3 Staff and ICNU argue that the central issue is the meaning of the word “recoverable” in  
4 subsection (1) and that its plain meaning makes clear that there is no requirement for  
5 dollar-for-dollar recovery.<sup>5</sup> The Joint Utilities also claim that the plain language of the  
6 statute is unambiguous, but argue that the RPS clearly “allows the Joint Utilities to  
7 recover in rates ‘all prudently incurred costs associated with compliance’ with the RPS”<sup>6</sup>  
8 and that “SB 838 specified the result required—100 percent cost recovery.”<sup>7</sup> By  
9 characterizing the statutory requirements in this way, the Joint Utilities’ misconstrue the  
10 statute’s guarantee of an *ability* to recover costs with a statutory guarantee to recover  
11 costs.

12 A review of the context of ORS 469A.120(1) does not support the Joint Utilities’  
13 argument for dollar-for-dollar recovery. Other provisions within the same statute are  
14 relevant when considering the context of a provision so long as the legislature enacted the  
15 provisions at the same time as or before the statute being construed.<sup>8</sup> This can include  
16 subsections of the same statute.<sup>9</sup> Because all subsections of ORS 469A.120 were enacted  
17 at the same time,<sup>10</sup> consideration of the statute as a whole, when construing the meaning  
18 behind cost-recovery pursuant to subsection (1) is appropriate.

19 The Joint Utilities rely on the legislature’s “broad and detailed description of the  
20 types of compliance costs recoverable” in ORS 469.120(1) as support for their argument

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<sup>4</sup> ORS 469A.120(1)-(2) (emphasis added).

<sup>5</sup> UM 1662 - Staff Prehearing Brief at 3-4; ICNU Prehearing Brief at 8.

<sup>6</sup> UM 1662 – Joint Utilities Prehearing Brief at 8 (emphasis in original) (internal citations omitted).

<sup>7</sup> UM 1662 – Joint Utilities Prehearing Brief at 9.

<sup>8</sup> *Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508 (2004).

<sup>9</sup> *Id.*

<sup>10</sup> ORS 469A.120 was enacted as part of the Renewable Portfolio Standard “RPS” via Senate Bill 838 (S.B. 838, 74th Leg., 2007 Reg. Sess. (Or. 2007)).

1 that “[t]he plain language of the statute differentiates RPS compliance costs from other  
2 utility costs to assure 100 percent recovery.”<sup>11</sup> And that the legislature would not have  
3 included such a detailed categorization of costs if it intended such costs “to be lumped in  
4 with all other costs in the general rate making process.”<sup>12</sup> This argument, however, is  
5 unsupported by the general tenets of statutory interpretation--the context of subsection (1)  
6 viewed in light of subsection (2) makes clear that dollar-for-dollar recovery is not  
7 required for the types of RPS compliance costs detailed in subsection (1). As CUB  
8 argued in its Prehearing Brief, the legislature was intentional and explicit when it  
9 intended dollar-for-dollar recovery for a given type of RPS compliance costs, as  
10 evidenced by subsection (2).<sup>13</sup> To read that requirement into every type of cost  
11 mentioned by the legislature in the statute requires reading a requirement (dollar-for-  
12 dollar recovery) into subsection (1) that is simply not there. As rightly acknowledged by  
13 the Joint Utilities, doing so is inappropriate.<sup>14</sup>

14 Finally, legislative history “may be used to confirm seemingly plain meaning and  
15 even to illuminate it; a party also may use legislative history to attempt to convince a  
16 court that superficially clear language is not so plain at all -- that is, that there is a kind of  
17 latent ambiguity in the statute.”<sup>15</sup> In the present case, the Joint Utilities do not contest  
18 that there is nothing in the legislative history of ORS 469A.120 that demonstrates a  
19 legislative intent to *require* dollar-for-dollar recovery of costs recovered pursuant to  
20 subsection (1). The Joint Utilities merely argue that “stakeholders were focused on the  
21 mechanism for recovery of capital investments and did not specifically propose cost

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<sup>11</sup> UM 1662 – Joint Utilities Prehearing Brief at 9.

<sup>12</sup> *Id.*

<sup>13</sup> UM 1662 - CUB Prehearing Brief at 7.

<sup>14</sup> UM 1662 - Joint Utilities’ Prehearing Brief at 10 (citing ORS 174.010).

<sup>15</sup> *State v. Gaines*, 346 Or 160, 172 (2009)..

1 recovery mechanisms for the variable costs of RPS compliance,”<sup>16</sup> but then PUC  
2 Chairman Lee Beyer clearly testified that “the utility will have to file a general rate case  
3 under ORS 757.210 to seek recovery of costs that do not qualify for recovery under an  
4 automatic adjustment clause.”<sup>17</sup> Jason Eisdorfer’s testimony also makes clear that  
5 stakeholders understood that some costs and benefits of RPS compliance would flow  
6 through existing annual rate adjustments.<sup>18</sup> Although the legislature was not prescriptive  
7 for variable RPS compliance costs, the legislative history very clearly demonstrates that  
8 cost recovery for these costs was appropriately subject to currently existing ratemaking  
9 processes. Contrary to the Joint Utilities’ argument otherwise, nothing in the legislative  
10 history suggests a legislative intent that the Commission would somehow be remiss by  
11 not designing a stand-alone, dollar-for-dollar cost recovery mechanisms for variable RPS  
12 compliance costs.<sup>19</sup>

13 ***ii. The policy goals of the RPS do not compel dollar-for-dollar recovery***

14 The Joint Utilities argue that the current regulatory framework for cost recovery,  
15 wherein they recover variable RPS compliance costs through their respective PCAMs,  
16 undercuts the “policy of the RPS to encourage the Joint Utilities’ transition away from  
17 fossil fuels.”<sup>20</sup> They claim that this is true because utility customers are not guaranteed to  
18 pay for 100 percent of variable RPS compliance costs in any given year, contrary to what  
19 was intended by the RPS.<sup>21</sup>

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<sup>16</sup> PGE-PAC/100/Tinker-Dickman/4-5; UM 1662 - Joint Utilities’ Prehearing Brief at 10.

<sup>17</sup> ICNU/301.

<sup>18</sup> ICNU/300.

<sup>19</sup> UM 1662 – Joint Utilities Prehearing Brief at 11.

<sup>20</sup> UM 1662 - Joint Utilities Prehearing Brief at 12.

<sup>21</sup> *Id.* at 11-12.

1           The policy goals of the RPS are not now, nor will they be, compromised should  
2 the Commission decline to adopt the Joint Utilities’ RRTM proposal. First, contrary to  
3 the Joint Utilities’ characterization otherwise, the RPS is not dependent on utilities  
4 feeling “encouraged” to transition away from fossil fuels--it simply mandates that 25  
5 percent of electric service be served by renewable energy by 2025,<sup>22</sup> and utilities are  
6 legally required to comply regardless of how variable costs of compliance are recovered.  
7 Second, these costs, like nearly all costs, are forecasted and rates are set to recover 100%  
8 of the forecasted cost.<sup>23</sup> Nothing in the PCAM design de facto precludes the recovery of  
9 any variable RPS compliance cost. As such, these costs are “recoverable” as required by  
10 ORS 469A.120(1) because they are forecast to be recovered at 100%, even if an after-the-  
11 fact review shows the forecast above or below the actual cost. It is also important to  
12 remember that the PCAM is designed to offer the utility additional protections in the case  
13 where the forecast of a wide range of variable costs diverges significantly from the  
14 forecast.<sup>24</sup> Finally, the RRTM’s design flaws, as discussed in more detail below, would  
15 not serve to make the transition away from fossil fuels neutral for the Joint Utilities--  
16 rather, the Joint Utilities would be in a position to recover variable costs that are not  
17 associated with RPS compliance.<sup>25</sup>

18 ***iii. As a matter of policy, PCAM design principles are applicable to recovery of all***  
19 ***variable power costs***

20           The Joint Utilities also argue that PCAM design principles are “irrelevant” to the  
21 RRTM because the RRTM only addresses the costs subject to recovery pursuant to ORS

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<sup>22</sup> ORS 469A.052(1)(d).

<sup>23</sup> CUB/100/Jenks-Hanhan/3-4.

<sup>24</sup> See e.g. *In re Portland General Electric*, OPUC Docket No. UE 180 *et al*, Order No. 07-015 at 26 (Jan. 12, 2007) (internal citation omitted).

<sup>25</sup> CUB/100/Jenks-Hanhan/10-11.



1 469A.120(1), which the Joint Utilities argue requires dollar-for-dollar recovery.  
2 Accordingly, the Joint Utilities argue that ORS 469A.120(1) “renders the PCAM design  
3 principles inapplicable”<sup>26</sup> because application of the PCAM means that the utility is not  
4 absolutely guaranteed recovery of 100 percent of its variable RPS compliance costs. The  
5 Joint Utilities’ argument is incorrect because it is based on the faulty assumption that  
6 application of the PCAM means that these costs are not “recoverable,” which is standard  
7 articulated in ORS 469A.120(1). As discussed above, these costs are forecasted and  
8 included in rates at 100% and are therefore “recoverable” as required by ORS  
9 469A.120(1). Dollar-for-dollar recovery of variable RPS compliance costs is not  
10 required by ORS 469A.120(1) and nothing in the language of ORS 469A.120(1)  
11 precludes the Commission from applying PCAM principles to the these costs. As such,  
12 the Commission has the discretion to impose PCAM design principles on any recovery  
13 mechanism used to recover variable power costs, including RPS compliance costs, and  
14 should continue to do so as a matter of policy. Notably, even the Joint Utilities seem to  
15 lend some weight to the PCAM design principles that they like.<sup>27</sup>

16 Furthermore, the Commission has already applied sound PCAM design principles  
17 to the recovery of variable RPS compliance costs by virtue of the fact that utilities are  
18 currently recovering variable RPS compliance costs through PCAMs established by the  
19 Commission.<sup>28</sup> It should also be noted that for several years, PacifiCorp complied with  
20 the RPS without a PCAM.

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<sup>26</sup> UM 1662 – Joint Prehearing Brief of Portland General Electric and Pacific Power (Joint Utilities’ Prehearing Brief) at 13.

<sup>27</sup> UM 1662 - Joint Utilities Prehearing Brief at 12 (claiming that the RRTM makes RPS compliance for utilities “cost neutral.”).

<sup>28</sup> See *In re PGE*, OPUC Docket No. UE 180, *et al.*, Order No. 07-015 at 26-27 (Jan. 12, 2007) and *In re PacifiCorp*, OPUC Docket No. UE 246, Order No. 12-493 at 13-16 (Dec. 20, 2012).

1           The Joint Utilities also seem to argue that the PCAM principles are inapplicable  
2 because they predate ORS 469A.120.<sup>29</sup> The Commission, however, has wide discretion  
3 in determining the appropriate ratemaking treatment of costs related to providing utility  
4 service<sup>30</sup> and has exercised that discretion in designing and implementing the PCAM.  
5 Nothing in the RPS limits the Commission’s authority to design a cost-recovery  
6 mechanism that incorporates pre-existing PCAM design principles. In fact, although  
7 subsection (2) of the statute allows for the Commission to establish an automatic  
8 adjustment clause, it also provides the Commission with the authority to establish a  
9 different cost recovery method so long as it would still ensure timely recovery of costs.<sup>31</sup>  
10 Clearly, the legislature intended the Commission to exercise its expertise and discretion  
11 when determining appropriate methods of cost recovery of RPS compliance costs,  
12 generally.

13           Finally, as ICNU pointed out, it is compelling that the Washington Utilities and  
14 Transportation Commission (“WUTC”) has rejected a similar proposal by PacifiCorp for  
15 an RRTM without dead bands and sharing bands.<sup>32</sup> The WUTC found that PCAM  
16 principles should apply to the recovery of variable RPS compliance costs.<sup>33</sup> Although  
17 PacifiCorp does not have a PCAM in Washington at this time, the WUTC nevertheless  
18 determined that a recovery mechanism for variable RPS compliance costs was a form of  
19 PCAM and should still include the elements of a properly designed PCAM, including

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<sup>29</sup> UM 1662 – Joint Utilities Prehearing Brief at 6.

<sup>30</sup> See ORS 756.040.

<sup>31</sup> ORS 469A.120(2).

<sup>32</sup> UM 1662 - ICNU Prehearing Brief at 9-10 (citing *WUTC v. PacifiCorp*, Docket No. UE-140762, *et al*, Order 08 ¶¶ 128-135 (Mar. 25, 2015)).

<sup>33</sup> *WUTC v. PacifiCorp*, Docket No. UE-140762, *et al*, Order 08 ¶¶ 128-135 (Mar. 25, 2015)).

1 dead bands and sharing bands.<sup>34</sup> Because PacifiCorp’s proposal did not meet these  
2 criteria, it was rejected.<sup>35</sup>

3 **B. Issue #2: Whether the RRTM meets the legal requirements and policy objective**  
4 **deemed applicable by the Commission**

5 Aside from the fact that dollar-for-dollar recovery is not compelled by ORS  
6 469A.120 or sound ratemaking policy, the Joint Utilities’ RRTM proposal should be  
7 rejected because it does not appropriately address the problems that it alleges to resolve.

8 *i. The RRTM design is fatally flawed*

9 Even if the Commission determines that cost recovery for variable RPS  
10 compliance costs should be revisited, it should nevertheless reject the Joint Utilities’  
11 RRTM proposal because it does not meet the criteria proposed by Commission Staff at  
12 the November 12, 2014 public meeting wherein the Commission voted to open this  
13 investigation. The Company has not demonstrated that it is able to adequately (1) isolate  
14 variable RPS costs, and (2) identify and quantify RPS benefits.<sup>36</sup> The Joint Utilities  
15 attempt to downplay the former deficiency by claiming that “[t]he RRTM is a  
16 straightforward mechanism designed to capture the *chief* components of RPS variable  
17 costs variances: generation output and market prices.”<sup>37</sup> Nevertheless, as CUB the Joint  
18 Utilities’ RRTM proposal misses the mark for several reasons.

19 First, the RRTM would inappropriately shift market price risk to ratepayers  
20 because customers could be charged for a variance despite the fact that the wind forecast

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<sup>34</sup> *Id.* at ¶132.

<sup>35</sup> *Id.*

<sup>36</sup> UM 1662 - CUB Prehearing Brief at 8-14.

<sup>37</sup> UM 1662 - Joint Utilities’ Prehearing Brief at 17.

1 was overwhelmingly correct.<sup>38</sup> Second, the RRTM would inappropriately rely on the  
2 hourly market to value the wind forecast error despite the fact that the Joint Utilities do  
3 not rely exclusively on hourly spot market purchases to manage this risk.<sup>39</sup> Third, the  
4 RRTM would introduce fuel price risk to an energy resource that has no fuel price and  
5 burden customers with prices based on fuel price rather than variances in renewable  
6 production.<sup>40</sup> Fourth, customers of PGE would face a duplicate surcharge if the RRTM  
7 were implemented while its AUT adjustment for wind forecast error were still in effect.<sup>41</sup>  
8 Finally, the flow of costs and benefits are balanced under the current rate recovery  
9 mechanism for variable RPS compliance costs.<sup>42</sup>

10 *ii. If the RRTM is adopted, the Commission should apply an earnings test*

11 The Joint Utilities also oppose and the application of an earnings test because the  
12 risk of double-counting would be removed by capping the RRTM at actual NPC.<sup>43</sup>  
13 However, because the RRTM would, in nearly any imaginable circumstance, be below  
14 the actual NPC, this is not a valuable offer. CUB is skeptical that its concerns with  
15 double-counting would be adequately addressed, in part, because the Joint Utilities have  
16 not offered a detailed explanation of how this would work. NPC are currently made up  
17 of a combination of a forecast (TAM and AUT) and the PCAM. The Joint Utilities  
18 propose to add a third element, the RRTM, so NPC would then be comprised of three  
19 components. Which part of NPC are the Joint Utilities proposing to cap? Are they

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<sup>38</sup> UM 1662 - CUB Prehearing Brief at 9-11.

<sup>39</sup> *Id.* at 11.

<sup>40</sup> *Id.* at 12.

<sup>41</sup> *Id.* at 13.

<sup>42</sup> *Id.* at 13-14.

<sup>43</sup> UM 1662 - PGE-PAC/100/Tinker-Dickman/12; PGE-PAC/200/Tinker-Dickman/11-12; Joint Utilities' Prehearing Brief at 16-17.

1 proposing to decline an RRTM adjustment when the PCAM reflects that they have over-  
2 recovered NPC?

3 **C. Staff’s Alternative Proposal should be rejected**

4           The principles that CUB articulated as a basis for rejecting the RRTM apply  
5 equally to Staff’s Alternative Proposal. Fundamentally, variable RPS compliance costs  
6 are being recovered in a manner consistent with Oregon law and stakeholder expectation  
7 at the time that the RPS was implemented, and the Joint Utilities have not met their  
8 burden in establishing that there is a problem that is specifically caused by RPS  
9 compliance. Accordingly, CUB cannot support an alteration to cost recovery for variable  
10 RPS compliance costs based on the record in this case and urges the Commission to  
11 reject Staff’s Alternate Proposal.

12 **D. The Commission should reject the Joint Utilities’ proposal to implement the**  
13 **RRTM subject to a review in three years**

14           Although the Joint Utilities’ proposal for a review of the RRTM after a three year  
15 implementation period may be better than an open-ended mechanism with no explicit  
16 review process, this proposal does not address the fundamental design flaws and policy  
17 concerns articulated by CUB, Staff and ICNU. Accordingly, CUB urges the Commission  
18 not to be tempted by the Joint Utilities’ “wait and see” proposal—customers should not  
19 be unduly harmed in the intervening three year period that the RRTM would be vetted.

1 **III. Conclusion**

2 For the forgoing reasons, CUB respectfully requests that the Commission deny  
3 the Joint Utilities' request for dollar-for-dollar recovery of renewable resource costs.

Respectfully submitted,



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